Praise for
The Plaintiff Lawyer's Playbook

"*The Plaintiff Lawyer's Playbook* should be mandatory reading for every trial lawyer, especially those who are new to the profession. Had it been written forty years ago, I would have given a copy to every associate that came through my office since then and demanded that they read it the first week in my office."

—James McElroy, San Diego trial lawyer, recipient of the Southern Poverty Law Center Distinguished Service Award, the AAJ Defense of Civil Liberties Award, and the Planned Parenthood Margaret Sanger Award

"Elden Rosenthal has given us a gem. *The Plaintiff Lawyer's Playbook* is a distillation of the wisdom born of a lifetime of trial practice at the highest level."

—Kelly Rudd, Wyoming trial lawyer and managing partner of Baldwin, Crocker & Rudd

"Elden Rosenthal's *Plaintiff Lawyer's Playbook* is accurate, brief, and clear. It's chock-full of the essentials necessary to prepare civil cases for their maximum potential. Every aspiring jury trial lawyer should have this book in their toolbox."

—Bill Barton, Oregon trial lawyer, author of *Recovering for Psychological Injuries*, fellow of the International Society of Barristers, and past president of the Oregon Trial Lawyers Association and Western Trial Lawyers Association

THE PLAINTIFF LAWYER'S PLAYBOOK

Insights and Recommendations on How to Prepare for Success in Settling and Trying Cases

By Elden Rosenthal

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ISBN: 978-1-941007-88-4

Managing Editor: Tina Ricks
Production Editor: Travis Kremer
Copyeditor: Patricia Esposito

Cover Design: Alexandra Starkovich
Original Interior Template Design by Laura Lind Design
Interior Layout by Travis Kremer

Printed and bound in the United States of America.
Printed on acid-free paper

This book is dedicated to the great lawyers who taught me the nuts and bolts of practicing law, and to my colleagues who, day in and day out, represent the victims of negligent, reckless, and intentional misconduct.

And to Margie, for everything.

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PUBLISHER'S NOTE

This book is intended for practicing attorneys. It does not offer legal advice or take the place of consultation with an attorney who has appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment. Readers should also consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and make independent decisions about whether and how to apply such information, ideas, and opinions for particular cases.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

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Real names are used only in reported cases for which citations are given in the footnotes. The publisher disclaims any liability or responsibility for loss or damages resulting from the use of this book or the information, ideas, and opinions contained in this book.

INTRODUCTION

My trial lawyer career began in 1972 in Portland, Oregon, where I was a new associate at Pozzi, Wilson & Atchison, a stellar thirteen-person law firm that specialized in personal injury trial work. I was fortunate to be surrounded by highly engaged and successful trial lawyers who taught by example how to prepare and try cases in an efficient and effective manner. The mentoring I received was intense and day to day.

After three years I struck out on my own and then, five years after that, joined forces with my great friend and Stanford Law classmate Mike Greene. Our partnership lasted thirty-five years. During the last ten years of our practice, my son-in-law, John Devlin, joined the firm and eventually became a partner. During my career I tried jury cases of all sorts: criminal, civil rights, auto, dram shop, product liability, slip and fall, and medical malpractice. I tried scores of workers' compensation and social security claims. Mike tried similar cases, along with legal malpractice claims. I tried cases solo, with Mike, with John, and with experienced lawyers from other law firms. I tried cases big and small, winners and losers. Over the course of my trial career, I received verdicts ranging from a few thousand dollars to multimillion-dollar awards.

When John joined the firm, Mike and I consciously began tutoring him in the philosophy, skills, and techniques we had learned and developed over the years. As I began to wind down my active practice in 2015, Bill Gaylord—a brilliant plaintiffs' trial lawyer who was also in the process of retiring—and I formed a partnership whose sole function was to actively mentor less-experienced lawyers.

Tutoring John with Mike, and mentoring lawyers with Bill, opened my eyes to the tremendous advantage I had enjoyed by beginning my career surrounded by experienced and successful lawyers. There were so many lessons to be learned as a young lawyer, so many fine points to master. The journey from law school graduate

to competent trial lawyer is not an easy or intuitive path. As with any difficult journey, a guide can be helpful.

In writing *The Plaintiff Lawyer's Playbook*, I thought in terms of the many decisions a successful lawyer must make in order to prepare a case for trial. Good judgment, of course, is the key to success in the practice of law. And good judgment is the product of knowledge and experience.

Malcolm Gladwell, the popular author who wrote a series of books introducing and explaining interesting aspects of contemporary social science, popularized the 10,000 hour rule. This rule hypothesizes that it takes 10,000 hours of practice to become a true expert at anything. He gives examples in music (such as the Beatles playing small clubs in Hamburg for years before becoming famous), business, and sports. I'm not sure how scientific the 10,000 rule is, but it should be comforting to know that learning all the dos and don'ts of practicing law does not come naturally to anyone and takes time.

The Plaintiff Lawyer's Playbook is my effort to help guide you through the learning curve of becoming an experienced member of the plaintiffs' trial bar. It is my goal that, like a senior partner, I can share some of the lessons learned during my forty-seven-year journey.

Although I firmly believe in the need to treat every case as though it will actually go to trial, this is not a book about how to try a case. Rather, my goal is to suggest how to handle many of the day-to-day tasks you will face as a plaintiffs' trial lawyer. Law schools, unfortunately, emphasize only the academic side of legal practice—how to research the law and analyze appellate opinions. No one taught me in law school how to get ready for depositions, how to hire an expert witness, or how to prepare my client for mediation.

I structured the *Playbook* to follow the course of a typical representation, beginning with the decision to take on a client's case and proceeding through investigation, discovery, settlement discussions, final trial preparation, and (briefly) trial itself.

When I began writing this book, I was inspired by *The Curtis Creek Manifesto*, a wonderful introduction and guide to becoming

a fly fisherman, written by Sheridan Anderson. When I took up fly fishing in my early thirties, Anderson's straightforward, illustrated book became one of my principal sources of guidance for many years. From tying knots, to reading water, to casting technique, the book guided me through the mysteries of fly fishing. I hope that this book will be as useful for you in navigating the pretrial waters of the plaintiffs' practice as *The Curtis Creek Manifesto* was in explaining to me how to navigate the trout waters of Oregon.

The plaintiffs' trial bar is the engine that drives the American civil justice system. Becoming an effective advocate for your clients is critical to the continued existence of justice in America.

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A TRIAL LAWYER'S POINT OF VIEW

The folks we represent have been wronged. For many of our clients, the wrong has been a personal injury or the death of a loved one. Others have endured a violation of their civil rights or the infliction of extreme emotional distress. Unlike the commercial transactional bar, our responsibility extends beyond the transfer of money. Our clients come to us seeking justice and trusting the legal system to recognize their basic human right to physical and emotional integrity. Many of our clients' and their families' future economic well-being depends on how we navigate the legal system on their behalf. And some of our clients are motivated by a deeply held belief that bringing a lawsuit will result in a safer community and will protect others from suffering as they have suffered.

Our duty and responsibility is to do what is best for our clients. This usually means an analysis of the economics of a lawsuit. But surprisingly often, economics will take a backseat to noneconomic considerations such as psychological well-being or a quest for

justice. On occasion, the goal of a lawsuit will be to cause systemic changes in government or corporate behavior. Our lodestar is to do what is best for our clients and is a legitimate goal of their case. Ideally this pursuit is a joint venture, with our client informed and agreeing to our goals and strategies.

It is our duty and responsibility to always do what is best for our clients.

Tenet 1

Keep Clients Informed

This leads to the first tenet of being an ethical and successful trial lawyer: *Keep your clients informed and in agreement with the approach and strategy you are employing*. A corollary is this: if it proves impossible for you and your client to agree on the approach and strategy you are employing, be prepared to withdraw from representation.

Although there are many ways to stay in touch with clients, email seems to be the communication method of choice for most lawyers. I urge you to resist relying solely on this approach to client communications. Pick up the phone and talk with your clients. Let them know what you are thinking and share your analysis of the tough decisions. Listen to your clients' thoughts on the litigation. There are two huge advantages to this approach. First, you are likely to have happy clients at the end of their cases, clients who respect and like you. And second, when it is time for you to take charge and advise your clients, they are more likely to trust you and follow your advice.

Tenet 2

Like Your Client

Here is a second tenet: *Don't take a case if you don't like your client*. If you don't like your client as a person, you won't communicate well, you won't trust each other, and the odds are the jury will not like your client either. Don't be tempted to represent a person you do not like because you think you can earn a fee on the person's case. You will feel pressure to shirk working on the file and pressure to settle, and in the end you will not want to try the case. This does not mean that you should turn away clients who have been convicted of crimes, or clients who dress or act unusually. Get to know a client before making this decision. Take the time to talk about family, hobbies, and experiences. I have had some terrific relationships with convicted felons, with former drug users, with clients who were oddballs. If you like your clients, if you are eager to represent and stand up for them, you are well on your way to successful lawyer–client relationships.

Chuck Paulson, a great trial lawyer I had the benefit of working with during the early years of my practice, once told me: "I don't take a case unless I would be willing to try the case the next day." It is a useful philosophy to adopt. Of course, you need to do discovery, of course you need to interview and arrange for witnesses, but are you ready to commit to representing your client? Does the case feel like a just and worthwhile endeavor? Are you willing to stand up in a courtroom and argue for your client tomorrow?

Tenet 3

Treat Every Case As If You're Going to Trial

And here is the third and final tenet of the successful trial lawyer: *Treat each and every case as if you are going to trial*. It is the mindset of all great trial lawyers. I know the majority of cases settle. You know this also. But you will maximize the value of every case you handle if you assume it is going to trial. Work up every case with the goal of winning the trial. Prepare each case with the attention to detail needed to try the case. Do not put off tasks because "the case will probably settle." Your client should not expect a settlement. Nor should you.

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FIRST THINGS FIRST

There is an old saw among trial lawyers that the way to get a $1 million verdict is to screw up a $2 million case. There are several ways to think about this observation. One interpretation might be that case selection is a trial lawyer's most important skill.

Evaluate the Statute of Limitations

The first consideration before accepting a new case must be the statute of limitations (SOL). In thinking about the SOL, the critical date is the date the claim *accrued*, which may be different from the date of the alleged wrongdoing. In most jurisdictions, in order for the claim to accrue, the plaintiff must have knowledge of their injury and of the defendant's actionable conduct. Additionally, the SOL is usually tolled for some period of time by the plaintiff's disability or minority. The rules of accrual and tolling are

state-specific and are usually statutory. Many jurisdictions also have a Statute of Ultimate Repose. Take the time to learn the rules in your jurisdiction.

The SOL can be a huge problem on the occasion when a potential client arrives in your office only a few days or weeks before the SOL expires. You must confront and sort out multiple issues when this happens.

- Do I really want this case?
- Do I know enough to make an intelligent decision about this case?
- Will I be able to identify the proper defendants and locate them?
- Will I be able to figure out the best venue?
- Will I be able to accomplish service within the statutorily required time?

Always determine whether another lawyer has turned down the potential client's case. If so, get permission from your client to talk to the other lawyer before proceeding. If no other lawyer has been consulted, ask yourself, "Why has the client waited so long?" A high index of suspicion is warranted.

Except in the rarest of circumstances, it is unwise to take on a case when there are only a few days available before the SOL expires. Trouble lurks.

A good rule of thumb is to avoid taking on a case that comes to you with less than a month before the SOL expires. If, for whatever reason, you accept a case with less than thirty days before the SOL runs, you must be prepared to make the case the top priority in your office. If you decide to accept a case with a looming SOL deadline, have the client acknowledge *in writing* that, under the

circumstances, you will not be held responsible for any successful defense based on the SOL.

Recognize Your Reason for Taking the Case

A second consideration before undertaking representation is to be honest with yourself about why you are accepting a client's case. Usually the reason is straightforward—the client has a claim that you consider just and you believe that you can win. As part of this analysis, you determine that you will be fairly compensated for your time and effort.

It may be tempting to accept a case based solely on the possibility of a significant fee. This is dangerous. Recall the second tenet from the first chapter: *Don't take on a case if you don't like your client*.

There will be occasions when friends or family members will want your assistance on a case you would normally not handle. There are pro bono cases, there are law reform cases. What is important in these situations is your self-acknowledgement that some cases are not going to be profitable, yet there are good reasons that you want to handle the case anyway. Once you commit to the not-so-profitable case, you must also commit to handling it with the same effort and vigor as any other case in your office. Doing a half-baked job will disappoint your client, and it will affect your reputation. Every case matters. You build your reputation on every case that you handle.

Every case matters. Your reputation is built on every case that you handle.

Avoid Conflicts of Interest

Always be alert to actual or potential conflicts of interest. Obvious conflicts, such as being asked to sue an individual or business entity that you are currently representing, are easy to spot. But what about suing a health-care provider that is treating another of your clients? Or suing a negligent driver that just happens to be in your spouse's book club? It is far better to excuse yourself from such representation right away than be compelled to admit to a client a few months later that you are uncomfortable proceeding.

It's a good idea to run any new potential defendant by your law partner(s) and your significant other to check for hidden conflicts of interest.

Another situation that bears careful attention is representing more than one client in a case where several people have been injured. It may seem like a profitable proposition to represent multiple passengers in a car accident case, but it is rarely the right thing to do. There may be insufficient insurance available for all concerned to be fully compensated. You cannot prioritize claims in that circumstance; you probably cannot represent more than one of the injured parties. Similarly, two or more family members seeking representation in a car accident, where one family member is driving, presents the potential for an unsolvable conflict of interest. Should the driver be sued? Should a claim be made against the driver's underinsurance carrier? Is there likely to be a limited pool of money to pay multiple claims? By agreeing to represent both driver and one or more passengers, you may end up being unable to represent any of the parties.

There will be times when the spouse of a potential client will have a viable loss of consortium claim to consider. You must determine whether the potential defendant has sufficient assets and/or insurance to fairly compensate both the injured person and the spouse. If not, you have a conflict of interest in representing both people. You must carefully explain the problem to the client and the

client's spouse, and a decision needs to be made whether to refer one of the claims to another lawyer or whether to ask both client and spouse to acknowledge and waive in writing the potential conflict. You may not know all you need to know about relationship issues between the spouses, issues that may lead to separation or divorce during the representation. It is a best practice, therefore, to urge the spouse to consult an independent lawyer before making any final decisions regarding a loss of consortium claim.

Make Sure There Is No Pending Bankruptcy

Although it is an uncommon occurrence, determine whether your client or client's spouse has a pending bankruptcy case. Bankruptcy filing generally results in an automatic stay against proceeding with any litigation on behalf of the person seeking bankruptcy protection. More importantly, it probably makes the plaintiff's claim an asset belonging to the bankruptcy trustee, the proceeds of which will be used to satisfy creditors. Unless you have experience with bankruptcy proceedings, consult a specialist.

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THE ATTORNEY–CLIENT BARGAIN

You've interviewed a potential client and decided to take the case. The next half hour is critical. Now is the time to begin educating your client, and now is the time to begin the process of developing trust in one another.

Enter into a Written Retainer Agreement

Never begin working on a case without a written retainer agreement. This is a legal requirement in most jurisdictions, and best practice in all jurisdictions. There may be times when you advise your potential client that you need to do some investigation or research before deciding whether to take their case. Even in such a situation, you should not begin working on a case without a retainer agreement. Put into the agreement that you have not yet decided whether to take on the case, but that you intend to perform

a preliminary investigation before making a final decision. There are at least two good reasons to do this. Most importantly, both you and your client need to acknowledge that an attorney–client relationship has been established even though no final decision has been made about filing a case. Additionally, you do not want to invest time and effort into research or investigation only to discover that the potential client has been shopping the case and has retained other counsel.

Client representation is a partnership.

If you are going to be advancing case costs, take the time to carefully explain to your client how you intend to collect your case costs and—if you are working on a contingency fee basis—whether you will be charging a percentage fee on the amount of case costs advanced. Without a detailed explanation, clients rarely understand how advanced case costs and a contingency fee are calculated.

If a guardian *ad litem* (GAL) or personal representative (PR) needs to be appointed, be certain to have the retainer signed *after* the court has formally made the appointment. A retainer signed before the GAL or PR is formally appointed may not be binding on a disabled person or a decedent's estate!

If the case holds the potential for an award of attorney fees, your retainer agreement must be carefully crafted to take into account the many situations that may develop. Consider this scenario that I once found myself in. After a multiday trial, my two civil rights clients were awarded $100,000 in damages. The trial judge then ruled that my co-counsel and I were entitled to $180,000 in attorney fees. At this juncture, the defense counsel filed a notice of appeal and then offered to pay the damages judgment plus $33,333.33 in attorney fees. Since I had never confronted this situation previously, my retainer agreement simply provided that I was entitled to a contingent fee of one-third. What could I do? I was compelled to accept the offer. I owed a duty to my clients to not put their award at risk as winning the appeal would not gain them anything!

Most cases where a statutory attorney fee may be awarded are handled on a contingency basis. In civil rights claims and other statutory attorney fee cases, I suggest calculating the attorney fee by multiplying the attorneys' hours expended by each attorney's customary hourly rate, provided that such fees shall not be less than the agreed upon contingency fee nor more than 50 percent of the gross settlement proceeds. If there is an actual court award of attorney fees, you should charge the court-awarded fees or the original contingent fee based only on the damages award. You can find a model portion of a contingency retainer agreement that deals with court-awarded attorney fees in appendix A.

Take the time to carefully explain these possible outcomes. Your client will be justifiably upset and angry if they do not learn until the time their case resolves that attorney fees are greater than their net award.

In addition to explaining your retainer agreement, for certain types of cases it is necessary to explain the possible tax consequences of being successful. For example, the 2017 Tax Cuts and Jobs Act may have a significant impact on a client's net recovery after attorney fees are paid. Under this revision of the tax code, some clients will lose the ability to deduct the attorney fees they pay for income tax purposes. Sexual harassment plaintiffs, for example, will be taxed on the entire amount recovered, including attorney fees.[1] Similarly, any award of punitive damages is taxable to the client. No lawyer wants to surprise a client after two years of litigation with the news that the fees, cost, and taxes associated with a lawsuit result in the client recovering only 30 percent of a settlement (settlement minus contingency fee minus state and federal income tax calculated on 100 percent of the settlement).

1. 26 U.S.C. § 162(q). How the onerous sections of the Tax Cuts and Jobs Act will be interpreted, whether they will be amended or repealed, is not known as of the date of this publication.

Establish Expectations

You need to establish expectations. Carefully outline the steps you will be taking over the next few weeks or months as you prepare the case for filing. Be honest and transparent. Let your client know your schedule, set up a time frame for doing the necessary tasks, and share the time frame with your client. Don't be shy about telling a client that you have another case to try that will delay work on their case. Your client will appreciate knowing this. If you have a planned vacation, let your client know. They will not begrudge you taking time off. Set up a fixed date in the future for your new client to call you to get an update on how the case is developing, and calendar the date. This will establish a deadline for getting your work done, and it will encourage your client to trust that you are working on the case.

Although you may not yet have a firm idea about the case's value, it is not too early to begin discussing the subject. Most clients genuinely do not know how to evaluate their claims and will welcome your acknowledgement that you will advise them about the case value during the course of representation.

On the other hand, some clients come to you with inappropriate expectations. A client may believe that their case is a "slam dunk" and/or worth millions of dollars. They may hold the view that the value of their case is something they or you can simply declare and make true by being insistent. If you fail to address a client's stated litigation goal when you accept their case, the client has every right to assume you agree with their valuation. It is critical that a client with unrealistic expectations be "talked down," and you must begin the education process in the first meeting. Failure to control expectations will almost always lead to a dissatisfied client and an unpleasant experience for both you and your client.

Another variation of this problem is the client who shops their case to the lawyer who will tell them their case is worth the most money. This mindset poses potential hazards to your future working

relationship and to your ability to ever achieve "success" for the client's case. The best way to avoid this pitfall is by discussing expectations at the outset. Managing expectations includes educating your client about what a case is probably worth.

There will be occasions when you simply do not know how to put a value on a case. Don't be reluctant to confess your uncertainty. Explain why you are unsure about the value of the case. Share with your new client the concerns you have and your need for research, investigation, and discovery in order to come to a conclusion about the case's value.

Assign Tasks to Your Client

Give a new client a few tasks to accomplish. For example, ask your client to prepare a list of all health-care providers, to send you tax returns, to send you photographs. You know the things the defense will be requesting; don't wait for the Request for Production to begin collecting information.

Some lawyers are in the habit of asking their clients to collect health-care or other records. This is not a good idea for several reasons. Your client will not know how to collect all of their health-care records and will meet resistance from their health-care provider when attempting to do so. For example, one systemic problem facing a client seeking their own records is some health providers' policy of excluding all handwritten notes and providing only copies of more formal parts of the chart, unless the request is from a lawyer and clearly seeks everything. Additionally, you cannot vouch to defense counsel that your client's collection of records is complete, and you do not want to be surprised at a later date. Finally, if your office collects all records, the requests are documented, and the records are logged in when they are received. All records received should be Bates stamped.

Discuss Social Media

Discuss social media with new clients. Many clients believe their social media accounts are personal and confidential. Lawyers know otherwise. Take the time to explain that, once a case is filed, there is no personal and confidential part of a plaintiff's life, other than attorney–client and spousal communications. Explain how even these privileges can be waived by disclosure. Encourage clients to cut back on their use of social media. Forbid clients from discussing their case on social media. Personal injury clients will not appreciate until it is too late that photos from a family trip, or photos of enjoying recreation of any sort, may be used to cast doubt on an injury claim. Request access to a new client's social media accounts so that you can assure yourself there are no hidden time bombs.

During litigation, what happens in Vegas does not stay in Vegas!

Most clients believe that the case they have entrusted to you is about the defendant and the defendant's conduct. That, of course, is only half the story. Cases often turn on the conduct of the plaintiff, often conduct that occurs after you have been retained. Explain that the defense may hire an investigator to talk to neighbors and coworkers, and even try to capture your client on videotape. Explain that if they have a conversation with a friend about the car they hope to buy with a settlement, the defense can use such a conversation to question their credibility and motives. Contrary to the saying, during litigation, what happens in Vegas does not stay in Vegas.

Discuss Communication Expectations

Discuss what the client should expect when calling or emailing your office. Clients need to understand that you have many cases and commitments. Encourage clients to trust your office staff to relay questions and information, and assure clients that your office will return phone calls within twenty-four or forty-eight hours. Clients have every right to be mistrustful of a lawyer that fails to communicate in a reasonable manner.

Legal Representation Is a Partnership

Both you and your client need to agree from the beginning of the relationship on the terms of the bargain. You agree to do your lawyer-work in a timely and competent manner. You agree to keep your client informed and current on developments in the case. Your client agrees to cooperate in helping you prepare the case and agrees to be on good behavior for the duration of the litigation.[1] In short, legal representation is best understood as a partnership.

1. It is advisable to put your client's obligation to cooperate and be truthful into the retainer agreement.