



# **NORTH CAROLINA INJURY LAW: A Reference for Accident Victims**

by Michael J. Lewis & David D. Daggett



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INJURY LAW:  
A Reference for  
Accident Victims**

**Michael J. Lewis & David D. Daggett**

**LEWIS &  
DAGGETT**  
ATTORNEYS AT LAW, P.A.

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*North Carolina Injury Law: A Reference for Accident Victims*

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## CONTRIBUTING AUTHORS

This book is a collective effort compiled for you by twenty leading members of the plaintiff's bar in the states of New York, North Carolina, South Carolina, Texas, Pennsylvania, Arkansas, Florida, Georgia, Indiana, Kentucky, Vermont and Tennessee. Each attorney involved has contributed his expertise to this project to assure the reader that they are being provided with basic sound information when they find themselves the victim of an accident. This is not a law book, but an overview of personal injury law.

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# FOREWORD

If you or a loved one have been injured in an accident through no fault of your own, you may be worried or confused about what you should do next. How much will the insurance company offer for my claim? Will it be fair? What do I do if the insurance company doesn't offer enough? What if the defendant doesn't have any insurance? What if the defendant doesn't have enough insurance? Will they take care of my car? Will the attorney I choose to represent me be competent?

*If any of these questions have occurred to you, then please keep reading.*

Over the years, we have had many members of our community ask for a resource to help guide them through the new experiences they have after they are in a serious accident. We have spent a number of years doing market research into resources available to people in your situation. Further, when we asked our clients for recommendations to better serve them, many have suggested that a tutorial or overview of some kind would be helpful, because the process of resolving a personal injury claim and its unique terminology were so foreign to them.

Year after year, we meet people who have been injured but don't seek legal advice. Some people don't go to an attorney because they are afraid or intimidated; some have attempted to handle their own claims; some think an attorney can't really help them; some think they can't afford to talk with an attorney; and some have even had bad experiences with an attorney.

Many people who are entitled to compensation for their injuries never take timely action to learn about their legal rights and claim the full compensation they deserve and are legally entitled to. *Doing nothing may be one of the worst things you can do.*

It bothers us to see hardworking people get less than they deserve because they simply don't have the *time, information or experience* to get what is fair. Being injured through no fault of your own is bad enough as it is!

When it is you, your family, or a loved one who is the victim, these

questions are very serious and very personal. We talk to accident victims every day and know how overwhelming a serious accident can be. This book will help you understand a little more about what can be a very confusing process.

Each chapter of this book provides you, the accident victim or family member, with information and direction on the practical issues you will encounter while you're dealing with your claim. Step by step, the chapters walk you through the basic concepts applicable to all accident and injury claims. Our team of attorneys, paralegals, former insurance adjusters, an investigator, a nurse, and a large professional support staff has collectively helped many thousands of individuals in our communities who have found themselves in a situation similar to yours.

This book has its roots in our long history of experience, diligence, and "a history of helping people." We hope it will guide you and help you avoid leaving uncertain and alone. You can now have more confidence and know that we are on your side.

# INTRODUCTION

At Lewis & Daggett, we have dedicated ourselves to helping those who have suffered a serious injury or unexpected death as a result of another's negligence. We only represent children, individuals and families who have been wrongfully injured, disabled or hurt at work, or who have had their land unfairly taken. We do not and will not represent insurance companies, governmental organizations or large corporations.

Since 1985, our team has successfully handled thousands of cases for injured people, getting them the compensation they deserve. We limit our practice to personal injury law because we believe that we can do the best job possible by concentrating in one area of the law.

We work hard for our clients and do what it takes to get the job done. Our well-managed staff of professionals works together as a team to provide high-quality service. We are committed to achieving the best results we can for each and every client. The values and culture of our firm make us continually strive to improve, and to live up to our reputation as a law firm with "a history of helping people."

We understand the importance of paying attention to details, because the details of a case make the difference between winning and losing. We get referrals from satisfied clients because they know we are a firm where every client and every case will get the attention they deserve.

## ***You May Know Us***

*"I feel proud to say that my attorneys are Lewis & Daggett!"*

*JoAnn C., Germanton, NC*

Michael Lewis and David Daggett began practicing law together in 1985, and we are proud of the strong team we have built since then. Our attorneys have more than 100 years of combined legal

experience. With the support of our wonderful staff, we have helped thousands of injured people and their families. For more information, please visit our website at [www.lewisdaggett.com](http://www.lewisdaggett.com).

Our team is dedicated to providing clients with exceptional service and personal attention. After so many years of working with accident victims, our attorneys know how stressful it is to be injured. That's why we strive to treat each client the way we would want to be treated if we were clients. We strive to promptly return client phone calls and be available for clients' questions and concerns. Our clients know that we are working to protect their rights, and that we are handling their legal matters effectively. This enables them to focus on their health, their families and restoring their lives.

In 1991, we founded Safe Sober Prom Night, a nonprofit organization that promotes safe driving by encouraging high school students not to drink or use drugs. The goal of Safe Sober Prom Night is to raise awareness of the dangers of underage drinking and driving, and encourage positive peer pressure to reduce it among young people. Safe Sober Prom Night encourages high school students to take a written pledge to be safe by staying drug- and alcohol-free on prom night.

We have worked hard to help make our community a safer place. Please see our website at [www.safeandsober.com](http://www.safeandsober.com).

*"They were very helpful. When something would not go well, they were right on it. They made us feel very special. You take time with people. Also, you feel very welcome every time you come into your firm. Keep up the good work!"*

*Annette H., Columbus, OH*

## **Warning**

The insurance companies are not on your side. They are in business to make a profit, and they make a profit by settling accident claims cheaply. *The less they pay you, the more money they might save.*

For that reason, resolving an insurance claim without legal advice can be very risky. The system is stacked against people who are not represented by attorneys. Insurance companies have their own lawyers and well-trained adjusters who are familiar with the

system and how to work it to their advantage. They are in business to make money, and they do this by paying you as little as possible or nothing at all — even if that is substantially less than the value of your claim.

## ***Insurance Company Hassles***

*“You all had a lot of patience in dealing with my frustrations due to the fact that the insurance company was trying to underpay me. You have the client’s interest at heart because you all are very patient.”*

*Bonita L., Madison, NC*

Are you tired of hassles with the insurance company? If you’re not being treated fairly, call us. We will explain how you can show them you mean business. Do not take chances with your case. *Do not let the insurance company give you the runaround.*

## ***Wait-and-See Strategy — Big Mistake?***

*“You were very thorough in the investigation process. Options were clearly stated. I have been very pleased with your services and the overall experience. You take the needed time to carefully work with your clients. You were excellent in your negotiating skills with opposing attorneys.”*

*Richard C., High Point, NC*

A lot of injured people delay getting legal help, hoping that the insurance company will give them the settlement they deserve. Unfortunately, waiting to see what the insurance company will do can be a big mistake. *The insurance companies may use your wait-and-see strategy against you.* They may wait and wait and wait and wait until a time when you really need your money, and then offer you less than you expect — sometimes far less.

Remember, insurance companies want to make a big profit for their shareholders. Insurance adjusters are really *not* interested in giving you a big check — it is their job to save money for their companies.

## **You Versus the Insurance Company**

*“I especially liked the beginner’s packet at our first conference. I was told what to expect and what not to expect. I feel that my attorney fought very hard for a decent settlement. I find this firm to be courteous, friendly, kind and knowledgeable and trustful. I like the way they kept me informed on my case and answered all my questions. You are doing everything right. Stay on track.”*

*Shirley B., Greensboro, NC*

The insurance companies have many potential advantages — hundreds of lawyers, millions of dollars — and let’s face it: They are *not* suffering the pain and financial loss that you have. *They are not under the extreme personal pressure that you are.* They have the time and energy to out-wait you or out-maneuver you.

Furthermore, if insurance adjusters have a question about their legal rights, they simply pick up the phone and call one of the company’s lawyers. Most of us don’t have that kind of luxury. Who do you call about your legal rights? You can call our office — *free of charge* — and find out what *your legal rights* are. We’ll be glad to talk with you, without obligation.

## **What Insurance Companies May Not Want You to Know**

*“We were all treated great and are happy with the result of our lawsuit. I don’t think we would have done as well without Lewis & Daggett.”*

*Kristie D., Lexington, NC*

Insurance companies are in business to make a profit — and one way they can increase profits is by settling claims for low dollar amounts. In fact, insurance adjusters may make their supervisors happy if they can settle your case for pennies on the dollar. *If the insurance company can talk you into taking less than you deserve, they can further increase their already big profits.*

## **You Deserve a Fair Settlement**

*“Professional, nice, getting things accurate and dealing with everyone so it is not put off on me. All of the staff at Lewis & Daggett are very nice and professional...the best I have met. I would recommend you because of the way you handled my case and took care of everything, such as my bills being paid and the fact that I got some payment for my injuries.”*

*Lenny H., Lexington, NC*

Do not let the insurance company give you less than what is fair — call us. We are injury attorneys; that is all we do. We have successfully settled thousands of cases. We do it one case at a time. We investigate the claim, know the law, follow the correct procedures and stand our ground when we have to in order to get a fair settlement.

The tragic thing is that lots of people do not get the fair treatment they deserve. They trust insurance companies to treat them fairly, out of basic decency or because they’ve faithfully paid their premiums for years, but the insurance company is not always worthy of your trust. Insurance companies want to pay you no more than they have to for your claim. The less they pay you, the more money they can save.

## **Now It Gets Interesting**

*“When we thought our case was not going to be one that anyone would be able to help us with, Lewis & Daggett created something out of nothing. I would recommend Lewis & Daggett because we received great service!”*

*Frances B., Winston-Salem, NC*

Being injured in an accident can be a terrible experience. A wise man once said, “Good judgment comes from experience, and experience comes from bad judgment.” How true that statement is.

If you have never dealt with an insurance company before, how will you know whether you are being treated fairly? When you have been hurt in an accident that is not your fault, choosing a competent

law firm may be as important as choosing a good doctor to treat your injuries!

## **Where Do You Go From Here?**

*“They sent someone to my house when it happened as soon as my wife called. Any time that I needed to talk to someone, they would call me back with an answer. Everything was taken care of, including me. Everyone at Lewis & Daggett took the time to handle my every need; to make sure that what I needed was taken care of. I needed the money to pay my bills with.”*

*Paul C., Winston-Salem, NC*

Why do you need an attorney to help you with your claim? Well, the truth is, you may not need an attorney. After talking with you — *for free* — about your case, we’ll tell you honestly whether we think you really need an attorney. But consider this: Would it be helpful to know the rules on what injuries you can collect money for in personal injury cases? What about the Rules of Evidence? The Rules of Procedure? And what about how to present the case to a jury?

If you do decide you need an attorney, selecting one can still be difficult. There are so many attorneys! How do you know if the law firm you choose is going to be competent, aggressive and right for you?

## **How to Choose the Right Law Firm for You**

*“Everyone was very helpful and very dedicated to meet me on their own weekends to sign or drop off papers. Lewis & Daggett never gave up on working toward the best outcome of my case.”*

*Barry B., Lexington, NC*

Here are some important questions for any law firm you consider asking to represent you:

- How many cases like yours has the law firm handled?
- How many referrals come from satisfied, happy clients?
- Will the firm provide written references from past clients?

- Does the firm have any investigators on staff?
- Do they have a registered nurse on staff to help you and your case?
- Does the firm have any former insurance adjusters on staff?
- How experienced is their staff in handling injury claims?
- Do they provide written or video information on how your claim will be handled?
- Do they provide a Statement of Clients' Rights?
- Do the attorneys belong to any trial associations?

Choosing the right law firm is not easy, but it is important. Before you make your final decision, you have the right to make sure you feel comfortable with your choice.

### ***So What Can We Do to Help You?***

*“Everyone was very courteous. My attorney was honest with where there were weaknesses in my case and why. Everyone was very responsive. Since this was my first experience in a case like this, everything was explained to me at a beginner’s level and clear. You can tell that this is a firm that takes care of their clients and it is not all about the money. They give you the pros and cons and I appreciate that greatly. This is definitely a firm you can trust.”*

*Elizabeth H., Advance, N.C.*

We find that many people feel nervous, scared or guilty, or are otherwise reluctant to seek help, when they have been injured by someone else’s carelessness. Some have had bad experiences with lawyers. Some have been intimidated by the insurance company. Some simply feel that it is wrong to bring a claim when they have been injured. Unfortunately, justice is not automatic, even when it is clear that you have been wrongfully injured and it is someone else’s fault.

In order to fully protect your legal rights, you must carefully consider and properly address a number of issues. These include time deadlines by which you must file or give notice of your case, how to maneuver through the insurance company minefield and

how to take advantage of all laws and insurance policy benefits that apply to you. These legal issues can be quite complex, and errors can be costly. Knowing the applicable law requires not only knowledge of state and federal statutes, but also the cases that have interpreted and applied those laws and the court system itself. Mistakes, such as failing to meet a deadline or comply with a notice requirement in an insurance policy, may cause you to lose your right to make a claim. Say the wrong thing to an insurance adjuster, and you may greatly harm the value of your claim.

### ***One Thing You Don't Want Is to Be Pressured!***

*“It seemed as if you really cared that this thing happened to me and realized I was completely innocent. They were so nice and sympathetic on the first call unlike any one else I called.”*

*Allison T., Winston-Salem, NC*

*People just want to be treated fairly, but they don't always know how to make that happen!* Once we talk with people about their claims and the legal process, they usually feel much better and more at ease with the process. After talking with us, they understand that *it's okay* to be compensated fairly — they feel good about the fact that they are doing *the right thing*. We think our clients also appreciate the opportunity to talk with us at *no charge* and with *no pressure!*

One of the reasons we wrote this book is to see if we can help you. We would like to tell you *free of charge* about your legal rights, to answer your questions *without pressuring you!* Here's what we would like to offer you: *a free interview*, which attorneys commonly call a case evaluation or consultation. At this meeting, we'll talk about your legal rights. We'll talk to you about what you can expect from the insurance company. We'll also answer any questions you have about our legal experience, including the thousands of cases we have settled and the many cases that we have tried in court.

## ***The Interview Is Free***

*“They are a nice place to go to for help. A very nice company to deal with.”*

*Leroy T., Winston-Salem, NC*

During this free interview, we'll do our best to help you:

- Determine whether you have a valid claim;
- Find a way to get fairly compensated for your losses;
- Find out whether the insurance company is withholding benefits that you are entitled to, or pressuring you to make a quick settlement;
- Help you understand your legal rights;
- AND MUCH MORE!

## ***No Trip to Our Office***

*“The most memorable thing for me was when I had gotten home from having my first back surgery and I spoke with your firm and someone came out immediately.”*

*Jacqueline B., Winston-Salem, NC*

We are as close to you as your telephone. You do not have to miss work or waste time traveling. We will make special arrangements so that you can meet with us and sign any necessary forms in the comfort of your home. Call us toll-free — 1-800-LAW-7777.

## ***No Attorney's Fee Until You Are Paid***

*“Lewis & Daggett will try to get you the best settlement even if it takes extra time. But it is worth the wait.”*

*Judy N., Conover, NC*

There is never any attorney's fee until we get money for you. If we fail to get money for you...you do not owe us any attorney's fee! Because we do not get paid until you get paid, we will fight hard to win your case. *Winning is not luck* — it is knowing how to fight. We fight to win.

## **We Believe in Returning Phone Calls**

*“It meant so much to receive phone calls from my legal assistant on a regular basis. It gave me hope. Caring gives hope to the sick that a wrong can be righted legally. Thank you again for your professionalism!”*

*Billie C., Mayodan, NC*

We know how important your case is. Any time you call our office, we’ll make every effort to speak with you or promptly return your call as soon as we possibly can.

## **We Believe in Keeping You Informed**

*“I was never in a position where I had to worry about my case or the job of my attorney. Also, I was always kept aware of what was happening. I would recommend you because you all mean business and get the job done.”*

*Sharale G., Winston-Salem, NC*

You will hear from us often. You will receive letters or phone calls from us regularly. We believe you deserve to know what is happening in your case.

## **People With Attorneys Get More Money**

*“When I was at my mediation, we got to a point where the insurance company ran out of money. My lawyer advised me to hold out, but I was ready to get this over with and said I would take what they had offered. When my lawyer came back in, he had gotten another \$1,000 on top of the amount I was ready to take.”*

*Joshua G., Jamestown, NC*

Insurance company research shows that people who have attorneys receive larger settlements. Of course, each case is different; we cannot guarantee any results in your case, or the amount of any recovery. But we can promise to work our hardest and use our

23-plus years of experience to get you the best financial compensation we can.

### ***What if the Defendant Is a Friend or Relative?***

*“They made me feel like I was doing the right thing. You have a great reputation and I was treated so nicely during this whole process. I never thought I would have to sue anyone and was very anxious. Both my attorneys encouraged me to take care of myself; get second opinions from doctors; and get regular checkups. These are things I had not thought about.”*

*Cynthia P., Greensboro, NC*

This might be a concern if someone you care about is personally or legally responsible for your injuries. However, we do not take money away from friends or relatives — we collect settlements for our clients from the insurance companies that insure friends and relatives. If the defendant in your case is your best friend or someone you know, give us a call. We have handled many similar cases and would be happy to talk about it with you.

### ***Will You Have to Go to Court?***

*“Because you got the job done and we didn’t even have to have a hearing. Thank you!”*

*Brenda T., Lexington, NC*

Most likely, *no!* Most cases are settled without the client setting foot in the courtroom once. We’re proud to say that cases are often resolved through hard work combined with knowledge, skill and perseverance, without actually having to go to court. But if we need to go, we are ready, willing and able!

### ***Little-Known Law Revealed***

*“The most memorable thing was your attention to detail and the ability to explain in an understandable manner the legal*

*complexities of the ongoing case, and honest advice when asked straight forward questions. I would recommend you because of your friendly, approachable people who try to see that you get the help you need when you find yourself in an unforeseen, difficult situation. Keep up the good work, the positive attitude and support also helps a lot when the situation is beyond anyone's control. Keep sharing information to keep the client informed."*

*John B., Walkertown, NC*

North Carolina is one of only a handful of states which still follow a rule of law called *contributory negligence*. Under this law, if the defendant can prove that the injured party *was at fault in any way* in causing the accident, even 0.01% at fault, the injured party recovers *nothing*. This defense is frequently used by insurance companies and other wrongdoers in North Carolina to defeat or reduce the value of a claim. Almost all other states use different rules, which allow injured people who bear some fault for their accidents to recover at least partial compensation.

### **As Close as Your Phone**

*"All the staff treated me with respect and was always willing to get me a quick response for medical treatment and was willing to just listen to me and be considerate of my pain and the situation I was facing."*

*Debra M., Wilkesboro, NC*

We are as close to you as your telephone. We represent people *all over the state of North Carolina*. Our clients like the idea they do *not* have to drive, park their cars and miss work just to talk to us. Telephone appointments are convenient and, most importantly, save our clients lots of time.

### **More Stuff You Need to Know**

*"They were professional in taking care of business. They took the time in getting all the facts together and they did it in*

*little time. Thank you so much in helping me. You all are a Godsend. I would recommend you because you are thorough in doing your homework. You can't change or go against a good thing. Keep the good work up!"*

*George F., Mebane, NC*

- We have represented clients from all over the state of North Carolina, and beyond.
- We have handled thousands of cases involving injury or wrongful death.
- If you do *not* have an attorney, please call our office now. You have nothing to lose.
- The free information we provide either over the phone or in writing could put more money in your pocket. Do not take chances.

### ***Show Them You Mean Business***

*"The personal relations that [were] made [were] very professional, but always felt as if a friend was taking care of business, not just some lawyer. Well, it is like your TV ad states, 'we mean business'."*

*Chris T., Newport, KY*

If this book applies to you in any way, then you've probably got a few questions. Feel free to call us while this is still fresh in your mind. Waiting any longer may cause more stress or concern on your part, and we would be happy to get you the information that may ease your mind.

You are always free to hire someone else. This happens sometimes, and it's okay. But at least you will have the information in this book and the benefit of the information that we will give you when we talk. If you think this approach is fair, and you want to take advantage of the *free interview*, with no obligation, just give us a call, and we will set a time aside for us to talk.

We look forward to hearing from you!

## ***Types of Cases We Handle***

We handle all types of cases involving personal injuries, including:

Animal Bites	Land Taking/Eminent Domain
Auto Accidents	Insurance Claims
Bicycle Accidents	Motorcycle Accidents
Inadequate Security	Nursing Home Abuse
Defective Products	Severe Adverse Drug Reactions
Head and Brain Injuries	Slip and Fall Accidents
Long Term Disability	Social Security Law
Serious Injuries	Workers' Compensation
Wrongful Death	

## ***References From Past Clients***

We will gladly provide references from past clients who have given us permission to do so. Here's a sample of what our clients say about us:

*"Lewis & Daggett operates with the highest standards. I received very sound advice to make a final decision and never felt pressure. I could not have made it without them. No matter how cut-and-dry your case seems, you better believe the insurance companies are working overtime to lower your claim, [and] you need this firm's help."*

*L.S., Walkertown, NC*

*"There are lots of things that come up after an accident that normal people know nothing about. They help you get all you might not get if you don't have a lawyer."*

*T.M., Bennett, NC*

*"Courteous, helpful, 'take charge' attitude, worry-free (on my part)."*

*J.A., Eden, NC*

*“On the initial visit after speaking with the attorney, I felt confident that I could ‘forget about’ the legal aspect of my auto accident and concentrate on my physical healing. I had confidence that my case was being handled to my advantage without my having to be greatly involved.”*

*M.B., Winston-Salem, NC*

*“You helped me in a manner that still makes me feel valued as a ‘person’ when suffering constant pain and depression, then add on the loss of your income, your self-esteem and becoming confined to the house, it is very easy to lose sight of this simple fact.”*

*P.W. North Wilkesboro, NC*

*“I feel that my case was handled efficiently, effectively and thoroughly. I was kept informed on the progress of my claim.”*

*W.R., Winston Salem, NC*

*“I was respected and my case was handled in a fast and professional manner. Everyone was very straightforward and gave me no problems whatsoever.”*

*J.C., Winston-Salem, NC*

*“A very helpful and courteous staff. They are so quick to help you or give the info to help you in any way — that makes a difference when you are in a situation that you are in! I could not have gotten through this without Lewis & Daggett.”*

*L.F., High Point, NC*

*“This firm went far beyond what they had to for my son and myself. I would tell anyone they do show concern.”*

*A.C., Fountain Inn, SC*

## CHAPTER ONE

# INSURANCE

Even people who have never been in a serious accident often dislike dealing with insurance companies. If you have been in an accident and have a large or complicated claim to make, you may soon find out why. Unfortunately, talking to insurance companies is an essential part of recovering from your accident, and how you handle these interactions can make or break your case. In this chapter, we have tried to present some of the basic information you need to make your insurance claims as successful as possible — even when the insurer causes problems.

### ***Are You Covered?***

After an accident, one of your first concerns will probably be whether your injuries and property damage are covered by auto insurance. Luckily, you probably have at least some insurance coverage, because 48 states make auto insurance mandatory. (The other two, Wisconsin and New Hampshire, allow residents to drive without insurance as long as they have the financial resources to pay for any damage they cause in an accident.) Unfortunately, having *some* auto insurance is not the same as having *enough* auto insurance — and some drivers break the law by carrying none at all. This is bad news if you rely on the other driver's insurance policy to cover your injuries.

Before we go on, you should understand how insurance works in your state. There are two types of auto insurance systems in the United States, and which one you use usually depends on where you live. Most states are either at-fault or tort states, which means the other driver is legally responsible for any injuries and financial costs caused by the accident. The other driver's insurance policy is supposed to pay those costs, but you may have to sue to get payment if the facts are in dispute.

As of late 2008, eleven states (including New York and Florida) and Puerto Rico have no-fault auto insurance systems. If your insurance policy is called Personal Injury Protection (PIP), you probably live in a no-fault state. In a no-fault system, your own insurance company pays the costs of your injuries, no matter whose fault it was. In exchange for that security, you cannot file a lawsuit over the accident unless you meet certain qualifications. In some states, your financial costs must be above a certain amount; in others, your injuries must be very serious (as defined by law).

Three states have “choice no-fault” systems, which means each individual may choose either an at-fault policy or a no-fault (PIP) policy. As of late 2008, those states are New Jersey, Pennsylvania and Kentucky. If you are not sure what type of insurance you have, check your policy or ask your insurance adjuster.

### ***Contacting Your Insurance Company***

After you receive medical care and recover from the immediate effects of your accident, one of the first things you should do is call your insurance company. If you live in an at-fault state, you will probably also have to call the other driver’s insurance company. You should make that call as soon as you reasonably can, because waiting too long might make it look to the insurance company like you are exaggerating your injuries. Calling quickly is also part of your obligations under the contract you signed with your insurer.

This first call should be fairly short. Its purpose is only to give the insurance adjuster the basic facts about your accident and the information for the other driver’s insurance company, if there is one. In fact, during the call, the insurance adjuster on the other end should never ask to record you or ask you to sign anything, especially in exchange for money. If you get this kind of request, you may be dealing with a dishonest company; you should politely decline and call an attorney as soon as possible.

During your initial call, the insurance adjuster will probably ask you who was at fault for the accident or who was to blame. He or she might also ask if anyone got a ticket. If this is disputed or you truly are not sure, just stick with the facts. During this or any other conversation with an insurer, it is important to avoid apologizing or

accepting blame just to be polite, because that could be taken as an admission of guilt. And if you were knocked unconscious or taken to the hospital, you may not have gotten the full story. One way to get it is to get a copy of the accident report, if there is one, made by the police. If they will not release it, your insurance adjuster can get it for you and use it to start your claim.

## **UNDERSTANDING INSURANCE LAW CAN MAKE THE DIFFERENCE**

Often, a more detailed understanding of insurance law can mean the difference in receiving full compensation for your injuries. Take, for example, the case of a 25-year-old day laborer who was seriously injured as a passenger on his way to the beach with a few of his friends. His injuries were severe and permanent, rendering him unable to work anymore. The other driver was clearly at fault, since he rear-ended the vehicle the young man was riding in. That driver's liability insurance carrier said there was a total of \$30,000 on his policy, so the young man would not be able to recover any more compensation for his significant injuries.

The young man consulted several attorneys who declined his case, saying there was limited coverage (the \$30,000) and his bills already exceeded \$137,000. Then the young man spoke to a friend who referred him to an experienced personal injury attorney. That attorney determined that while the vehicle the young man was riding in did not have underinsured motorist coverage, the trailer it was pulling did have coverage through his friend's father, a small business owner with a commercial insurance policy. The attorney was convinced that there was underinsured motorist coverage through this policy, allowing his client to collect the full amount of his injuries. The attorney negotiated and "worked" the case for over a year, finally convincing the insurance carrier that this client could collect on \$1 million in additional insurance coverage.

The attorney was able to settle the case for the limits of the trailer's commercial policy and structure this additional settlement in a special needs trust, which allowed the young man to keep receiving Medicaid and still buy a specially equipped house and car. By fully investigating the case and understanding insurance law, the attorney was able to fully compensate the young man and provide for his future medical and financial needs.

## ***How Do You Get Your Medical Bills Paid?***

If you received any sort of medical treatment after the accident, you will have to worry about medical bills and health insurance claims as well as auto insurance claims. Auto insurance should cover your medical treatment, but hospitals prefer not to wait to work out who was at fault. If you were not able to give them your health insurance information (if any) when you arrived, they will probably try to bill you personally. You or your law firm should be able to get the bill sent to the appropriate party later.

If you have both medical and auto insurance, you may be wondering which will pay for your medical costs. Under at-fault insurance plans, the hospital will start by billing you personally or billing the medical insurance company whose information you provide. Later, after you make your auto insurance claim, you or your health insurer may be reimbursed by the other driver's auto insurer. If you are among the few drivers who have medical payment coverage on your auto insurance policy, your own insurance company may reimburse you.

If you have no-fault insurance (PIP coverage), your auto insurance company should pay. The hospital may bill you personally at first, especially if you could not provide them with insurance information when you arrived, but it should be simple to transfer the obligation to your insurer. You may still have a deductible under your PIP policy. If your bills are higher than the amount of PIP coverage you have, any medical insurance will take over after your auto insurance coverage is used up.

If there are problems, keep in mind that most states ultimately

hold you responsible for your own medical bills, regardless of whether insurance should cover it. That means you should take action quickly if the insurance company refuses to meet its obligations.

### ***Auto Repairs and Other Property Damage***

If you were injured in your accident, the chances are good that there was also damage to your property. Damage to your car, truck or other vehicle is the most common type of property damage, but any other property you lost or had to repair because of the accident should also qualify. The same auto insurance policy that covers your injuries should also cover all of your property damage.

Generally, claims of damage to your vehicle fall into two categories. If the insurance company says your car or truck is “totaled,” it means the repair costs are likely to be greater than the actual fair market value of the vehicle. That makes it not worth repairing, at least to the insurance company. (In North Carolina, insurers generally keep the car in this situation and auction it as a “salvage.” You can ask to keep it and pay for your own repairs, but the insurer will deduct from your settlement the amount that it would likely have gotten at auction.) The fair market value of the vehicle is determined by its age, condition, mileage, appearance, depreciation and other factors. Each insurer does this differently, and some take into account incidental costs like storage.

Because car loans and other financial obligations related to the vehicle are not considered in determining fair market value, your car or truck might be considered worth less than what you owe for it. This is especially likely with newer vehicles, which depreciate (lose value) quickly within their first few years of use. The insurance company is obligated to pay only the actual cash value of the vehicle immediately prior to the accident, not the cost of repairs you made or your original purchase price. A special type of insurance called gap insurance is designed for this situation; it pays the difference between actual cash value and any loans you still owe. Gap insurance is optional, but insurers will probably try to sell it to owners of new vehicles.

If the insurance company considers the vehicle repairable, it should pay for repairs by a body shop or a mechanic. Your insurance

coverage may pay for your use of a rental car during repairs, or compensate you for the temporary loss of your car or truck. Some states allow you to choose your own repair shop; others allow the insurance company to choose. If you disagree with the insurance company's estimation of the damage, you can sometimes get a second opinion from another repair shop.

### ***Dealing With Uninsured and Underinsured Drivers***

If you were hit by an uninsured or underinsured driver, you have an especially difficult task ahead. An uninsured driver is a driver with no insurance coverage at all; an underinsured driver is one with some coverage, but not enough to cover the damage he or she caused. (A hit-and-run driver is considered an uninsured motorist, at least until he or she can be identified.) In a no-fault state, your own PIP coverage should cover at least some of your injuries and property damage. But in an at-fault state, being hit by an uninsured or underinsured driver may mean there is no money at all available to cover your injuries. You are free to sue, of course, but most individuals are not wealthy enough to fully pay for a serious injury.

In at-fault states, and in no-fault states with low coverage limits, more and more drivers are responding to this risk by carrying uninsured/underinsured motorist insurance that supplements their basic policies. In fact, some states require it. Uninsured/underinsured motorist coverage compensates you for the costs of the accident, up to the limits of the uninsured/underinsured policy. Unfortunately, the actual cost of your injuries can still exceed those limits. And because uninsured/underinsured motorist claims can be difficult to document, some insurance companies make them difficult to collect.

## **INSURANCE MAY COVER YOU, EVEN WITH AN UNINSURED DRIVER**

If you were hit by a driver without insurance in an at-fault state, you may think you are out of luck — unable to collect any settlement at all. But before you give up, you should always call an experienced personal injury attorney. The experienced personal injury attorney is sure to look at all possibilities for insurance coverage, including insurance covering the driver, the vehicle's owner, and any user given permission to use the vehicle, as well as a client's own insurance coverage, before giving up.

In one case, a law firm was able to help a distraught woman who was hit by an uninsured driver in an at-fault state. This driver was clearly at fault for the accident. In fact, he said at the scene that he knew he was at fault, but had no insurance to pay for the damage. The client had purchased collision coverage only, thinking she was doing the smart thing by saving money. Because neither driver had any insurance that applied to the crash, this woman thought she was out of luck. Still, she called a law firm, which agreed to take her case.

After investigating the facts, the law firm discovered that the at-fault driver was driving his girlfriend's mother's vehicle — with the permission of his girlfriend, to run an errand. Also, as it turned out, the mother and daughter had an agreement that the daughter could borrow her mother's car as needed from time to time. That meant the at-fault driver was a "permissive user" under the policy — someone who has permission to drive the car — which meant that he was covered by the mother's liability insurance. In most states, liability coverage will cover permissive users of an insured automobile. This was true even though the driver of both vehicles involved in the accident were personally uninsured.

This scenario is actually quite common. Although laws in almost every state require all drivers to have liability insurance, many violate the law. An experienced personal injury attorney may be able to help by searching thoroughly for an applicable insurance policy covering any party involved in the accident.

## ***When a Disability Takes You Out of Work***

If your injuries take you out of work for more than a few days, you stand to lose a lot of wages. If you have short-term or long-term disability coverage (under auto insurance or separately), you should be able to collect payments that help you make ends meet while you are out of work. If you are eligible for this coverage and decide to use it, you may hear from your insurance company about “subrogation,” which is a legal term for transferring the obligation to pay from one party to another. (You can find more about subrogation in Chapter Six.) In an at-fault state, subrogation gives your disability insurer the right to be reimbursed if you win any money for lost wages from a third party, such as the insurance company for the other driver. Because this can be complex, your law firm should handle it for you.

You may be entitled to payment of lost wages from your own PIP insurer in a no-fault state. Because you do not necessarily need to sue, subrogation is limited in no-fault states, and it is handled differently in each state. Again, your law firm should handle this for you.

## ***Dealing With Workers’ Compensation Insurance***

If you were at work during your accident, you are probably entitled to workers’ compensation benefits. Workers’ compensation pays the cost of any injuries you sustain at work and a limited replacement wage while you are unable to work, regardless of who was at fault for the injury. Your employer carries workers’ compensation insurance to cover those payments. In exchange for that right (not the benefits themselves), you agree not to sue your employer, even if you believe it caused the accident. However, if a third party was responsible for the injury, you may still be able to sue that party while collecting workers’ compensation benefits. Subrogation may also come into play with a workers’ compensation case, because multiple insurance companies are often involved in a claim.

Workers’ compensation law is a complicated area that depends largely on the laws of your state, and many attorneys focus their practice on it completely. Many workers have trouble collecting

workers' compensation because replacement wages can be expensive — and as we noted before, insurance companies prefer not to pay expensive claims, even when that is their legal obligation. If you have a workers' compensation claim as a result of your accident, your attorney may refer that part of your case to another attorney who specializes in workers' compensation law.

### ***Settling Your Claim With the Insurance Adjuster***

Sometimes, it is possible to settle an accident claim by just working with the insurance adjuster. This is most likely when you have few injuries that require little medical treatment, or no injuries at all. In this situation, you may not even need help from an attorney. But before you close your claim, you should make sure you have identified all of your injuries and property damage and feel that you will be truly fully compensated by the payments you will receive.

Many people do not realize that they are not required to take the first settlement their insurance companies offer. In fact, you are allowed to negotiate for the fullest compensation you are entitled to, using documentation from police, repair shops and other independent parties to support your claim. But if your insurer refuses to change its offer, an attorney can drastically change your situation. Hiring an attorney to handle the negotiations lets the insurer know that you know your rights and are prepared to enforce them, if necessary.

### ***The Adjuster Is Not Your Friend***

Because we refer to “our” insurance companies, it can be easy to believe that insurance adjusters are here to help us. Unfortunately, that is just not true. Insurance companies are in business to make money, and premiums — the monthly or yearly payments we make to have insurance — are just part of their revenue. Like any other business, insurers make more money if they keep costs low. In an insurance company's case, that means paying less to people with expensive claims. The job of an insurance adjuster is to save the company money by settling your claim for as little money as possible.

If you were seriously injured in your accident, you may not be in the best position to fight with your insurance company. Hiring an attorney may be the best decision you can make to protect yourself, your family and your future.

## CHAPTER TWO

# UNDERSTANDING YOUR INJURIES AND DAMAGES

In personal injury law, the wrongdoer (sometimes known as a tortfeasor) is responsible for all of the injuries caused by his or her negligence, or by any other unlawful conduct. If you are injured as a direct result of that conduct, you are entitled to be fully compensated for all the injuries that you suffered. In the law, the goal is to make the injured party whole. That is, the purpose of monetary compensation is to try to restore you and your family to the position that you were in before your accident.

Once it is clear that the wrongdoer is at fault for your injuries, an experienced personal injury attorney can help you fully identify and understand your injuries. Your law firm will obtain and review your medical records and talk with you, your family and even your physicians to fully understand your injuries and how they have affected your life. Using prior experience with similar cases, your attorney will then be able to predict the range of dollar amounts a jury could award.

In recent years, insurance companies, their lobbyists and greedy corporations have put forth a great deal of propaganda that casts personal injury victims and their attorneys in an unfavorable light. They do this purposely to bias potential jurors against personal injury victims and in favor of the people and insurance companies they sue. Often, the media exacerbates this problem by highlighting bizarre or rare multi-million-dollar cases. This creates the mistaken perception that most people pursuing personal injury claims receive unjust windfalls, or do not entirely deserve the compensation they receive. Nothing is further from the truth. In reality, most people injured by careless wrongdoers are hardworking Americans who just happened to be victims of another person's carelessness.

## PROVING YOUR INJURIES CAN PROVE YOUR CLAIM

Sometimes, understanding your injuries can actually help prove your case. Take the case of a nine-year-old boy who was hit by a car while running back across the street from an ice cream truck. The driver of the car claimed that she was not at fault and that the boy had simply run into the side of the car. Even the investigating police officer took the driver's word and decided the little boy was at fault. There were no other witnesses.

However, thanks to the experienced personal injury attorney the boy's family consulted, that was not the end of the investigation. The attorney investigated and researched the particular type of leg fracture the boy had. To make a long story short, the attorney was able to prove, using medical and scientific evidence and testimony, that the only way the injury could have occurred was if the car had hit the boy, as opposed to the boy running into the car. By fully understanding the injuries in the case, the attorney was able to turn a claim denied by the insurance company into a substantial recovery to provide for the boy's future.

### *Follow Through With Your Doctors*

The full extent of your injuries may not be obvious immediately after an accident. Some people may feel that they did not sustain a serious injury, only to discover weeks or months later that what they initially thought was a minor injury has worsened and may require significant medical treatment. Because of this possibility, one of the things you should do after an accident is to see a doctor for a full evaluation. Depending on the type of injury, it may be best to consult with a specialist. Be certain to tell your doctor about all of your symptoms, no matter how minor they may seem. You should see this doctor as soon as possible after your accident, so the doctor can properly document the full extent of your injuries. This documentation is important because it creates a clear record of your

injuries and treatment, which is important in a legal claim.

Immediately after the accident, it may be difficult even for the most experienced doctor to tell you how long you will require medical treatment. Depending on your injuries, you may need follow-up care for the first few weeks or months after you leave the hospital. For some extremely serious injuries, you may need long-term or even lifelong care. Because it is often difficult to predict your needs early in a case, it is important for you to be vigilant about your health. If you notice a change in your symptoms, you should be certain to tell your doctor about it. You should also, of course, actively participate in your own recovery by following your doctor's orders, taking your medications and undergoing whatever rehabilitation or treatment your doctor recommends.

Your law firm will also need to know about changes in your condition and how they affect your life, so he or she can explain the full extent of your injuries and damages to the insurance company and ask for the fairest settlement of your claim. To help your attorney, you should keep a written record of your medical treatment and how your life has been affected by your injuries. This will also help you refresh your memory later, in case your claim goes to trial months or years after the accident.

When your treatment is completed or your doctor feels you have reached maximum medical improvement, your law firm may request additional medical records, to better understand how the injuries will affect you in the future.

## **MEDICAL RECORDS CAN BE ESSENTIAL**

One example of a case in which understanding the injuries was crucial was the case of a 50-year-old construction worker, who suffered back injuries after being struck by a dropped piece of drywall. The worker had been employed in the construction industry for 30 years at the time of his accident, and had back pain on and off throughout his working life, just because of the nature of his job. Thankfully, he was always able to recover from whatever was causing his back pain and return to work without restrictions.

In this case, the drywall was dropped by an employee from another company. That company contended that the injured worker's back problems were preexisting, so they were not responsible for the injury. However, after a thorough investigation, the injured worker's attorney was able to prove that the back injuries were new, and truly were caused by the falling drywall. The attorney used medical evidence such as a detailed comparison of imaging studies taken before and after the accident, consultation with medical experts and further medical testing, to prove when the injuries occurred. This proof made the difference in the case, allowing the injured worker to recover financial compensation for his medical care, his pain and other damages.

## ***Types of Injuries***

Under the law, a personal injury is any harm that you as an individual sustain, including physical injuries, financial costs and emotional trauma. Injuries can also be personal losses, such as losing the care and companionship of a loved one.

As you work to resolve your accident claim, you may hear insurance adjusters, lawyers and doctors talk about different degrees of injuries. You may hear injuries described as minor, moderate, severe or catastrophic. Minor or moderate injuries can be injuries such as sprains, strains, fractures, bruising or superficial cuts. These may be painful, but they usually heal well and quickly, with minimal medical treatment.

You may hear insurance adjusters refer to "soft tissue injuries." Soft tissue injuries are injuries to the non-bony parts of the body, such as internal organs, nerves, muscles and connective tissues. Sprains, whiplash and pulled muscles are all types of soft tissue injuries. Even if you have a bruise over the affected area, you and your doctor may not realize you have a soft tissue injury under the bruise, because it can be hidden from sight and hard to detect with tests. Soft tissue injuries may heal quickly, but they can also take a long time to heal. Some can even result in chronic pain and disability, which can be permanent if not treated properly. Typically, it is harder to recover substantial compensation in these cases than in

cases involving serious or catastrophic injuries.

A catastrophic injury is a serious injury that is expected to permanently change the victim's life. Examples of this type of injury include burns, amputations, spinal cord injuries, paralysis and head injuries (also called traumatic brain injuries). These types of injuries result in the most significant settlements and verdicts, because the injuries can be proven objectively and are more obvious to the insurance company or the jurors.

Although catastrophic injuries are immediately obvious in most cases, sometimes the full extent of the injury is not immediately revealed. This is especially true when the victim suffered a traumatic brain injury, which may also be called a closed head injury. In some cases, the brain may be affected in ways so subtle that only people close to the victim notice changes in abilities, behavior or personality. A closed head injury can be caused by physical trauma (a hard blow or penetrating wound) or violent shaking of the head. It often results from actual jostling of the brain. Such trauma can damage the tissues of the brain, which in turn affects the abilities controlled by the damaged tissue.

A concussion is the mildest form of brain injury, but more serious brain injuries leave their victims permanently disabled. Naturally, brain injuries affect many aspects of the injured person's life, including physical movement, the senses, intellectual ability, creativity and even personality. Sometimes, what appears to be a minor concussion or brief loss of consciousness following a car accident can result in a serious closed head injury, with symptoms such as chronic headaches, memory loss, loss of concentration or changes in a person's personality or behavior.

### ***Permanent Disability***

Unfortunately, some people's injuries lead to permanent disabilities, either partial or total. A permanent disability is any loss of ability that will affect the rest of the victim's life, and at least partially impair his or her ability to work or perform other day-to-day activities.

A permanent disability is often a major, life-changing event for victims and their families. In addition to the disability itself, disabled accident victims also face a higher risk of medical complications

than uninjured people and often suffer profound emotional injuries because of their disabilities. People with permanent disabilities may require significant medical help, such as home health care nurses, extensive inpatient medical care and rehabilitation, or the need for long-term accommodation in an assisted living facility. Someone who has suffered a permanent disability is much more likely to recover a large judgment than someone who has fully recovered.

### ***Medical Expenses***

As everyone who lives in a modern society knows, health care can be very expensive. Even if you have medical insurance or good medical coverage through an auto insurance policy, you may be charged thousands or tens of thousands of dollars for a lengthy hospital stay, a trip to a specialized care center or repeated doctor visits and physical therapy appointments. If you do not have medical insurance, these costs can quickly reach into five or six figures. For someone who has suffered a catastrophic injury or a permanent disability, lifelong medical treatment can cost millions of dollars.

In a personal injury claim, these medical expenses are part of the damages (financial compensation) you are entitled to claim. This is not limited to direct health care costs, but may extend to any medical expense, including prescriptions, medical devices and the cost of transportation to and from your doctor's office. Recovering your medical expenses is an essential element of your personal injury claim.

If your case involves a catastrophic injury, your law firm will want to not only determine your existing medical costs, but also hire medical experts to determine the likely cost of your future medical treatment. In some cases, your law firm may need to hire an expert to develop a "life care plan" that predicts all of your future medical needs. This expert will evaluate your injuries, review your medical records and project the cost of future medical care.

### ***Lost Income and Loss of Earning Capacity***

If you are unable to work because of your injuries, you are entitled to claim the income you lose. In addition, if you have a disability

that affects your future earning potential, you are also entitled to recover monetary damages for loss of the income you would otherwise have earned.

For example, let us say that you can no longer do the specific job you had at the time of the accident, but you find a job within your physical limitations that pays less than your previous job. In this case, you would be entitled to recover not only the income you lost from the old job, but also any future income you lose because you had to take the lower-paying job. If you are self-employed and your injury makes you unable to do your job, you may need to hire someone to replace you. You may be entitled to compensation for the extra money you pay to that person during your recovery.

In addition to your lost income and loss of future earning capacity, you may be entitled to recover any loss of benefits, such as health insurance, pension plans, bonuses or other benefits directly associated with your employment. An experienced personal injury attorney will help you determine all of your financial losses so you can seek compensation for those losses. Your law firm may need to hire experts, such as a vocational expert (an expert in work) or an economist. These experts will review your financial and medical records, then calculate and predict the economic losses you have suffered from the accident. If you are self-employed, you can prove your economic losses through tax returns and other business documents.

### ***Pain and Suffering Damages***

Another part of your personal injury claim is the way your injuries affect your daily life — your pain and suffering. Personal injury victims are entitled to recover damages for past and present suffering as well as any suffering they may experience in the future. These damages for pain and suffering are different types of damages from those you would claim for your economic losses or physical injuries. For example, someone who suffers chronic pain after an injury is entitled to be compensated for that pain and suffering.

Pain and suffering are not the same. Physical pain is a sensation and suffering is a mood. Pain is the awareness, through a stimulus in the brain, or something that could damage your tissues and is

followed by a feeling of discomfort or unpleasantness. By contrast, suffering is an emotion that could be considered the opposite of happiness or enjoyment, and involves cognitive awareness of an unpleasant situation, or a lack of the pleasure the victim could have expected had it not been for the accident. Suffering could involve many emotions, including depression, anxiety and humiliation. For example, embarrassment and anxiety may result from a disfiguring facial injury, an amputation, incontinence, paralysis or another injury that severely limits the victim's life activities.

It is the job of an experienced personal injury attorney to help you prove specifically how your injuries have affected your life and your family. The ultimate goal of a personal injury claim is to obtain the maximum possible compensation, so you may return to your life as it was before the accident. Although injuries make that impossible in some cases, you are entitled to seek compensation for every injury you suffer. It is the goal of a personal injury attorney to help you obtain the fullest and fairest compensation permitted by the law.

### ***Loss of Consortium***

In many states, the law allows the spouse of an injured person to recover damages as well, even if the spouse was not injured. This is called a loss of consortium claim.

Black's Law Dictionary defines "consortium" as the "conjugal fellowship of husband and wife, and the right of each to the company, society, and cooperation, affection and aid of the other in every conjugal relation." Loss of consortium includes not only material services that you may lose because of a spouse's injury, but such intangibles as society, guidance, companionship and sexual relations. Usually, you may only make a loss of consortium claim where one spouse has been seriously injured, and that injury has had a direct negative effect on the marital relationship. Generally, you cannot make a loss of consortium claim if you are merely living with the injured person. A marital relationship is essential to making a loss of consortium claim.

Often, the non-injured spouse, at the direction of an experienced personal injury attorney, can present compelling testimony at trial. This helps convince a jury that an accident has affected not only

the marital relationship, but also the family. Juries can sometimes empathize with the spouse who was not injured and better appreciate how the injuries have affected the marriage and the family. An experienced personal injury attorney can help you determine whether you should add a loss of consortium claim to your personal injury claim.

### ***Common Defenses Used by Insurance Companies***

As experienced personal injury attorneys, we have years of experience with the misrepresentations and exaggerations insurance companies commonly use after injury victims make a legal claim. One common defense is to suggest that the victim suffered from similar injuries before the accident, or that the victim was predisposed to the type of injury he or she suffered. Yet another defense is to try to prove that the victim's injuries were not caused by the accident, but by other events in the victim's life. When insurance companies cannot dispute the fault of their insureds (customers), they might resort to the age-old tactic of attacking a plaintiff's character or preexisting medical history.

A good attorney will successfully challenge these common defenses and help the victim present his or her injuries clearly, concisely and coherently. For example, even if you suffered from a similar medical problem (such as a back or neck condition) before the accident, your attorney can help you prove that your previous injury was made worse as a result of your accident. Most state laws support the premise that a wrongdoer "takes his victim as he finds him." This means victims are entitled to recover full compensation even if they were particularly susceptible to an injury, or predisposed to experience greater pain or suffering than could have been foreseen by the defendant.

For example, you have a bad back that never required surgery, but then you are involved in a serious car accident that aggravates the back condition enough to require surgery, you are entitled to recover compensation for the surgery. After all, you would not have needed it if the accident had never happened.

## ***Doctors and Other Medical Providers***

If you have been seriously injured for the first time, you may be encountering types of doctors that you have never heard of before. The following are some of the medical specialists that personal injury victims are most likely to encounter.

An **anesthesiologist** administers drugs to provide pain relief during surgery. Some anesthesiologists also treat chronic pain. Anesthesiologists who treat pain are also sometimes called specialists in **pain management**.

A **burn specialist** is exactly what it sounds like — someone who cares for patients with severe burns.

A **dermatologist** handles diseases and injuries to the skin, including burns.

A **doctor of emergency medicine** usually works in an emergency room. This doctor may have been the first doctor to treat you after the accident.

The doctor you most likely see regularly is probably a **family practice** or **general practice doctor**. Depending on your injuries, he or she might take an active part in your care or refer you to a specialist.

A **neurologist** treats injuries and abnormalities of the nervous system, which includes the brain and spinal cord. This is the doctor you will see if you have a brain or spinal injury. If you need surgery, you might also see a **neurosurgeon** or **spinal surgeon**.

An **orthopedic doctor** treats injuries to the bones, muscles and joints, sometimes including amputations as well as broken bones.

A doctor who treats problems with joints is a **rheumatologist**.

For accident victims, doctors of **plastic surgery**, **reconstructive surgery** or **cosmetic surgery** work to correct damage to the body or unsightly scars, and to restore functions or prevent loss of functions.

**Physical therapists** and doctors of **physical medicine** and **rehabilitation** work with injury victims to restore movement or function to areas affected by an injury. This sometimes includes functions that you might not think of as physical, like brushing your teeth or writing.

**Psychiatrists** handle mental health issues, including emotional

injuries caused by accidents.

Specialists in other specific parts of the body include **nephrologists** (kidneys), **hepatologists** (liver), **gastroenterologists** (the digestive system), **cardiologists** (heart), **pulmonary specialists** (lungs) and **podiatrists** (feet and ankles).

## ***Common Medical Tests***

If you sustained any sort of internal injury, including an injury to the spine, brain or internal organs, your doctor may ask you to take one of these special tests. This is good, because the more information you have about your injuries, the easier it will be to begin healing. This will also make it easier for your law firm to prove your injuries. Tests you might take include:

**X-rays** are the radiation tests we are all familiar with; you have probably taken one at the dentist if you had your wisdom teeth removed. They show bony structures, so they are best for diagnosing bone injuries and cannot be used to diagnose soft tissue injuries.

A **CT scan**, sometimes known as a **CAT scan**, is short for computerized tomography. A CT scan uses multiple x-rays taken in a circle around the same point to build a better picture than one x-ray could provide alone, using a computer to combine them. A CT scan is likely to be ordered if the doctors believe you have an injury to the internal organs of your torso or abdomen, or multiple fractures to a hand or foot.

**MRI** is short for magnetic resonance imaging. If you get an MRI, the doctors will ask you to lie down in a large tube that uses harmless magnetic radiation to look at soft tissues of the body. Sometimes they will also ask you to drink or have an injection of a substance that makes those tissues easier to see. If your doctor suspects an injury to your brain or spinal cord, you might be asked to do this test. Because this technology uses magnets, you cannot use it if you have a pacemaker or other metal implanted in your body.

A **PET scan** is often used in tandem with a CT scan. In a PET scan, the patient is injected with a harmless substance that can be seen by the scanner using radioactivity. Unlike CT scans, PET scans can show your body's metabolic activity rather than just structures of the body. The images they produce are also three-dimensional.

If you know anyone who has had a baby recently, you are probably familiar with an **ultrasound**. An ultrasound test uses high-frequency sound waves that bounce off internal structures of the body to build an image. The image it builds is not as detailed as images from other methods, but because it does not use radiation, it may be the best choice for people with certain conditions. It is also less expensive than an MRI. Doctors use it to look at internal organs, connective tissue, bones, blood vessels and eyes.

If your doctors believe you have a nerve injury, you may take a **nerve conduction study**, an electrical test that can detect problems with your nerves. In this test, one electrode is placed over the nerve being tested, while another is placed in a “downstream” area of the nervous system. The speed it takes for the electricity to travel between them determines whether there is nerve damage.

An **electromyograph** (EMG) shows muscles’ activity by measuring the electrical current they produce when they are in motion. This might be used for people with nerve damage, muscle weakness or the conditions that might cause them. In an EMG, doctors either insert a thin needle into the muscle being tested or place an electrode over the area, then measure the electrical impulses of the muscle.

An **endoscopy** uses a flexible tube with a light and a camera to look inside natural openings in your body, such as the throat. This is most commonly associated with tests on the stomach or colon, but can be used in any area with a natural opening.

## ***Health Care Facilities***

If you are seriously injured, you may end up at a health care facility more specialized than the hospitals we are all used to. If you need this kind of care, you might even be transferred from your original hospital to one of these facilities:

A **trauma center** handles patients who have sustained a sudden and serious physical injury. They are ranked from Level I to Level IV, with the most serious cases at Level I facilities. Because they are expensive to run, they are not common; patients outside major cities may have to be airlifted to one.

A **rehabilitation center** is a facility where patients work to

reestablish or relearn abilities they lost because of a serious injury, through therapy. **Physical therapy** helps with movement or prevents loss of movement, while **occupational therapy** might focus on relearning activities of daily life or finding ways to perform them despite a new disability.

**Burn centers** focus on patients with serious burns. They not only treat burn injuries, but work to help patients return to everyday life, often with therapists, social workers, psychiatrists and other professionals who are not conventional doctors.

**Assisted living facilities** may be appropriate for injury victims who need long-term physical or occupational therapy and help with everyday living. This might be true of someone with a severe brain injury or spinal damage. In addition to providing meals and house-keeping, as at a nursing home, the staff at an assisted living facility works with patients to help them regain independence and abilities. Some patients are able to return home eventually; others may need to remain in a facility throughout their lives.

**Home care** is an option for patients whose injuries do not require full-time hospitalization. A nurse or other health care professional might visit every day or a few times a week. Depending on the injuries, the professional might do anything from changing bandages to administering a treatment with an IV to helping with personal needs.

## CHAPTER THREE

# CHOOSING AN ATTORNEY

The attorney you choose is one of the most important factors in the success or failure of your case. It is a decision you should make with care. Unfortunately, choosing an attorney can be intimidating for people who have never been through the process before. You may be justifiably concerned about ending up with an attorney with bad ethics or poor skills. In this chapter, we hope to ease those fears and provide a basic guide to finding a personal injury attorney.

The first thing to consider is that attorneys, much like doctors, often concentrate their practices in specific areas of the law. If you need hip replacement surgery, you would probably see an orthopedic surgeon, not a cardiologist. Similarly, if you are in an accident, you will not want to hire an attorney who focuses on divorce. Another type of attorney may be able to help you, but he or she may not have the same experience and skills that a personal injury attorney brings to a personal injury case. Personal injury attorneys understand the legal, procedural and evidentiary strategies that can maximize the value of your personal injury claim, because they work with these issues every day.

At our firm, we find that many of our clients come to us after a recommendation from someone they know who has used us in the past. For that reason, we recommend that you begin the search by talking to your family and friends. Ask if anyone can refer you to a personal injury attorney who helped them get good results, or who they have heard good things about.

If nobody you know can recommend an attorney, you can also start by considering attorney advertisements. You have probably seen attorney ads on television, in newspapers or in the Yellow Pages. Consistent advertisements from a particular attorney show that his or her firm has been practicing for all of that time, and may have the experience and resources necessary to take on insurance companies. In fact, insurance companies sometimes decide whether

or not they will settle a case before a trial based on the reputation and experience of your law firm.

If you are comfortable with computers and the Internet, you can try an Internet search. Using a search engine like Google, Yahoo! or MSN, you can easily search by both your location and the legal specialty you need. There are many ways to search for this information. Here are a few tips that may be helpful:

1. Search for a phrase instead of a single word. “Auto accident attorney” will probably turn up more useful results than just “attorney.”
2. Put the phrase you search for in quotes. This will tell the search engine to look for the entire phrase as you searched for it, not the individual words in the phrase. Without quotes, your results will be greater in number but not nearly as relevant to your search. Just make sure to spell everything correctly.
3. Narrow your search by including some geographical information. For example, if your auto accident happened in New York, you might want to search for “New York auto accident attorney.” You need an attorney in the state where the accident happened, even if that is not the state where you live or have legal residency.

## WHY HIRE AN ATTORNEY?

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The question may enter your mind: *Should I even hire an attorney, as opposed to just dealing directly with the insurance company and its adjuster?* You should know that although the insurance adjuster may seem friendly and cooperative, he or she works for the insurance company that will pay to settle your claim. If the insurance adjuster can persuade you to settle your claim for less than what it is worth, that is good for the insurance company but bad for you. Unlike an attorney you hire, the insurance company has no legal duty or financial incentive to treat you fairly!

Case in point: A working-class mother had a serious accident with a commercial tractor-trailer rig. She was injured in the accident and her car was so badly damaged that it was useless, both of which posed challenges for this mother of three young children. The very next day, she was visited at home by a representative from the truck driver's insurance company. The insurance adjuster was very skilled at creating a sense that he was there to help her deal with the problems the accident had caused. After learning that she had no medical insurance, he told her that he believed she would make a good recovery, based on his experience and the way she was able to get around in her home and carry one of her children. Based on this evaluation, he offered her cash to repair her damaged vehicle, and \$1,000 to compensate her for the trouble and pain she may have experienced. All she needed to do was accept the cash that day and sign the release, barring her from making any further financial claim.

Although tempted, she called her husband at work. He told her not to accept or sign anything and to call an attorney immediately. After contacting an attorney, she eventually found that she had severe injuries to her shoulder and would need a period of treatment and testing to see if she could recover without surgery. Fortunately, she recovered without surgery after receiving the necessary treatment, and was fairly and fully compensated for her months of suffering and damages. Ultimately, she received nearly 25 times what the adjuster wanted her to accept. As you can imagine, this client and her family were immensely pleased with their decision to retain an attorney rather than deal directly with the insurance company.

## ***The Initial Consultation***

When you first call a law firm, your call may be taken by an attorney, a paralegal, a legal assistant or an intake specialist. This person will ask you for basic contact information, as well as the details of your accident. Based on your answers, an attorney will make an initial assessment of your case and may schedule a consultation. If you

cannot travel to the law firm, many personal injury attorneys are willing to have the consultation on the telephone, in your home or at the hospital. At our firm, we make every effort to accommodate clients and potential clients with this type of need.

During the initial consultation, you will be asked for details about your accident and your injuries. Because details can be hard to remember, and because some clients feel intimidated or stressed by this meeting, we recommend that clients bring all of the documents they have that are related to the accident — things like police reports, hospital bills, your insurance policy and more. We always do our best to put clients at ease and explain everything as thoroughly as possible, without “legalese.”

Questions the attorney is likely to ask at your consultation include:

1. Did anyone receive a ticket?
2. Was a police report made? If so, do you have a copy?
3. Did you take photos of the vehicle?
4. Did you take photos of your injuries?
5. Did you give a statement to police, insurance adjusters or anyone else?
6. Were there any witnesses, and if so, did anyone get their contact information?
7. How much damage was done to your vehicle?
8. What medical treatment have you had thus far?
9. What medical treatment, tests or follow-up are currently recommended by your treating physician(s)?
10. How are you feeling?
11. How are your bills being paid?
12. What insurance companies are involved?

Once you have discussed all of this, the attorney should bring up his or her fees. Most personal injury attorneys work on what is called a contingency-fee basis. This means that you are not required to pay for legal services unless and until the case has been won. The attorney should have a fee agreement that specifies that he or she will be paid with a percentage of the financial settlement or verdict. The size of that percentage depends on whether the claim is resolved

before or after the lawsuit is filed. (It is possible, and common, to resolve claims before filing; see Chapter Four for more.)

This arrangement may sound strange, but it remains popular because it allows attorneys to take strong cases brought by clients who might not be able to afford legal fees otherwise. We believe this is an essential and valuable part of our legal system, providing access to justice for everyone, no matter what their income or background might be.

## **CHOOSE YOUR ATTORNEY CAREFULLY**

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Choosing the right attorney can have a substantial effect on the results of your personal injury claim. An experienced personal injury attorney who meets you and takes the time to listen carefully to the facts of your case can sometimes save you substantial financial and personal hardship. Take the case of a 39-year-old man who was hurt in an auto accident, who had already undergone one cervical spine surgery to correct injuries from his accident. To settle his claim, the insurance company had offered him just \$150,000 out of a total available insurance policy of \$250,000. What's more, the man did not realize that he had an additional \$750,000 in underinsured motorist insurance, which could cover his treatment if his claim exceeded the \$250,000 limit.

The man and his wife consulted several personal injury attorneys to discuss whether they should accept the insurance company's offer. The first two attorneys they consulted did not delve into all of his medical problems. Importantly, they did not identify the fact that he would likely require future surgeries, which could jeopardize his livelihood as a salesman who traveled thousands of miles a year. Fortunately, the couple sought out the advice of one of the experienced personal injury attorneys who wrote this book. After listening carefully to the prospective client, the attorney realized that this gentleman was a likely candidate for future surgeries that could threaten his career. The attorney recommended that he wait for several months before considering any settlement offers, to see whether he needed more treatment or had other problems related to the accident.

As the attorney suspected, the man ultimately needed two additional cervical spine surgeries, which resulted in permanent physical limitations. He was terminated from his job and ultimately had to accept a job paying significantly less. Based on these lost future earnings and his additional surgeries, the attorney was able to negotiate a settlement that was over six times the amount of the offer from the defendant's insurance carrier. In this case, waiting to make a claim until he fully understood his injuries, and hiring an experienced personal injury attorney, helped the man avoid the financial and medical problems that might have resulted from taking the smaller initial offer.

### ***What Is the Next Step?***

When you find the right attorney, you will sign a contract formally retaining him or her as *your* attorney, giving you all of the rights of a client. To get the case started, your law firm may ask its professional support staff to obtain your medical records, doctors' notes and medical test results, along with a copy of any accident report and any insurance information or statements the insurer might have recorded. If necessary, the attorney might also retain a private investigator to find important but elusive information about your case. All of this case development takes time. At our firm, we have found that clients really appreciate being kept informed, whether or not we have anything significant to report. For that reason, we assign specific staffers to update clients regularly about the status of their cases.

In this first stage, your attorney is working to understand the facts and the strength of your case. After the case is built, your law firm can begin negotiating with the other side to get you the best possible compensation under the laws of your state and the facts of your individual case. You may end up settling the case outside of court or participating in a full trial. You will learn more about this process, the stages of a lawsuit and your own responsibilities in Chapters Four through Seven.

### ***What if My Case Is Rejected?***

Unfortunately, sometimes attorneys must turn down cases. In order for an attorney to accept a case, he or she must consider many factors, including the severity of your injuries, which parties were at fault, conflicts of interests, legal limitations, time constraints and more. If the firm decides that it cannot handle this case for you, that may not necessarily mean that you do not have a case — just that this firm is not in a position to accept your case.

At our firm, turning down cases is one of our least favorite parts of our work. When we have to tell clients that we cannot take their cases, we do our best to refer them to a local bar association or another attorney who is better suited to help. We also try to provide them with educational materials, like this book, to help them better understand the system and where their cases may fit into it.

## CHAPTER FOUR

# YOU HAVE BECOME A PLAINTIFF — WHAT NOW?

You have been injured through someone else's actions, and you know you may be entitled to recover financial damages. You have decided to hire an attorney to represent you and bring a legal claim for these damages. You are now a plaintiff.

The most important thing for you to do now is focus on getting better. That means you need to follow your doctor's advice and keep all of your appointments. If your doctor prescribes physical therapy, tests or other medical procedures, you should follow through with his or her recommendation. If your doctor writes you a prescription for medication to help you heal or manage your pain, you should not delay having it filled at the pharmacy.

Not only will this help you heal, but it also creates a "paper trail" that will be important for your personal injury lawsuit. Your doctors' records often act as the medical testimony in your case and help the attorney determine the value of your claim. It is vital to be careful about following through with your doctors' recommendations.

### *Keeping Diaries and Calendars*

Your attorney may ask you to keep a diary, a calendar of your daily activities or both, focusing on your physical and psychological injuries. This may seem like a chore, but it can be important for your legal case because it helps to prove your claims about your injuries, your pain and how they affect your life. If you sustained serious injuries in the accident, your treatment may continue for months and your healing patterns may change over time. It is important to keep a record of the changes you notice, both positive and negative, starting as soon as possible after the accident. In some cases, even your treating physician may benefit from your notes.

In your diary, you should focus on how you feel and how you are coping with your injuries. Make these entries as often as you feel a change; there is no need to make an entry every day. To begin, write down your name and a start date. On any day after the accident when you notice any changes in how you feel, or experience anything unusual, write it down. Include the date and a brief description of what you are feeling and what you were doing when you felt it. Include any descriptions of things that seem important, such as events that seem to trigger pain.

It is important not to forget the diary as time goes on. At the beginning, you may make daily entries, but as you start to feel better, you may find yourself making entries that are further and further apart. It is absolutely fine to make fewer entries if you have less to say, but it is important not to forget your diary altogether. Unfortunately, some injuries continue to have occasional side effects, even after they seem to have healed. Try not to tuck your diary so far out of sight that you forget about it.

## YOUR DIARY MATTERS

Clients and potential clients frequently tell personal injury attorneys "I am not the suing type." Many people are injured by someone else's wrongful or negligent act, yet they are either afraid of litigating or do not know what it takes to bring a claim. Essentially, bringing a claim means that you become a plaintiff, and this may seem like a daunting task to many people. However, the simplest tasks assigned to plaintiffs can often have huge rewards.

This was the case for one client who came looking for an attorney nearly two years after his accident. He was severely injured when his van was run off the road by an unknown driver, causing his right arm to be paralyzed. He told his attorney that he waited so long to get legal help because he assumed there was no one to collect from, since the car that caused the accident was never located. He did, however, keep a diary of his daily life over the two years since his accident. In it, he noted every time a nurse came to his house, every time his mother had to drive him to therapy and even how excruciating the pain was on a daily basis.

After investigating, his attorney discovered that the client's company van had uninsured motorist insurance that should cover the accident. After a two-week trial, he was awarded a multimillion dollar verdict. This daily diary of his life was very important, because it helped explain to the jury all that he had been through. Even though he did not know at the time that he would eventually become a plaintiff, common sense dictated much of what he did that resulted in such a large recovery.

You should use the calendar to record each of your doctor's appointments or other medical care. When you record a diagnostic appointment, be sure to note the type of test, such as an MRI. It is better not use this calendar to record social appointments or chores that are not relevant to your case. However, you should also record the dates and times of appointments with your attorney, and any deadlines or court dates he or she provides.

You should take your diary and calendar with you both to doctor's appointments and to meetings with your attorney. They will help your doctor treat you better and keep your law firm updated on your injuries and how they are healing.

### ***Pre-Litigation Settlement***

Many of our clients are surprised to learn that they might be able to settle their cases before they even file their lawsuits. In fact, a significant percentage of personal injury cases are settled during the beginning stages of the case. This is possible because part of the job of a personal injury attorney is to negotiate with insurance companies, both your own and the company or companies for the other parties involved. This type of quicker settlement is most likely when there is little or no question that the other driver is liable for your injuries, such as when the driver has admitted responsibility, or when he or she got a ticket. It may also happen when liability is still in question, but your injuries are especially severe.

During the pre-litigation process, your law firm verifies that the liable person or people have insurance coverage, and determines whether your own insurance policy provides coverage for the

accident. Your attorney will also investigate the facts surrounding the accident, reviewing the police report, interviewing the witnesses, and inspecting the scene of the accident in order to get the best possible information on how the accident occurred and who is at fault. And he or she will also review your current and prior medical records, to prove that your injuries stem from the accident and understand how they relate to any preexisting medical condition.

Once your law firm has done all of this, he or she can begin to determine what your legal claim may be worth, financially. This is generally expressed as a range of values (such as \$10,000 to \$20,000), because of the uncertainty of settlement negotiations and trials. But rest assured that your attorney will never settle your claim for less than it is truly worth.

At some point, following the course of your medical treatment, your attorney will demand a settlement from the insurance company, in an effort to get the compensation you are entitled to without a formal lawsuit. Usually, the insurance company will respond with either an offer to settle or a request for additional information. That additional information may include copies of MRI films, tax returns, records of a physical examination of you by a doctor of your choosing or other information the insurance company feels is important in understanding your case. Once it has all of the necessary information, it will be in a position to make a settlement offer. Your attorney will notify you of this offer so that you can discuss it and determine whether you find the offer acceptable.

## **FOLLOW YOUR DOCTOR'S ORDERS**

Following your doctor's recommendations will help you recover as well as possible, but it will also help your case. That was underscored by one trial involving a woman who was rear-ended by another driver while she was parked behind a stopped school bus.

After the crash, which was obviously the defendant's fault, the plaintiff was taken to the hospital with complaints of back and neck pain. After taking X-rays and examining the plaintiff, the emergency room doctor instructed the plaintiff to "follow up with your medical doctor if you continue to have problems."

The next day, the plaintiff still had back pain. She called her chiropractor and received treatment for her crash-related injuries. At trial, the defendant argued that the plaintiff did not follow her doctor's orders because she saw a chiropractor rather than a medical doctor.

The jury returned a five-figure verdict for the plaintiff, but reduced the award by several thousand dollars because she saw a chiropractor rather than a medical doctor. Fortunately, the judge corrected the jury's decision and awarded the plaintiff the full original amount. (North Carolina judges may not do this.) However, if the judge had not done this, the woman's failure to follow the exact recommendation of her doctor would have resulted in a verdict that penalized her for it.

### ***Pre-Litigation Mediation***

Sometimes, but not often, the parties will agree to mediation before continuing to litigation. The mediation may come at the suggestion of either the insurance adjuster or your own attorney. Mediation allows both sides to present the relevant facts of the case and the extent of the costs and damages to an independent third party, a mediator, who will work to help them agree on a settlement. These independent mediators are often retired judges or people with special court certification as mediators, so they should have experience with the laws and issues that are important in your case. (For more on mediation and other forms of alternative dispute resolution, see Chapter Six.)

If no settlement is reached at mediation, the case is free to proceed to litigation. Any failure to settle at mediation will have no effect on your right to continue your case.

### ***The Case Settles***

If a settlement is reached, either through negotiation or pre-litigation mediation, the insurance company will send a check for you.

They will also send a legal document called a release for you (and if necessary, your spouse) to sign. By signing the release, you relieve the insurance company and the party who is liable for your injuries of any further obligations or payments related to the injuries and damages from the accident. You must sign this release in order to collect the settlement.

Your law firm should have a trust account, which holds money that has been entrusted to him or her but belongs to clients. Once the settlement funds clear through this trust account, your attorney will prepare a settlement statement or closing statement for your signature. This is another legal document, which sets forth the total amount of the settlement and any deductions for attorneys' fees and costs, or any medical bills or liens that should be paid from the settlement. You will have the opportunity to review this statement, and your signature will authorize the law firm to send you your settlement funds. Once you receive the proceeds from the settlement, your case is successfully concluded. For more on settling and closing your case, please see Chapter Six.

## CHAPTER FIVE

# LITIGATION

Even though many claims are resolved before a lawsuit is formally filed, there are some insurers that simply refuse to settle a claim for a fair amount. The extent of your injuries, the type of accident you had, the amount of insurance coverage available, who was at fault and the difficulty of proving that fault are all factors that could prevent you from reaching a fair and quick settlement with the insurance company. If you are unable reach a fair settlement, your attorney will probably recommend filing a lawsuit. However, even if a lawsuit is filed, your law firm will almost certainly continue trying to settle your case before the trial.

### ***When Do You File Your Lawsuit?***

The law of each state sets deadlines by which you must file your lawsuit. These are called statutes of limitations, and they are usually calculated either from the date of your injury or from the date you discovered an injury that was not immediately obvious. (They may also be extended for minors and people with certain disabilities.) For example, the statute of limitations for most personal injury lawsuits in North Carolina is three years. Statutes of limitations are different in each state and often change according to the type of case you have, but all of them are hard deadlines. That is, if you wait too long, you will not be able to pursue your case, no matter how strong it is. One of the first things your attorney will do after learning about your case is calculate the statute of limitations that applies, and take any action necessary to preserve your right to sue.

There are also legal deadlines that apply in certain specific circumstances. For example, if you plan to sue a government agency, you are frequently required to give that agency notice within a relatively short period of time, or file an administrative complaint, before you may sue. Because these deadlines can be as short as 30 days, and

because missing them can take away your right to sue, it is essential to learn about them and take action as quickly as possible. This is one reason why personal injury attorneys prefer to see you as soon as is practical after your accident.

## ***Filing a Lawsuit***

Your law firm should take care of the actual, formal filing of the lawsuit. But in general, you will file your case in the county where your accident happened, or in the county where one or both of the parties involved lives, depending on the circumstances and the laws of your state. The county where the case is filed is sometimes called the “venue.” Your attorney can explain how these rules affect your case.

A lawsuit formally starts when you file a written complaint or petition with the court. This complaint first describes the facts of the case, your injuries and why the person you are suing is responsible for your injuries. It then separately lists each “cause of action,” which is a reason for suing, and finishes with a request for financial compensation for the injuries you have listed. This can be quite detailed, depending on your state’s requirements, but it always contains enough information to tell the plaintiffs why they are being sued.

Along with the complaint, your law firm will also file a summons or citation, a document that will be served to (that is, formally given to) the defendants. The summons explains how the defendants should respond to the complaint and gives the deadline to do so. As a courtesy, your law firm may send a copy of the complaint to the defendants’ insurance company or companies.

When this complaint is filed, your law firm will also specify whether you prefer a trial by jury or a “bench trial,” in which a judge makes most of the decisions. You and your attorney should have agreed on this ahead of time. In a jury trial, a group of randomly selected citizens from the area decides all of the questions of fact while the judge acts as a referee and resolves legal questions. By contrast, in a bench trial, a judge decides questions of fact as well as questions about the law. Bench trials are less common than jury trials. If your attorney recommends one, he or she should be able to explain why.

## ***Who Answers the Complaint?***

After the complaint is filed and served, the defendant's insurance company will usually assign the matter internally to an employee called a litigation claims adjuster, who will oversee the claim. This person's job is to try to resolve your claim before trial, or handle the claim in a way that helps the insurer at trial. Insurance companies do not like to be sued, of course; they may take extra steps to resolve your claim after the lawsuit is filed, so you may be able to settle at this stage. However, for this chapter, we will assume that you will not settle right away.

The insurance company will also assign one of its own lawyers, or hire an outside lawyer, to represent the defendant in court. The first task for this lawyer is to prepare a document called an answer to file with the court. This answer will either admit or deny the allegations of your complaint; it may even say that other parties are at fault for your injuries and should be added to the lawsuit. The answer may also set forth any defenses the defendant is planning to use in the case that explain why he or she is not responsible for your injuries.

It is only after the answer is filed that a trial in your case will be scheduled. If the defendant fails to file an answer at all or breaks a rule when filing it, you can ask the court to simply declare you the winner by asking for a "default judgment." This is not common; it is a little like a sports team forfeiting a game because it never showed up to the playing field.

## ***Discovery***

Discovery is the process of exchanging information about the case with the other side of a lawsuit. This is a formal legal process governed by set rules. The law requires that both sides of a lawsuit share information about the case with one another on request. (Certain things, such as privileged communications between you and your law firm, are exempt from discovery even if they are specifically requested.) In most cases, the information exchanged includes information about your accident, the injuries you sustained, the nature and cost of your health care, the effect of your injuries on your life and your family, your employment background and your

educational background.

Discovery is extremely important because it permits both parties to learn about the facts and issues of the lawsuit before trial. This allows both sides to build a case and evaluate the strengths and weaknesses of their positions. During settlement talks, the information you receive during discovery can be invaluable.

## **YOUR RECORDS ARE ESSENTIAL IN DISCOVERY**

As a plaintiff, you now have the responsibility to prove your case. But ironically, the defendant does not have to prove anything. Because the burden to prove your case is on you, your actions as a plaintiff are very important. Take the case of a 37-year-old construction worker who was hurt when a load of cement blocks were partially dropped on him, driving him to his knees. This injury caused him debilitating back pain, and because of it, he was never able to return to work.

The problem in the case was that all of the damages were based on an invisible injury — pain. Pain is very difficult to prove. But in this case, the injured worker was extremely consistent about attending all of his medical appointments, kept very good records, established reliability with his medical providers and had a long-established reputation for honesty and hard work.

Because of this consistency and reliability, all of the witnesses in the case were willing and able to give favorable testimony. The injured man's medical providers were able to explain and support his claim for the unseen injuries. As a result, his attorneys were able to convince the defendants of the substantial risk of taking the case to trial, winning an out-of-court settlement large enough to supplement the man's lost income and provide security for his family. In his role as a plaintiff, the worker did his job successfully so that his attorneys could do theirs.

## ***Interrogatories***

Typically, the first step for both sides in discovery is to send written questions for the other side to answer. These written questions are called interrogatories, and in many areas, you will answer these questions under oath, even though they are written and you will not be in a courtroom. Interrogatories will usually ask you about the accident, your background and your damages, including any past injuries or problems for which you have sought health care, as well as any previous legal claims you were involved with. You may also be asked to provide details about any income you lost or information about your past employment. The goal is to build a story about the relevant parts of your life before and after the accident. When you have written your answers, you will sign them and they will be sent to the defendant's lawyer.

We find that some clients are initially reluctant to answer these questions, because they can be personal or stray into topics considered impolite or irrelevant. Your attorney can and will formally object to an inappropriate interrogatory, or to a number of interrogatories that exceeds limits set by your state's laws. However, these questions are usually being asked because they are relevant to your case. Most of the information about your health and your finances is considered "discoverable," which means it is a fair question during discovery. Your responses help your own attorney and the other side gather the information they need to evaluate your claim, which helps you get closer to settling your case fairly.

## ***Requests for Admissions***

Another written discovery tool is a request for admissions, which is simply a document asking one side to admit or deny the facts it specifies. When you might get these requests depends on the rules of your court. If you dispute or deny a request for admissions, you must write down the facts that you believe support your position. Your attorney should help you with this. Using requests for admissions helps both sides determine which facts are agreed upon, which are disputed and which must be part of the lawsuit.

It is important to respond to requests for admissions in a timely

manner, because if you miss the specified deadline, the court will behave as if you admitted to everything asserted in the request.

## THE IMPORTANCE OF BEING EARNEST DURING DISCOVERY

Complete disclosure of information during discovery is an important way to come to a settlement, but it is also important if you end up in trial. This was illustrated by the case of a client who failed to inform her attorney that she had been denied a promotion at work because of her injuries, resulting in over \$20,000 a year in lost income. She thought it would be better to “surprise” the insurance company with this information at trial.

However, because this client had failed to bring this information up in discovery, the defendant was able to prevent her from testifying about it at trial, because it had not had an opportunity to investigate that part of her claim. The judge ruled that because the information was not provided before trial, as required by the rules of discovery, it could not be presented to the jury.

This mistake by the client prevented her from recovering compensation for lost wages that totaled \$400,000 over her lifetime. The client still won her lawsuit, but the judgment did not include any compensation for her lost future income. Not only could she have won more by disclosing this loss before trial, but she could also have increased her chances of settling the claim for a larger amount — without going to trial at all.

### ***Requests for Production***

Requests for production of documents — that is, asking the other side to send copies of specific papers — are an important part of discovery. Requests for production may come with the interrogatories, but both sides are free to request production of documents throughout discovery.

Requests for production should be requests for documents that

are relevant to the lawsuit, the accident or your damages. This often includes copies of your health care records, receipts or invoices for your health care expenses, accident reports, witness statements and pictures of the scene of the accident. If you are claiming a loss of income, you will probably be asked to provide your tax returns for several years prior to the accident. You may even be asked to produce any notes or diaries you have kept. But either side may request any discoverable document. Your law firm may review the request for production with you and help you copy the documents and send them to the defendant's lawyer.

In addition to requesting documents and evidence from you, the defendant's lawyer may also ask other people or companies for information. Most commonly, he or she may request copies of your medical records directly from your treating doctors. The defendant may also be entitled to request information about you from your employers, schools you have attended or from the military, if you have served. Additionally, if you have applied for Social Security benefits, the defendant's lawyer may request information about your claim from the Social Security Administration. You may feel uncomfortable with these requests, but if the information is discoverable, the defendant's lawyer is entitled to ask for these documents. In fact, you may even be required to sign forms authorizing release of the information.

## ***Depositions***

A deposition is a little like an oral version of interrogatories. When you give a deposition, you answer questions from the lawyer for the defendant in person, under oath, and usually with all of the parties and their lawyers in the room. A court reporter will be hired to take down your answers, which you usually give in the office of the court reporter or one of the lawyers. Either side may request a deposition at any time, but the request is most likely to come after you have responded to interrogatories and requests for production of documents.

Many of our clients are nervous before depositions, but there is no need to be nervous. Your attorney will be there to observe throughout the deposition and can object to inappropriate questions

or ask for breaks if you need them. This is important, because it is essential for you to stay calm and professional during a deposition. This is the first opportunity for the other side to evaluate you in person, so you should appear neat and as confident as possible. Your attorney can advise you on what to wear and how to behave.

Your law firm should also prepare you ahead of time for the questions in your deposition. You may be asked to attend a meeting where you review all of the written information your law firm has, as well as any responses you gave to interrogatories. It is especially important to make sure that your testimony is truthful and consistent with these interrogatory responses, because the lawyer for the defendant will probably question you closely about any inconsistencies. Your deposition preparation should also help refresh your memory about the details of your injuries, your treatment and your recovery.

When the deposition begins, you will be asked to swear an oath to tell the truth to the best of your knowledge, just as you would in court. The court reporter will swear you in, then type your testimony into a written transcript that will be available to the lawyers later. In some cases, the deposition is also videotaped, which means that there will be another person operating a video camera and filming the deposition. The lawyer taking your deposition will introduce him or herself and may briefly explain the procedure for the deposition.

At your deposition, you will probably start by reviewing the information in your written interrogatory responses. The deposition is an opportunity for the other side's lawyer to clarify or have you explain those written answers, and to obtain additional information. As we said, it is important to make sure that your testimony is truthful and consistent with your interrogatory responses, so the other lawyer does not spy a seeming inconsistency between your oral testimony and your written testimony. Your answers should be based on your own personal knowledge; do not guess in making an answer. If you do not know or remember the answer to a question, you should say so. Many people feel embarrassed to admit they do not know something or had a memory lapse, but these things are only human. And when you are under oath, it is important to be as straightforward as possible.

Remember that the lawyer for the insurance company is your adversary, not your friend, and may not believe the facts are the way you say they are. If you are asked a question that you disagree with, perhaps because it assumes something you do not believe is true, do not be afraid to say so in order to answer the question. Stay in control; if the lawyer for the defendant puts you in a position where you must speculate, say so. If you do not understand or hear a question, you can ask for it to be repeated or rephrased.

As with the written discovery, you may feel that some of the questions are invasive or do not directly relate to your accident. However, unless your attorney objects or tells you not to respond, you should answer every question in the most honest way you can. If some of the questions upset you, you can usually take a break during your deposition testimony, although you may have to respond to any unanswered questions first. If you would like a break, you can simply tell your attorney. If the break is allowed, you will be permitted to get up, walk around, get a drink of water or just clear your head.

After the other side has finished questioning you, your attorney is usually permitted to ask you more questions, or clarify an answer you gave earlier. This does not happen in every case, and in many instances, your attorney may not ask you any questions at all. If this is the case, it does not mean the attorney failed to do his or her job; there may be strategic reasons.

In addition to taking your deposition, the attorneys in the case may also depose (take a deposition from) any other witness in the case. While the number of depositions will vary from case to case, depositions are often taken from the defendant, any witnesses to the accident, friends and family members who are familiar with your injuries, representatives from the defendant's insurance company and your own doctors and health care providers.

## ***Discovery and Settlement***

The discovery tools outlined in this chapter are only some of those available in a lawsuit, but these will be used in the majority of cases. Discovery may seem time-consuming, but by exchanging this information, the parties can often get the information they need to settle the case without a trial. And if the parties are still not able

to resolve their case after discovery, the information they exchange during discovery will help them build evidence for their cases and narrow down which facts must be decided at trial.

## CHAPTER SIX

# SETTLEMENT

Many cases settle voluntarily, without having to go to trial. Trials take time, are expensive and may make clients nervous. They can also produce unexpected outcomes. From a personal perspective, an experienced personal injury attorney may want to take a case to trial — but that is always the client’s decision. The job of an experienced personal injury attorney is to help clients achieve their goals. We find that most of the time, the client wants the matter resolved quickly and fairly, so settlement is always in mind. If no settlement offer meets the client’s goals, the matter can be resolved by trial.

Experienced personal injury attorneys also understand that settlement should not be rushed. Settling a case is a *process*. It is a dialogue and can be complex. Different attorneys initiate the process in different ways (who goes first and so forth), but it always ends up with an offer and a series of counteroffers and counterdemands. This is the process, and there is more to it than simply passing numbers back and forth. Behind the numbers is reasoning. It is through this dialogue that the case is, hopefully, resolved. Each side has an opportunity to persuade the other. By exploring the weaknesses and strengths of each side’s case, the parties will generally be able to either agree on settlement or agree that they need the help of either a judge or a jury. Either way, they make forward progress — and reasonable decisions.

Be wary of settlement offers that come very early in this process, even if it is tempting to end the case quickly. After many years of practice, we have found that insurance companies will often offer a settlement before clients and their attorneys can determine all of their damages. Or a settlement offer will be extended quickly by an insurance company, before all the liens and other expenses have been determined. Everyone wants the matter resolved as quickly as possible — but an experienced personal injury attorney knows that a fast settlement offer by an insurance company can be a trap.

Deciding whether to accept a settlement offer requires you to consider subjective as well as objective factors. For example, there are benefits to ending your claim, and it may also be a personal relief. On the other hand, the time, anxiety, energy and risk assumption required to go to trial may be worth it for the client — because of the potential for greater compensation, for an important lesson to be learned or for an important message to be sent. The decision does not always turn on the money alone. Client objectives vary, and each case and each client is different. The settlement process offers an opportunity for dialogue — and out of this dialogue comes a decision that fits the client in *that* case.

There are numerous factors to think about when considering a settlement offer, but issues to consider start with the amount of money being offered, the conditions attached to the offer and the amounts owed to third parties — like health care providers or other insurance companies. There are laws and contractual obligations that govern these third parties' rights to participate in the distribution of settlement proceeds. These rules are part of every settlement agreement, and you are expected to know them. An insurance company has no duty to explain the rules to you. Third parties such as health care providers might also claim part of your settlement behind the scenes.

What you and your law firm must determine is the true *value* of the offer being extended. That is, you need to know how much of the money offered will end up in your pocket. To answer this question, the attorney has to solve the puzzle (so to speak) that is the totality of the client's claim, with the goal of maximizing the claim's value. An experienced personal injury attorney will analyze these and other issues behind the scenes, so the client can focus on the challenge of recovering from injuries and putting his or her life back together.

The attorney participates in settling cases — but it is always the client who makes the final decision. The attorney's job is to prepare the client to make that decision fully informed. And, of course, the attorney will provide the benefit of his or her education and experience, as well as perspective that can be valuable for clients who may be upset and angry about their injuries. Emotions play a part in decisions on settlements, of course, but they should not be the only

criteria. Your attorney will help you strike a proper balance as you go through the process.

Sometimes the courtroom is the right choice, if the client makes that decision with the advice of an experienced personal injury attorney. Understand, however, that your attorney will work to give you a realistic assessment of the benefits and risks associated with settlement and trial. That way, you can make an informed choice.

### ***Understanding a Settlement Offer***

In a settlement, there is always paperwork. Before you agree to a settlement offer, you and your attorney will discuss whether you understand and accept all of the terms and conditions of the settlement. The insurance company for the at-fault party will ask you to accept money in exchange for your agreement to end the case — releasing the at-fault party from any future responsibility.

First and foremost, you and your attorney will discuss whether the amount of the offer is reasonable under the circumstances. Your attorney should be able to give you a professional opinion on this, weighing the likely outcome of a trial against the certainty and benefits of settling now. Rejecting one settlement offer does not mean you will never get another. In fact, some defendants even expect to go through several rounds of offers and rejections.

Another consideration is any debt, claim or lien that you might owe to health care providers or other parties because of the accident. (We will discuss and define liens in the next section.) If the settlement offer is not sufficient to pay all of these debts, you may be liable for the rest. Sometimes, your law firm can help by negotiating or using other remedies available under the law to make sure all of your obligations are covered. Depending on the circumstances, your attorney might be able to convince creditors to take a lesser amount in exchange for immediate payment. But because this is an uncertain process, it is important to discuss your debts and obligations with your attorney when analyzing a settlement offer.

At this stage, your attorney may also talk to you about subrogation, which we discussed a little in Chapter One. A subrogation claim is a claim that an insurance company or other party has on the money you recover in your case. For example, if you have

medical insurance, it probably covered your initial medical care. But if an auto insurance company is legally obligated to cover those costs, the medical insurer may be entitled to reimbursement from the auto insurer or from you, out of any settlement you reach with the auto insurer. Subrogation can be complex and depends on state and federal laws as well as individual contracts. Your attorney should help you understand how it applies to you.

If you have claims against more than one defendant or insurance company, or are considering a lawsuit over the same injuries against another party, you should also consider whether settling with one defendant could limit or eliminate your right to pursue the other cases. For example, in states with at-fault auto insurance, you may have a claim against your own auto insurer for unpaid uninsured/underinsured auto insurance claims. (Much more about insurance can be found in Chapter One.) Many states require you to notify other parties if you settle with one. If you fail to follow this or other laws, you may lose your right to pursue your other claims.

## **QUICK RESULTS HELP FAMILY IN NEED**

Sometimes, a quick settlement is one of the most important services a personal injury attorney can provide, as with one tragic wrongful death case. In this case, a young and growing family was in a serious car accident that killed the wife and her unborn child, leaving the husband a single parent of a two-year-old. Thankfully, the two-year-old was not seriously injured. The husband, his mother and his child filed a wrongful death and personal injury lawsuit.

Because the driver responsible for the accident did not have substantial assets, the family's law firm knew it was important to identify and collect from all available insurance policies. The firm worked quickly and was able settle these claims in just eight months, for an amount exceeding \$1 million. Although that money could never bring back their lost loved ones, receiving this large settlement so quickly allowed this grieving father and husband to move on with his life and take care of his child.

## ***How Liens Could Affect Your Settlement***

Liens are legal claims against personal property, used to secure a debt. A residential mortgage is a common type of lien. A lien claim might be a part of your case if you have a large amount of debt stemming from the accident and you cannot pay it out of your own pocket. This is particularly common with debts for medical care. If this is the case, the hospital or other medical provider that you owe money to can eventually put a lien on your settlement, or on your home or other property. Liens make it difficult to sell or otherwise make changes to the property.

Resolving lien claims can be difficult because of the many complex laws that apply to them, and because holders of lien claims are often slow to respond in writing to questions about their liens. Unfortunately, the law does not always say that lienholders are required to respond to requests for a lien amount within a specific time, and it sometimes takes months to get an appropriate answer. This delay prevents prompt payments of settlement funds to clients like you, and can be frustrating for you and your attorney. Your law firm should work hard to obtain this information and resolve these issues, so that the settlement can be distributed and you can resolve your case.

For example, if Medicaid or Medicare has paid health care providers for treatment you needed because of your accident, they are entitled to reimbursement of those payments. To ensure that they are paid, they may place a lien on your settlement. Your law firm will probably have to hold back a part of your settlement equal to the debt until you can negotiate an agreement and pay the agency.

When multiple insurers or debts are involved, this can become quite complex. For example, you might run into complicated lien problems when you have your own private insurance (including a settlement from a personal injury case) but are using Medicare as a secondary insurer. When it is not certain whether Medicare is a primary or secondary insurer, Medicare will make a conditional payment. If it is later determined that some other party was responsible for that payment, Medicare is entitled to a refund from that party, or from you or the health care provider, if one of you was paid by that party. The federal government may place a lien on your

property to recover this type of conditional payment. (It might also be entitled to make a subrogation claim against your settlement.) Again, your settlement funds cannot be distributed until you reach an agreement and pay Medicare.

## TAKE CARE WITH MEDICARE

Cases involving Medicare can be much more complicated than cases involving private insurers. One family using Medicare found that out after the mother was seriously hurt in a car accident. They were unable to resolve their claim with the wrongdoer's insurance company, so they hired an experienced personal injury attorney. After the attorney was able to settle the case for \$100,000, the family thought that their life would turn around. However, they soon discovered that Medicare was demanding all of the settlement proceeds for reimbursement of the medical bills it had paid on the mother's behalf. In fact, Medicare claimed it should be reimbursed for all medical care provided to the mother for the last five years, even though the accident had only happened a year earlier.

Their experienced personal injury attorney was able to distinguish the charges for treatment of the auto accident injuries from the other types of treatment. Medicare, because it is a government entity without any true controls, took months to consider the case. After extensive negotiations with Medicare, the attorney was able to substantially reduce Medicare's claim, to an amount allowing this needy family to retain enough money to help pay the mother's future medical expenses and replace their car.

## *Ways to Reach a Settlement*

In this book, we have referred a few times to "settlement negotiations." However, negotiating directly with the defendant and his or her lawyer is just one way you can reach a settlement. You can also use methods that are collectively called "alternative dispute resolution,"

which are more formal. They include mediation and arbitration, both of which are a little like informal trials led by someone specifically trained in resolving disputes. In some states, courts may order the parties to try an alternative dispute resolution method, or you may be obligated by a contract to try it. You can also choose this on your own.

### ***Direct Negotiations***

The most direct way to reach a settlement is simply to negotiate with the insurance adjuster, or the defendant and the defendant's lawyer. Doing this requires substantial knowledge in two areas: The prospects of your case if you go to trial, and the value of your claim. This is where having an attorney can benefit you greatly. Experienced personal injury attorneys have handled hundreds or even thousands of cases like yours, so they understand how your case is likely to come out at trial. They should also be familiar with the courts and juries in your area. For the same reasons, they understand how to calculate the full value of your claim. And of course, an attorney is probably an experienced negotiator. This levels the playing field against the insurance adjuster or defense lawyer, who will work to minimize your payments to save money for the insurance company.

Once you retain a law firm, it will handle all contact and negotiations with the insurance company and the defendant. Legally, they can no longer contact you directly, so the law firm will take care of it for you. Under most circumstances, you do not need to be present for direct settlement negotiations, although your law firm will keep you informed throughout. Using the information you provided about your case and the information obtained during discovery, your law firm will build the strongest possible case for settlement and present it to the other side. If they make an offer, your attorney will present it to you for a decision, along with his or her advice. As we said before, this is 100 percent your decision.

### ***Mediation***

Mediation is a type of settlement negotiation in which an impartial third party helps both sides come to an agreement, using training

in dispute resolution methods and legal experience. Mediation is usually conducted through an in-person discussion with all parties, including you, the insurance company and/or the defendant, as well as the lawyers for all parties. Generally speaking, a mediator is a retired judge, a lawyer or other neutral person who has also been trained to mediate disputes. Frequently, he or she has a special certification from the courts or the bar association of your state. However, unlike a judge, a mediator must be paid. Usually, you and the defendant will split this cost evenly. Mediation can be chosen or ordered by the court at any time during your case, although it is more likely after discovery has been conducted.

At a mediation conference, both sides will sit down and present their cases to the mediator informally. There is no jury. The mediator will then discuss each party's claims, either in the same room or in private conferences, if necessary. In these conferences, the mediator might ask questions and raise issues to help the parties find a compromise that they can agree to. Because the mediator is experienced in the law affecting your case, he or she should take into account your legal rights, the extent of your injuries and the prospects of your case in a trial.

After the initial mediation conference, you may have a follow-up conference or discuss the matter by telephone. It is important to realize that coming to an agreement in this way can be slow. If you reach an agreement at mediation, it is not binding unless you and the defendant sign papers and take other steps to formalize it. If you do not come to an agreement, you are free to try again or continue toward trial.

In mediation, you are in a way previewing your case for the other side, just as they are previewing theirs for you. That means it is important to be careful about what you say and to present yourself in a professional manner, just as you would if you were going to trial. A good rule of thumb is to behave as if the room is full of a diverse group of people from your area, some of whom may not be sympathetic to you. Your attorney will prepare you for mediation, just as he or she would for trial and depositions. And if you cannot attend a mediation conference, you should let your law firm know as soon as you can, because not showing up might result in penalties or even the dismissal of your case.

## ***Arbitration***

Arbitration is another form of alternative dispute resolution. Like mediation, it brings the parties together before an impartial third party who understands the applicable law and will keep order during discussions. And like mediators, arbitrators are often retired judges or lawyers with experience in the legal area affecting your case, with a fee that will usually be split evenly between the parties. But unlike a mediator, an arbitrator does not actively guide the conversation or give opinions. Arbitrators are more like judges who keep order and rule on questions about the law, and eventually, on which party should prevail. In non-binding arbitration, the resulting judgment is only a suggestion; in binding arbitration, the decision is usually final.

At a non-binding arbitration, both parties present their cases as they would in mediation. But instead of holding the conference that a mediator would hold, an arbitrator simply decides which side should prevail and how much the plaintiff might be entitled to in damages. The idea is to show the parties how an impartial person sees their case, which encourages them to settle. The arbitrator's decision is non-binding, so if you do not agree, you are free to continue to trial. However, in some jurisdictions, you may be penalized for this if the court ordered the arbitration, or if you go to trial and do not do as well. Your attorney should be able to tell you about the rules that apply to your case.

Binding arbitration is just like non-binding arbitration, except that both parties agree beforehand to abide by the arbitrator's judgment. You and your attorney can choose binding arbitration, or you may be contractually obligated to use it. Binding arbitration can be advantageous for parties who want to resolve their cases more quickly, and sometimes more cheaply, than they might be able to in court. However, because it is hard to challenge the judgment produced by binding arbitration, it is important to understand before the arbitration that you usually must follow the decision of the arbitrator. In fact, you may be penalized for ignoring or defying that decision. Your attorney can give you a professional opinion on whether binding arbitration is a good idea in your case.

## ***Closing Your Case***

Reaching a settlement can provide some satisfaction in knowing that your legal claim is finally going to be behind you. But you must still complete the closing process, which is an important part of finalizing your case and can take time.

Usually, you will be asked to sign a form called a release that formally concludes all current and future claims against the at-fault party and/or insurance company for these injuries. Because signing this ends your right to collect any more compensation for your injuries from this defendant, you should understand this completely and raise any objections before you sign it. Do not hesitate to bring up questions or concerns with your attorney. After it is signed, both sides will notify the court that the case has been resolved and ask to dismiss any lawsuit.

As part of the closing process, your attorney may have to address outstanding bills, claims or liens on your settlement proceeds, as discussed in the section entitled “Understanding a Settlement Offer.” This may mean that you have to pay some of your settlement to a third party, or that part of your settlement payment may be held by your law firm while questions about payment are resolved.

Settlement proceeds are sent directly to your law firm. Injury law firms have bank accounts called trust accounts, where they hold money belonging to clients until their cases are finalized. (This is a lot like holding money in escrow for people who are buying or selling a home.) Ethics rules forbid attorneys from using this money for their own purposes. Your settlement check will go into this account at first. You will probably sign a statement authorizing the law firm to deposit it.

The net settlement proceeds will be released to you after you sign a form called a closing or settlement statement, which typically ends your case and your client relationship with the law firm. It also lists all of the disbursements of the settlement funds, which includes payment of legal fees and costs, outstanding medical expenses, liens, and any other debts to be paid out of the settlement, as well as your own payment. Again, you should not hesitate to bring up any questions or concerns about this document. If you have special circumstances or a particularly complicated case, your attorney may

bring up other ways your settlement proceeds might be disbursed, or have suggestions designed to serve your best financial and legal interests.

Your law firm cannot write you a settlement check until this paperwork is done, and in many states, until after a legally required waiting period is over. If you are concerned about receiving the money quickly, it is important to take care of the paperwork as soon as possible.

### ***Case Study: Increasing Your Settlement***

Hiring an experienced personal injury attorney may substantially increase your recovery, even if there is limited money available from insurance policies and you have high medical bills. In this section, we would like to show you an example of how an attorney's negotiations made a difference for one client who was injured in a motorcycle accident. Of course, the facts of each case are unique, so the results may not look much like the results in your case. But we hope we can show you how valuable it can be to get help from an experienced personal injury attorney when dealing with insurance claims.

The client in this case, a woman in her twenties, was riding on the back of her boyfriend's motorcycle when a tire fell off the back of a tow truck and struck the motorcycle. She was seriously injured in the resulting accident, with medical bills reaching a total of \$140,000. The tow truck's insurance company offered her \$100,000, which it claimed was the total amount available under the insurance policy covering the tow truck. That is, that was what they claimed *before* she retained an attorney. Before calling an attorney, she had worked out an agreement with her medical providers, in which they would receive the entire \$100,000 available under the insurance policy, and she would make payments for the remaining amounts due over time.

This victim learned of an attorney who had many years of experience with accident cases, and called to ask if he had any advice about dealing with outstanding medical bills. The attorney asked her if she had confirmed that the \$100,000 was the only amount available under the tow truck company's insurance policy, or if she had

confirmed that this was the only insurance policy that could cover the accident. The attorney also asked whether any of her medical bills had been paid through a group health insurance policy, if she had reviewed that policy to determine whether one insurer might have to compensate another, and if any agreement was made by the tow truck's insurer with medical providers for paying off the medical bills.

After speaking with the attorney, the woman realized that there was more to the case, and that she needed help to get the best compensation she could. With help from the attorney, she was able to reach a settlement with the tow truck company's insurer. Ultimately, the settlement she received in the case paid all of her medical bills and her attorney's fees, and even provided compensation for her pain, suffering and inconvenience.

## CHAPTER SEVEN

# TRIAL

Once you have been through all of the detailed preparations for a jury trial, you might see why most people prefer not to go to court. People want their disputes solved quickly and fairly. While a trial may be fair, it is rarely quick. Trials require months of preparation, even if the trial itself may take only a few days once you enter the courtroom.

The good news is that many cases handled by experienced personal injury attorneys are settled long before litigation would have started. And in most cases where a lawsuit is filed, the parties still settle before going to the courtroom. It is the collective experience of the attorneys collaborating on this book that 90 percent or more of personal injury cases handled by an experienced personal injury attorney settle before trial.

This is in part because the job of the personal injury attorney is to get the fullest possible information to decision-makers on the other side of the case, as early as it can reasonably be shared. Presenting your case before trial lets the defendants know you have a strong case, and is aimed at convincing them that settlement may be a better option for both sides. Remember, only you can decide to settle your case. If the other side does not make a fair offer, a jury will be able to decide the dispute.

An experienced personal injury attorney will prepare your case, from the beginning, just as if it will ultimately go to court. This is not just in case you do go to trial — it is also because full preparation allows you and your attorney to make the most compelling case possible in settlement talks. The facts will be gathered. The witnesses will be found. The evidence will be assimilated. The issues will be understood. The law will be applied to the facts. Demands for settlement will be presented. Through the settlement discussions, an experienced personal injury attorney will learn all about the strengths and weaknesses of your claim. If the claim can be

settled fairly, so much the better. If not, you will enter your trial ready for litigation.

## **SOMETIMES, YOU JUST HAVE TO GO TO TRIAL**

Sometimes, a trial is necessary in order to reach a fair settlement. That was the case for one 79-year-old man who was badly hurt during an otherwise nice walk at the mall. A kiddie ride had been set up in an open area of the mall, with a ramp leading up to the ride. That ramp was in the walkway and was nearly the same color as the floor. Before the man walked through that area, the owners of a nearby store had reported to the mall security that they had seen numerous shoppers trip and fall over the ramp. Despite this warning, the ride operators took no safety precautions. When the man walked through that area, he tripped and fell. His medical bills exceeded \$80,000.

To the man's attorneys, it appeared to be a clear case of negligence — but the defendant denied liability and offered no settlement at all. His law firm filed suit and prepared the case for trial. Still, the defendant offered no money. The law firm took the case to court. After a two-day trial, the jury returned with a verdict of nearly twice the cost of his medical bills.

### ***The Complaint and Answer***

Every lawsuit starts with a written complaint/petition filed in court by the attorney for the plaintiff. The plaintiff's complaint lays out all of the relevant facts, then lists each cause of action (reason for suing), stated as a separate count. At the end of the complaint, the injured party will sum up his or her request for relief in a "prayer." This is a request for damages — financial compensation for your physical, emotional, financial and other injuries. (Please see Chapter Two for more about understanding your injuries.)

The people being sued are called defendants. After your law firm files the complaint and has a copy served to the defendants, they must file a written document of their own, called the answer.

The answer either admits or denies all of the points raised in the complaint. Because the answer includes reasons for these admissions and denials, it is often your first look at arguments the defendant is likely to make at trial. Together, the complaint and the answer frame the issues the lawsuit will ultimately be about.

## LITIGATION IS A MEANS — NOT AN END

In many cases, litigation is a tool for solving problems, not an end in itself. Take the case of the Robinsons, who were involved in a car accident. As they made a right turn, they were sideswiped by a driver on the intersecting street, who was traveling the other direction. In the accident report, a police officer wrote that the collision occurred in the center of the road. The Robinsons said the other driver had crossed the center line, so the collision was his fault. The other driver said Mrs. Robinson steered wide around the corner, so the collision was her fault. The insurance adjuster refused to make any settlement offer.

The Robinsons did not want to litigate. They wanted a fair and fast settlement. But in this scenario, there was no choice but to start litigation so that the drivers could be deposed. (That is, give out-of-court spoken testimony — see the “Discovery” section in Chapter Five for more.) After litigation starts, attorneys for both sides schedule depositions of both parties and all witnesses. In this case, the couple was able to settle after depositions showed their story was backed by the evidence. Mr. and Mrs. Robinson would have received no compensation if their law firm had not filed a lawsuit. In their case, as in many other cases, litigation was a tool for solving problems, not an end in itself.

## *Motions*

As soon as the case is filed, either side is free to file a motion, which is a request that the court decide a point of law. For example, a defendant may move to dismiss, asking the court to rule that the

complaint was filed too late (for example, if the complaint was not filed until after the statute of limitations expired). In considering a defendant's motion to dismiss, the court must assume that allegations in the complaint are true, so that any challenge at this stage is made strictly as a "matter of law" — what the law of your state says about a specific situation. Another example is a motion for summary judgment, which asks the court to rule in the requester's favor because essential facts are no longer in dispute (perhaps because of what has been learned in discovery), making a jury's decision unnecessary.

Either side can also present motions orally, while in the courtroom. Like pre-trial motions, these oral motions ask the court to decide a matter of law. For example, defendants sometimes move for judgment as a matter of law (called a motion for a directed verdict in some states), after the plaintiff has finished presenting evidence. This motion asks the court to dismiss the case without requiring the defendant to present any evidence, asserting that the plaintiff failed to show that a question of material fact is in dispute. Such a motion can address some or all of the many legal issues involved in trying a personal injury claim.

## ***Jury and Bench Trials***

When your attorney files your complaint, he or she will most likely request a jury trial. In a jury trial, a group of randomly selected citizens from your area serve as the "judge of the facts." A jury collectively decides who to believe and what to believe, deciding all questions of disputed fact. After all evidence is presented, the jury will use directions from the judge (called jury instructions) to decide the three most important questions in any civil trial: fault, causation and damages. Questions of fault ask the jury to decide how much fault each of the parties bear for the injuries. Questions of causation ask the jury to decide whose fault caused what injury. At the end, the jury assigns a dollar value to each injury it believes was caused by the defendants' actions. The jury does all of this according to the judge's instructions and a verdict form provided by the judge. The judge presiding over a trial, who may also be called the court, is "the judge of the law." His or her job is to preside over all the courtroom

proceedings, keeping the trial on track (according to procedural rules) and decide any questions of law. Questions of law can be about either matters of procedure (such as whether a line of questioning is appropriate) or matters of substance (such as whether the defendant may present a certain technical legal defense).

The judge also instructs the jury on how the law affects the facts they are deciding, through the use of jury instructions. For example, if you claim the defendant was negligent, the judge will provide the jury with a written definition of negligence. This definition will be one that has been decided in prior appellate court decisions, or by the state legislature.

There is another type of trial, called a bench trial, in which a judge decides the issues without a jury. If your attorney thinks you should consider a bench trial, he or she will discuss it with you in advance. As with all aspects of your case, you will make the final decision, using your attorney's advice.

### ***Burden of Proof***

As the party seeking financial damages, the plaintiff has the burden of proof, which means you and your law firm must provide the evidence to prove that your allegations are true. Many people are familiar with the requirement to prove a case "beyond a reasonable doubt," which is the standard used in a criminal trial. The standard is lower in a personal injury case, because you are seeking a payment, not to put someone in prison. Plaintiffs in personal injury trials must prove their cases "by a preponderance of the evidence," which means the facts you are alleging are more likely than not.

### ***Presenting and Defending the Case***

Because you, as the plaintiff, have the burden of proof, your attorney will present your case first during trial. After your attorney has presented all of the evidence in support of your complaint, he or she will "rest." Then the defendants will present the evidence in support of their answer. After each witness testifies for the side that called him or her, the other side has the right to ask questions. This is called cross-examination. A famous legal quotation describes

cross-examination as “the greatest legal engine ever invented for the discovery of truth.” A good attorney uses this tool effectively, either to show the strength of the client’s case or to show weaknesses in the other side’s case. While cross-examination is frequently portrayed by television shows and movies as hostile, it does not have to be hostile in order to be effective.

### ***The Jury Verdict***

After all the evidence has been submitted and both sides have rested, the judge will explain the applicable laws to the jury by reading the jury instructions. The jury will then be asked to go to the jury room to discuss the evidence in secret. Out of the presence of the judge and the attorneys and the parties, the jury will decide which facts presented are true, apply those facts to the law specified in the jury instructions and attempt to reach an agreement. In order to reach a verdict, a required number of jurors must agree on each point to be decided.

The number of jurors who must agree in order to reach a verdict is different in different jurisdictions. A unanimous verdict is required in federal court, but some state courts allow a verdict even if some of the jurors do not agree with the majority. The rule in your state will be explained by your attorney. If the jury cannot reach a verdict, the court will declare a mistrial, which is sometimes called a “hung jury.” When a trial ends with a hung jury, the case has to be retried before a new jury, starting from the beginning.

### ***Judgment and Collection***

If the judge believes the jury’s verdict was proper, the judge will file a document called the judgment of the court. A verdict in the favor of the injured party is called a plaintiff’s judgment. A plaintiff’s judgment is a legal document stating that the plaintiff is entitled to collect the payment the jury decided was fair. It shows that the defendant got the due process he or she was entitled to receive and that the defendant is legally being asked to give up property to pay the money awarded by the jury.

If the defendant has an insurance policy that covers this judgment,

that insurer will usually pay it without intervention from the court. However, if the defendant or his or her insurance company does not pay voluntarily, you may need to ask the court to force the defendant to comply. This process is called post-judgment collection procedures, and includes requests for documents such as a “writ of execution” or a “writ of garnishment.” The purpose of these post-judgment remedies is to seize assets belonging to the defendant so those assets can be sold and the money applied to satisfy the judgment.

If a defendant does not have insurance and does not have assets sufficient to satisfy a judgment, the defendant can file a petition asking that the judgment be discharged. This is done in a bankruptcy court. This is a complicated area of the law and beyond the scope of this book. As a part of the decision to take your personal injury claim through the litigation process, an experienced personal injury attorney will consider whether a defendant has the ability to pay. This discussion will occur at the beginning of your case. The ability to get paid is always a matter of utmost concern.

The role of an experienced personal injury attorney is to figure out the end of a case at the beginning, and to work throughout the case to maximize the client’s recovery. That work always includes considering whether you will get paid if a verdict is obtained.

## ***Appeals***

If either side believes there was a mistake at trial, it can file an appeal. An appeal is a request to another court, called an appeals court, to reconsider the first court’s ruling. Most people do not realize that an appeal can only be made on the basis of an error in the law. A jury’s decision, as “the judge of the facts,” cannot be overturned on appeal unless the jury’s decision was somehow the result of an error of law. Appellate courts decide matters of law.

There is no jury in the appeal process. The appellate court judges are required to presume the jury’s decisions at trial were correct — as long as the record on appeal contains evidence to support the jury’s verdict. A jury’s decision can be changed by the appellate court only where there are no facts in the record to support the jury’s decision or when the judge who presided over the jury trial allowed the jury to consider facts that should not have been considered, or to

incorrectly apply law that was given to the jury. Appellate court decisions are important because they form what is called the common law. The common law is the law of your state, unless a decision of the judicial branch of government is precluded or overturned by a decision of the legislative branch of government.

When the defendant files an appeal, he or she can post a financial bond to stop collection of the judgment. If the appeal fails, that bond will be used to pay the judgment. If you win your case, but the other side appeals, you may have to wait some time before you can collect the compensation you won.

Your attorney will need to explain this complicated process to you and will counsel you about whether to settle on appeal, given the increased costs, fees and time associated with the complicated appeals process. All of these decisions will turn on the specific facts and law applicable to your case. An experienced personal injury attorney will explain all of your options and help you make the right decision for you and your family.

### ***It Is the Client's Case***

We find that some potential clients are afraid that an attorney will make important decisions about their cases, such as what settlement amount is fair or whether to file a lawsuit. This is not true. A personal injury claim belongs, at all times, to the client. The attorney is hired to gather the facts and the law, and to show the client how the law will likely be applied and how the facts will likely be interpreted. As the owner of the claim, the client has the right to make the final decisions about things like whether to settle.

Experienced personal injury attorneys know litigation is a means to an end, not an end in itself. The end is justice for the injured client — full financial compensation for his or her injuries and the satisfaction of holding wrongdoers responsible for their actions. Litigation is simply the means that must be applied when there is a no *voluntary* settlement along the way.

An experienced personal injury attorney will begin with the end in mind — preparing the claim from the outset in such a way that both the attorney and the client are ready for litigation and trial — *if necessary*.

# CONCLUSION

We wrote this book in order to give you, our clients and potential clients, a helpful and relatively detailed guide to the process of a personal injury claim. We believe this is important information for people who have already decided to pursue a case — but also for those who want more information before they are ready to decide. As a potential client, you have the right to know what you're committing to. And if you become a client, you truly *need* to know these things about your case, for your own peace of mind and to help us make the case as successful as possible.

However, we know that no book can be detailed enough to address every plaintiff's situation. Each case, each pattern of facts and each plaintiff is unique. This is why we want to once again encourage you to meet with us, if you have not already, for more information about what you can expect if you become a plaintiff, tailored to your specific case and your circumstances.

As injury attorneys, we believe that helping people is one of the most important parts of our work. An injury lawsuit helps clients directly by securing money to pay for health care and other costs of an accident, of course, but also by cutting through the bureaucracy of insurers, hospitals and other large organizations to get you the help you need. More indirectly, it can even help the community by alerting others to the dangers that caused your accident, including the at-fault parties' careless or illegal behavior and the lack of oversight or accountability that allowed those behaviors. In a few cases, you may even be able to make new laws or force policy changes that better protect our community.

But no matter what form it takes, a successful resolution to your case is both our goal and our pleasure. There is nothing more fulfilling than being able to make a difference for the better in someone's life. As a plaintiff, you are a partner in that work, and your participation is not just helpful — in many ways, it is essential. We hope that this book has helped you better understand what you can expect from your case, and your own role in making it a success.

***We wrote this book as an introduction to personal injury law for people who find themselves just where you are now: the victim of a devastating accident.***

*As experienced personal injury lawyers, we understand that most accident victims are caught unprepared for the life-changing effects of a sudden, serious accident. This book should help guide you through those changes and the new legal and medical worlds you will enter, worlds filled with their own members and their own vocabularies. We offer a step-by-step explanation of the entire process, from accident to settlement.*

*This book should not be considered legal advice, but an overview of the world of personal injury.*

***If you have chosen this book, an accident has probably seriously hurt you or someone you love. It may have been a motor vehicle wreck, a workplace accident or another catastrophe caused by someone else's wrongdoing. We wrote this book for you.***



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