

IV. CASE INTAKE

§ 23 In general

Processing the toxic exposure-construction accident case is relatively simple where the client originally presents himself or herself shortly after the exposure for the prosecution of a workers' compensation claim. In that situation the compensation proceeding and the third-party liability case generally proceed along parallel tracks, with the former matter usually resolved well in advance of the latter. The other typical situation is where the client has been referred to counsel from another attorney who represented the client in a workers' compensation proceeding. In this situation processing the case is similar to undertaking any other type of civil litigation,²⁵ except that counsel may rely on the compensation attorney's being able to supply a variety of investigative and medical materials that ordinarily are not available to counsel in the usual civil case at the time of case intake.²⁶

Cases

Class was certified under FR Civ P 23(b)(2) consisting of all retired and former employees at industrial plant whose job duties exposed them to orthotoluidine and aniline supplied by defendants. Plaintiffs alleged negligence and strict liability based on failure of defendants to provide adequate warning of health hazards of these products. Plaintiffs introduced evidence of National Institute for Occupational Health study that found that workers at industrial plant had excess risk of developing bladder cancer ranging from 3.6 to 27.2 times normal risk. Plaintiffs sought injunctive relief in form of court-administered fund paid for by defendants that would cover reasonably anticipated costs of medical monitoring program for bladder cancer for lifetime of class members. *Gibbs v E.I. DuPont De Nemours & Co.* (1995, WD NY) 876 F Supp 475, 25 ELR 20926.

²⁵Processing the Case, 1 Am. Jur. Trials 189.

²⁶See §§ 6–8, 35.

§ 24 Initial client interview

The initial client interview is important for a number of reasons.²⁷ First, the initial interview provides the attorney with an opportunity to establish the close rapport that is vital in all dealings with the client, and it is essential to establish that rapport early in the litigation. When an atmosphere of mutual trust and confidence has been created at the beginning of the attorney-client relationship, a client is easier to deal with during settlement negotiations later in the case.

An attorney interviewing a person who has been exposed to hazardous substances must be prepared to deal with a wide range of legal and personal problems. For example, a person who has contracted a fatal disease through such exposure has many other thoughts, such as the management of property left behind, the care for surviving children, and the settlement of outstanding debts. The attorney should recognize their existence and should appear interested and helpful with these problems.²⁸ Such an approach not only helps ease the client's burden, it helps give the impression that the attorney is interested in the client and not just the money the client's case can generate.

Although it is important to let the client tell the story in the client's own words, it is also important to let the client know that counsel is listening. Counsel should listen attentively to the client's story and ask occasional questions. Questions about various incidents can be interposed without breaking the flow of the narrative, which gives the client the impression that the attorney is not only listening but thinking as well.

The initial interview is also an opportunity for the attorney to judge the feelings and expectations of the client. Many clients who have been exposed to hazardous chemicals and toxic substances and incurred serious injury are understandably angry. How the client feels about the defendant will play an important role in how the case proceeds. If the client has excessive bitterness which is carried into the litigation or if he or she nurtures unrealistic expectations about the possibility of success, counsel faces a difficult task in proceeding with the action. The initial interview is a good place to begin conditioning the client to the rigors and realities of the case.

²⁷Interviewing the Client, 1 Am. Jur. Trials 1.

²⁸If the client's estate problems are beyond the expertise of the lawyer, counsel should consider referring the client to someone who has the necessary experience or associating co-counsel to handle such matters as estate planning.

§ 25 —Client preparation for interview

The primary purpose of the initial client interview is to discover the facts surrounding the case and to determine the extent of the client's injuries.²⁹ It is very helpful for the client to be prepared for the meeting. Particularly in a case such as that of the model trial situation, where counsel will know in advance the factual situation that has led to litigation, and whenever possible, the client should be asked to review the case and reflect on what he or she knows prior to appearing at counsel's office for the interview. This is true, for example, regarding dates and the names of witnesses. A prepared client will be able to relate to the attorney more of the crucial facts during the initial interview, and this will save investigating time and prevent duplication of effort.

The initial interview in a toxic exposure case should explore all of the client's prior as well as present health problems in order to ensure that the client may be appropriately compensated for all harm suffered. While the client may be relying on a specific exposure at a particular location in claiming injury, the entire history of exposure should be traced, including exposure to hazardous substances at other sites.³⁰ Where the client has been exposed to a substance that may be carcinogenic, the client's prior exposure to other carcinogens is an important subject of inquiry in order to evaluate the claim. If a client has had considerable unrelated prior exposure, the claim may not be worth pursuing.

If the client has been injured as a result of a toxic exposure at work, counsel should be aware of the third-party liability potential of the case. Generally, damages for tort may be recovered from general contractors and subcontractors at the worksite—other than the client's employer—on negligence claims, and from manufacturers of industrial substances on product liability claims.³¹ Although the workers' compensation aspect of toxic exposure cases is beyond the scope of this article, counsel should generally note that while most states permit the filing of a workers' compensation claim and the pursuit of a third-party liability case concurrently, other states may force a plaintiff to elect either a workers compensation claim or a

²⁹Investigating the Civil Case; General Principles, 1 Am. Jur. Trials 357.

³⁰Putzrath, Dinman & Campbell, "Occupational and Environmental Exposures" in G. Nothstein, ed., *Toxic Torts: Litigation of Hazardous Substance Cases* §§ 2.01–2.13 (Shephard's/McGraw Hill 1984).

³¹See §§ 11, 14.

third-party suit.³² Some states also allow intentional torts to be prosecuted outside of the workers' compensation system.³³ The initial interview should help the attorney analyze these situations as well as the underlying compensation claim.

§ 26 Client Interview Checklist

A carefully drawn up client interview checklist should be available to counsel for use at the initial interview. The checklist should cover the areas that counsel wants information on when conducting the interview. The resulting information will, and should, play a vital role in counsel's determination whether or not to accept the lawsuit. Even if counsel decides to accept the case, if the information gathered indicates significant past exposures to toxic substances, significant family history of the condition the client suffers from, significant use of tobacco or other cancer-causing substances, the case is likely to be very difficult to handle, and the attorney should be aware of this in setting the fee³⁴ and estimating litigation expenses.³⁵

- Name and address
- Social security number
- Telephone numbers at home and at work
- Date of birth
- Family members
- Family medical history
- Place of employment at time of exposure
- Length of time employed
- Duties at work
- Supervisors, fellow workmen, union stewards

Facts of Exposure

- Date or dates of exposure
- Times and places of exposure

³²Am. Jur. 2d, Workmen's Compensation § 77.

³³Am. Jur. 2d, Workmen's Compensation § 57.

Intentional Infliction of Emotional Distress by Employer, 45 Am. Jur. Proof of Facts 2d 249.

³⁴See § 29.

³⁵See § 30.

- Circumstances of exposure
- Other exposures
- Witnesses
- How exposed
- Who exposed client
 - Duty of that individual
 - Actions of that individual
- General layout of the work site
- Precautions taken to insure worker's safety
 - By the client's employer
 - By other contractors
 - By those actually handling the chemicals
- Chemicals exposed to, if known
- Other dates chemicals were used
- Company who manufactured chemicals
- Other chemicals in work place
- Warning labels

Injuries

- What kind of illness or condition
- Type of symptoms
- Date of first symptoms
- Date of seeking medical treatment
- Date diagnosed
- Diagnosing doctor
- Prognosis
- Other Injuries (obtain details as to each)
- Name and address of all health care providers
- Dates of all medical treatment
- Dates and time lost from work
- If a construction worker or someone who works out of a hiring hall, the dates unavailable for work

Past Exposures

- Past employment
- Locations of all previous employers

- Exposure to chemicals
- Dates and places of exposure
- Circumstances of exposure
- Chemicals exposed to
- Symptoms of illness from each exposure
- Use of tobacco and frequency
- Exposure to pesticides and circumstances
- Complete medical history
- Dates and places of all medical treatment
- All diagnosed illnesses

§ 27 Options at conclusion of client interview

The attorney has three options at the end of the initial interview: (1) to accept the case, (2) to reject the case, or (3) to enter into a contract with the client to investigate the claim with an option to provide representation if it appears to have merit. Unless the initial interview indicates that the case should be rejected, the third option is the best to take to protect both the attorney's and the client's interests. Assuming that the case is not rejected, the attorney should obtain a signed authorization for the release of medical information and a signed written contract, either to represent the client or to investigate the claim, at the time of the initial interview.

§ 28 Setting the fee

Most persons who seek representation for having been injured by exposure to toxic chemicals will not have the resources to retain counsel at an hourly rate, and in that instance a contingent fee contract is necessary.³⁶ The contingent percentage of the contract should be based on the degree of difficulty of the case. In most instances, a toxic exposure case will justify the highest rate allowed by law since such litigation is expensive to pursue and quite risky. A client's toxic exposure may also result in a death case at some point in time, and many states require that counsel establish a reasonable fee for services on the case through the probate court. These courts often have the power to reset the contingent fee, and the attorney must be prepared to defend the fee at a later time.

³⁶Setting the Fee, 1 Am. Jur. Trials 93.

§ 29 Payment for litigation expenses

If a contract to investigate the claim before accepting it is entered into between the attorney and the client, the parties must decide how the expenses are to be paid. Whenever possible, the client should pay some or all of the initial investigation costs. If this type of arrangement is made, the attorney should attempt to keep the initial expenses to a minimum.

If the case is accepted for representation, the client and the attorney need to make some further arrangement regarding the payment of litigation expenses. Toxic exposure cases frequently require an expenditure of \$10,000 or more in costs. Assuming the client is unable to cover those expenses, and that the rules in the jurisdiction permit, an arrangement where the costs of the litigation are advanced by counsel to be repaid by the client out of the settlement or recovery is necessary. The contract should clearly specify whether the costs are to be reimbursed out of the gross recovery or from the client's share after counsel's contingent fee has been deducted. Explaining the agreement for expenses to the client early will save having to do it at the time of a recovery when the client's expectations have been firmly set.