A Consumer's Guide:

Personal Injury Claims in Wisconsin

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Attorney at Law

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LAW OFFICES, S.C.

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We Take Fewer Cases

Rozek Law Offices, S.C. is not the typical personal injury law firm. We do not take every personal injury case that we are offered. We are not a personal injury *"mill."*

Each year, our law firm accepts a limited number of serious injury cases from the people who ask us to represent them. We do not allow our paralegals and / or legal assistants to negotiate our cases with the insurance company. We take the time to get to know each of our clients. Our ability to limit the number of active cases means more time for you and, we believe, better results.

Sometimes the best advice an injured person can receive is that they *do not* need a lawyer to represent them. If we believe you would be better off handling your claim without an attorney, we will tell you. If your case is not a good fit for our law firm, we will refer you elsewhere. If we do accept your case, we will provide you with personal attention and aggressively represent you. We will keep you up to date on what is happening in your case and give you advice as to whether you should settle your case or go to trial. We will fully explain all fees and costs to you before working on your case. Together, we will decide on the best strategy for your case.

– Randy Rozek, Esq.

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Introduction

Insurance companies are in the business of handling claims. The typical person who is injured will likely have little, if any, experience with the claims process. This creates a distinct advantage for the insurance company. The goal of this book is to put those truly injured on a more equal footing with the experienced insurance companies.

This book begins by dispelling popular myths about Wisconsin personal injury claims, then introduces you to common defense arguments insurance companies make in an attempt to pay less money to injury victims. The book provides information about what should be done following an injury or accident and identifies common mistakes that can hurt your case. The book explains why it is critical that you hire the right lawyer for your personal injury case from the beginning. The book also explains the process our firm follows in most injury cases to provide you with an example of what needs to be done in most cases.

This book is not meant to provide legal advice. Instead, the goal is to educate you about personal injury claims in general and provide information that may help you avoid making mistakes that could hurt your case. This book cannot be considered a substitute for the sound legal advice of an experienced, licensed, Wisconsin personal injury lawyer.

If, after you read this book, you have questions or you need more information, please feel free to call for specific legal advice and counsel.

Why Was This Book Written?

When I began representing personal injury victims, (known in the insurance industry as *claimants*) over ten years ago, it became immediately obvious that claimants were at a huge disadvantage if they were not represented by a lawyer. A 1999 study by the Insurance Resource Council revealed that claimants represented by lawyers received settlements three times larger than unrepresented claimants with similar injuries.

Many injury victims do not understand the adversarial relationship between an injured person and insurance company. In general, the less an insurance company pays for a claim, the higher their profit margin. Multiply this by hundreds or thousands of claims per month and you will begin to see an insurance company's benefit in paying less for each claim. If an insurance company's objective is to pay as little as possible, and a claimant's goal is to obtain fair and reasonable compensation for injuries, then it should be clear that the two parties are not aligned. My hope is that in educating claimants about the personal injury process, more claimants will be able to make informed decisions about their case.

About the Author

Wisconsin attorney Randy Rozek has devoted his professional career to representing individuals harmed by the negligent or intentional conduct of others. Randy has successfully taken on many large corporations and insurance companies throughout the United States. Attorney Rozek has his own office, ROZEK LAW OFFICES, S.C. in Milwaukee and Madison, Wisconsin.

Personal Injury Claims

In the legal field, a claim for personal injuries is technically referred to as a *"tort."* Every tort consists of the following element:

1. ***Duty***
2. ***Breach***
3. ***Proximate Cause***
4. ***Damages***

1. Duty

In general, duty refers to the reasonable amount of care a person should use in a particular circumstance. For example, in the case of an automobile accident, all drivers are required to obey the Rules of the Road. These Rules of the Road are contained in the Wisconsin Statutes and are clearly explained in a State of Wisconsin, Department of Transportation booklet, which is reviewed and taught in driver's education classes.

Different Rules of the Road apply to different types of drivers. Professional drivers, for example, are generally held to a higher standard of care than people that do not drive for a living. For example, professional truck drivers must comply with federal regulations that limit everything from how many hours they can drive without rest to how much weight they can transport.

There are many personal injury claims that do not involve automobile accidents. Common examples of other *"torts"* include premises liability (slip-and-fall), product liability, medical malpractice, nursing home neglect or abuse and dog bites. In each of these cases, there is an identifiable obligation involved. A landowner has an obligation to guests on the property. A manufacturer has an obligation to the consumers of their product. A doctor has an obligation to their patients. A nursing home has an obligation to the residents. A dog owner has an obligation to prevent the dog from biting others.

To find these obligations, lawyers look to federal regulations, state statutes, state administrative codes, and sometimes even local ordinances. However, some obligations are not clearly defined in the law, making it necessary for a lawyer to look to the particular area where the personal injury occurred. For example, in nursing home neglect cases, a lawyer should look to the federal and state regulations, the particular nursing home's policy and procedure manual, and general nursing manuals that apply to all nurses, in order to determine the applicable obligations a nursing home has to its' residents.

Wisconsin lawyers have the benefit of also accessing obligations in the Wisconsin Jury Instructions published by the University of Wisconsin Law School. These instructions provide the most comprehensive and organized set of rules that can be utilized in the majority of personal injury cases. Most experienced personal injury lawyers rely upon the anticipated jury instructions in framing all aspects of the case from the moment the client walks in the door. If you lawyer is just beginning to think about jury instructions during your trial, you may have a problem.

2. Breach

Once a duty on the part of an individual is established, it must be shown that someone breached that duty. In the automobile accident example, the duty is that drivers must stop for a red light; the breach of the duty is the act of not stopping for the red light.

Breach is proven through direct or indirect evidence. Direct evidence can be shown through eye witness testimony of people involved in the accident or independent witnesses that directly witnessed events in the accident. Indirect evidence is more common and oftentimes more reliable. In many automobile accident cases, indirect evidence would include skid marks at the scene and pictures of the property damage to the vehicles. This evidence can then be used to reconstruct the details of the accident.

3. Proximate Cause

Proximate cause simply means that the injuries are caused by the breach of the duty. Lawyers use a variety of means to prove proximate cause. Most commonly, a medical doctor testifies that the injuries and medical bills are due to the injuries sustained from the accident.

At this step in the process, the insurance company will usually put up their biggest defense. Typically, they will find doctors willing to testify that the medical condition of the injured party is due to other reasons.

4. Damages

Damages refer to an individual's harms and losses from an injury. Damages for serious personal injury cases can include the following:

- *Past Medical Bills*
- *Past Wage Losses*
- *Past Pain, Suffering, Disfigurement and Disability*
- *Future Medical Bills*
- *Future Wage Losses*
- *Future Pain, Suffering, Disfigurement and Disability*

Determining whether it is economically feasible to pursue a personal injury claim will depend on the value of the total damages in the case. If an individual sustained relatively minor injuries and it would cost thousands to pursue the case, then it may not make economic sense to pursue the claim. This is often a difficult decision, because although it is clear that the person was hurt, at the end of the case the client will receive very little, compensation because most of the award will go to proving the case.

"But I Could Have Really Been Hurt"

Injury victims only get compensated for actual injuries that can be proven. I cannot tell you how many times I have had clients, or potential clients, say *"But I could have really been hurt"* or *"I could have been killed."* I always explain that injury victims are compensated for their actual damages, not their hypothetical damages. They get damages for what *DID* happen, not for what *COULD HAVE* happened.

A Note About Burden of Proof

Throughout the tort process, the party attempting to prove their case has the *"burden of proof."* The burden of proof in personal injury cases is different than the burden of proof in criminal cases. Most of us have heard the phrase *"beyond a reasonable doubt"* when television shows or movies discuss burden of proof in a criminal setting.

"Beyond a reasonable doubt" means just that, proof beyond any real, reasonable doubt. *"Beyond a reasonable doubt"* is a very high burden of proof to meet and that is why it is reserved for criminal cases. The burden of proof for a personal injury case is much lower. It is referred to as the *"ordinary"* burden of proof. The ordinary burden of proof means to show through a greater weight of the credible evidence, to a reasonable certainty, that the evidence in favor of something has more convincing power than the evidence opposed to it. Simply put, something is more likely true than not true.

The injured party must meet their burden of proof at every step of the tort process. They bear the burden of proving, albeit more likely than not, that there was a duty, a breach, proximate cause, and damages.

Comparative Fault

Wisconsin follows a modified version of the comparative fault law, recognizing an individual is responsible for their own safety. If an individual is in any way responsible for their own injuries, then the injured person's portion of fault reduces the amount of damages that can be recovered.

For example, if an individual is injured while traveling through a yellow light, when the other driver ran a red light, a jury could apportion a percentage of fault to each driver. A typical fault determination in such a case could be 10% fault on the individual entering on a yellow light, and 90% of fault on the individual that

entered on red. The injured person that entered the intersection on the yellow would only be allowed to recover 90% of the total damages awarded by the jury.

If an individual is 51% or more at fault in causing or contributing to their injuries, then they cannot recover any portion of their damages.

In situations where more than one person was responsible for causing injuries to someone, then the negligence of each individual is apportioned by the jury. The total apportionment of fault cannot exceed 100% regardless of how many different parties contributed to the injuries.

Health Insurance Payments

The legal term *"subrogation"* refers to the health insurance carrier's right to get reimbursed for payments they made for an injured person's health care, when that injured person recovers money from a third party.

The theory behind subrogation is that if an injured party is allowed to recover all of his / her health care expenses from the at-fault insurance company, but those bills have already been paid by the injured person's health insurance carrier, then the injured person receives a *"double recovery,"* i.e. they are getting paid twice for the medical bills incurred in the accident, once by the at-fault insurance company and once by their health insurance company via payment of the medical bills.

I strongly disagree with the concept that the health insurance company for an injured victim should be reimbursed out of the injured victim's settlement proceeds. After all why do we pay health insurance premiums? Wouldn't this process just make the original payment by the health insurer a loan to the client? Fortunately, many states do *NOT* allow health insurers to recoup these payments from injury victims. Unfortunately, Wisconsin law allows subrogation.

There is however an exception to subrogation. If the injured person has not been made 100% whole from the settlement with the insurance company or from the jury verdict, then the health insurance carrier gets nothing. A good personal injury lawyer will be able to get the subrogated health insurance carriers to take substantial reductions with the promise that they will receive nothing if the judge is convinced that the client, for whatever reason, did not recover 100% of their damages. These reductions always result in more money for the injury victim.

NOTE: *Payments from the government (Medicare, Medicaid, or County Assistance Programs) or from certain employer-funded health insurance plans governed by the federal law, referred to as ERISA plans can be exempted from any reductions to the amounts paid.*

Government Programs And ERISA Plans

1. ***Government Programs:***
   By law, Medicare, Medicaid, and County Assistance Programs, are entitled to repayment out of any final settlement or jury verdict. Fortunately for injury victims, these government programs usually pay much less to health care providers for services that private health insurers or individuals would pay. Medicare customarily pays approximately 1/3 of the standard charge to a medical provider for full payment. Reimbursement for both Medicare and Medicaid is calculated using formulas that reduce the amount to which they are entitled by a portion of the legal fees and costs incurred by the injured party. If any of your medical bills have been paid by Medicare, then it is critically important that you or your lawyer notify Medicare of the specifics

of the accident and injuries as soon as possible. Medicare has a history of taking months to years to actually determine the exact amount of their claim to repayment.

2. ***ERISA Plans:***
   The Employee Retirement Income Security Act of 1974. *"ERISA"* is a federal law that greatly benefits medium to large sized companies. ERISA states that if employers fund their employee's health insurance plans, they do not have to follow state laws preventing or limiting subrogation. Employers are entitled to repayment of *EVERYTHING* they have paid to injury victims. This is true even if the injured party has sustained a million dollars of damages but the at-fault person only had $25,000 of insurance coverage. In such a situation, the employer would be entitled to all $25,000. The injured person would be entitled to $0.

Wal-Mart – Erisa Plans In Action

The recent Missouri case outlined below sheds light on the fundamental unfairness of ERISA plans.

Seven years ago, Missouri resident Deborah Shank was severely brain injured following a collision with a semi-truck. At the time of the collision, Deborah was employed and insured by Wal-Mart. All of Deborah's initial medical bills were paid pursuant to her ERISA plan with Wal-Mart.

Soon after the collision, it became clear that Deborah would need future medical care for the rest of her life.

The family sued the trucking company that was responsible for this tragic event. The proceeds from the eventual settlement with the trucking company's insurer went into a special trust that could only be used for Deborah's medical expenses that weren't covered by Wal-Mart's ERISA plan.

Once Wal-Mart became aware of this trust, they made a claim against it for all of the medical expenses paid by Deborah's ERISA plan through Wal-Mart. According to Wal-Mart, all of the money dedicated in trust for Deborah's future medical care should be paid back to Wal-Mart's ERISA plan.

Wal-Mart's ERISA plan position was that once they receive all of Deborah's money from the trust, she will be fine because she can obtain medical expense and living reimbursement through a public assistance program funded by the taxpayers.

For more information on this story and many others see the informational website: http://walmartwatch.com.

Common Myths about Personal Injury Cases

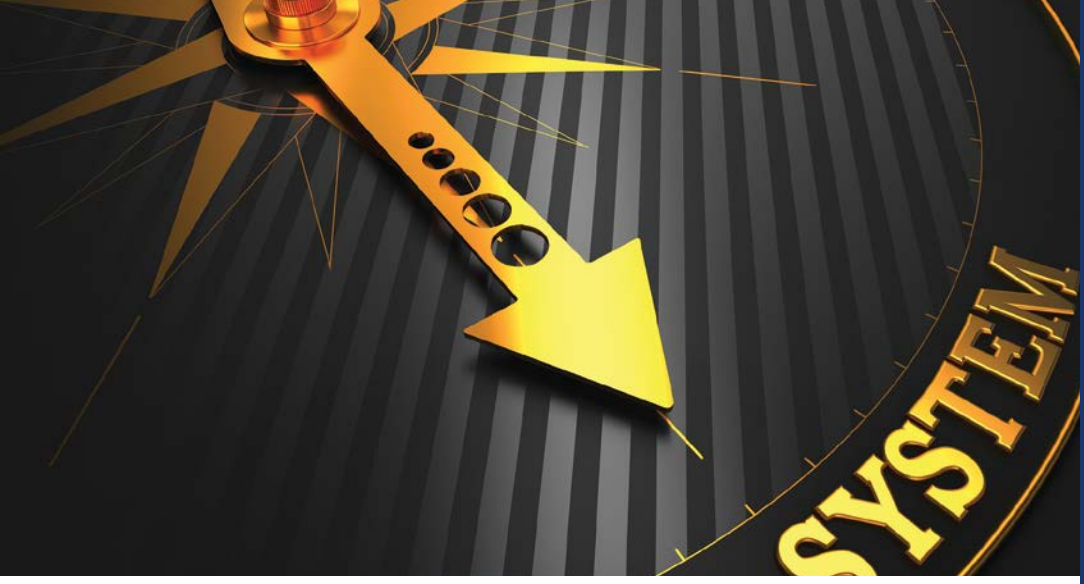
Myth	Truth
1. If an injured person is reasonable with the insurance company, then the injured person will receive a reasonable settlement.	Insurance companies routinely request more information than is necessary in making a fair and reasonable settlement offer. Some insurance companies routinely demand to see an injured party's entire prior medical history before making an offer, despite the fact that this was the first time the client was injured. This is usually just a delay tactic on the part of the insurance company. When insurance companies make such demands, most competent personal injury lawyers prefer to file a lawsuit instead of allowing the insurance company to delay settlement. Once a lawsuit is filed a lawsuit, most judges would not allow an insurance company to see all of a client's prior medical records unrelated to the client's actual injury.

Common Myths about Personal Injury Cases

Myth	Truth
2. The insurance company for the person that injured me will pay my medical bills as they are incurred.	Insurance companies have no legal obligation to pay your medical bills as they are incurred. Their goal is to pay as little as possible on each and every claim. Therefore, insurance companies gain leverage if the injured person has no health insurance coverage and is unable to afford any type of ongoing medical treatment.
3. I was in an automobile accident and the person that injured me was uninsured, therefore, I cannot collect for my damages.	If you had uninsured motorist coverage at the time of the accident, which is mandatory with all automobile insurance issued in Wisconsin, then you are entitled to make a claim against your own automobile insurance company.
4. It is in my best interest to provide the insurance company for the person that injured me with my recorded statement, after all I have done nothing wrong and I have nothing to hide.	You have no legal obligation to provide a recorded statement to an adverse insurance company. Adjusters are professionally trained to ask questions that could minimize your claim for damages. *NOTE:* There are exceptions to this rule if you are making an uninsured or underinsured motorist claim.

Common Myths about Personal Injury Cases

Myth	Truth
5. My primary care physician does not specialize in accident cases. Therefore, I should go to a chiropractor or doctor that does specialize in injury cases.	Insurance companies have elaborate systems in place for tracking doctors and chiropractors that regularly treat injury victims. It can be a mistake to go to a doctor or chiropractor specializing in treating people that have been involved in accidents. Especially, if they have a poor reputation with the insurance company. Insurance companies are much less likely to offer a fair amount to settle the case, because they know these doctors will not play well in front of a jury.
6. I need a lawyer to represent me in my personal injury claim.	Not all personal injury cases warrant a lawyer's involvement. The need for an attorney depends on the facts involved in the particular case. Fortunately, most personal injury lawyers offer free telephone consultations, so take advantage. Unfortunately, some personal injury lawyers use this free consultation as an attempt to try to persuade the injured person to sign up with them. Be aware and do not sign anything unless you are fully informed.



40 Arguments Insurance Companies Use to Diminish Your Claim

Insurance companies will use any argument available to reduce the amount they have to pay to an injured person. The following are the most common arguments that insurance companies use. Some of these arguments may only be applicable to automobile accidents; however, many apply to any type of injury claim

1. You were more at fault in causing the accident; therefore, you are not entitled to recover anything. *(See Page 9, Comparative Fault).*
2. You were partially at fault in causing the accident; therefore, your damages should be reduced by a substantial percentage. *(See Page 9, Comparative Fault).*
3. Your injuries were caused by something other than the accident in question.
4. You were not seriously injured in the accident.
5. You were seriously injured in the accident, but you should have gotten better sooner.
6. Your medical records show that your injuries pre-existed the accident.

7. You exaggerated your symptoms to your doctor.

8. You saw the doctor for too long.

9. You didn't take an ambulance to the emergency room immediately after the accident; therefore, you were not seriously hurt.

10. You have pain now that you didn't have at the emergency room; therefore, any current pain complaints are not related to the accident.

11. You now claim injuries that you did not complain of in your recorded statement taken shortly after the incident.

12. You failed to tell your doctor about past injuries to similar areas of your body.

13. You missed doctor or therapy appointments; therefore, you not really hurt.

14. You have a lawyer that never goes to trial; therefore, we know we can pay you less to make your case go away.

15. You waited too long to see a doctor after the incident.

16. You have a history of past injury claims.

17. You were referred to your current doctor by a lawyer.

18. You had a subsequent accident that caused your injuries.

19. You did not miss any time from work; therefore, you could not have been seriously injured.

20. Your doctor did not provide you with a written work excuse; therefore, you should have gone back to work immediately after the incident.

21. You had a poor work history prior to the incident; therefore, you likely would have missed work anyway.

22. Your prior tax returns do not match the claims you are now making about lost income.

23. You failed to file tax returns in the past.

24. The statute of limitations has expired (usually three years in Wisconsin).

25. You have no visible signs of injury.

26. You did not give a recorded statement to us; therefore, we cannot fully evaluate your case.

27. You did not notice the other car until impact or immediately before impact; therefore, you were inattentive and at fault.

28. You told the police or your doctor that the other car hit you from behind was going 50 m.p.h.; however, since most people could not have known the speed of someone behind them…you must be lying.

29. You were speeding; therefore, you must be at fault in causing the accident.

30. You stopped too fast in traffic, causing the other driver to rear-end you.

31. You were not wearing a seatbelt; therefore, you caused your own injuries. Note: Wisconsin law limits comparative negligence for failing to wear a seatbelt to 15%.

32. This type of car accident could not have caused the specific injuries you are claiming.

33. There was little damage to your vehicle; therefore, you could not have been too seriously hurt.

34. No police came to the scene; therefore, you could not have been seriously hurt.

35. No one else in your vehicle was injured; therefore, you should not have been injured.

36. There were no independent witnesses to the collision; therefore, it is our driver's word against yours and our driver is not making a claim for injuries so he/she must be more credible.

37. You should have been able to avoid the collision.

38. Your ability to drive was impaired by alcohol, drugs, and/or medication.

39. Our driver lost control due to invisible *"black ice"* which created a sudden emergency situation for which he/she is not responsible.

40. You were on a cell phone at the time; therefore, the collision was your fault.

There are many other arguments in addition to those listed above. Insurance companies and their lawyers can get very creative in their defense of an injury claim. Most people find that an experienced personal injury lawyer is necessary to anticipate and overcome these arguments.

12 Things You Should Do After Every Automobile Collision

Insurance companies will use any argument available to reduce the amount they have to pay to an injured person. The following are the most common arguments that insurance companies use. Some of these arguments may only be applicable to automobile accidents; however, many apply to any type of injury claim

1. ***Stop.***
   Wisconsin law requires that the driver of an automobile involved in a collision to stop at the scene of any collision that has resulted in personal injury, death, or property damage. Failing to remain at the scene of the accident could lead to a traffic citation, or even criminal charges.

2. ***Assist the Injured.***
   Do your best to provide comfort and assistance to anyone that has been injured in the collision. Do not move anyone unless absolutely necessary for their immediate safety. You could easily cause more injury to someone simply by moving them.

   If you are the one injured, then obtain medical treatment as soon as possible. If you are at the scene, request an ambulance.

If it is too late, go to the nearest emergency room. If you are in pain the next day, go to your primary care physician. One of the biggest mistakes following an accident is failing to see a doctor immediately afterwards. Many people think that their pain will go away on its own, but months later, they still have the pain. Without medical treatment, there is no way to prove the injury is related to the automobile accident.

3. ***Call 911 As soon as possible.***
   Call 911 if anyone has complaints of pain or seems to be dazed or disoriented. Explain your situation and provide them with the exact location of the accident. Inform the 911 operator as to whether an ambulance or a fire engine is necessary. It is always better to err on the side of caution when deciding whether an ambulance is necessary. Remain on the telephone until the 911 operator tells you it is okay to hang up.

4. ***Move All Vehicles to Safety.***
   Assess the scene of the accident to determine whether oncoming vehicles will see and be able to avoid the accident. You could be liable for damages to approaching vehicles unless they are properly warned. Make sure to turn on your hazard lights. If your car can't be driven, have the emergency responders obtain a tow truck on your behalf.

5. ***Assist the Authorities.***
   Unless you have been injured, remain at the scene of the collision until the police have arrived and authorized you to leave. Further assist the police by explaining exactly what you witnessed. Do not guess or speculate when asked about speeds or distances. When estimating speed or distance it is always best to provide a range for which you are comfortable. Avoid making conclusory statements, such as, *"He was at fault."* The role of the police officer is to determine fault after gathering all facts and evidence. Ask the officer for his or her information and how you may obtain a copy of the completed motor vehicle accident report.

6. ***Identify Everyone at the Scene.***
   It is absolutely critical that you attempt to obtain as much information possible about all of the people at the scene of the collision. This includes the drivers, passengers and witnesses. This is perhaps the most common mistake made by accident victims as well as police officers. Name, address, phone number, license plate number, make / model of vehicle, date of birth, etc. All of this information could help track down witnesses if it later becomes necessary.

7. ***Do Not Admit Fault.***
   Do not volunteer any information about who may have been at fault in causing the collision. You may think you were at fault, but later learn that the other driver is as much or more to blame than you are. Anything you say at the scene can later be used against you.

8. ***Do Not Agree to Pay for Anyone's Damages at the Scene and Do Not Accept Payment for Your Damages at the Scene.***
   Your offer to pay someone's damages is an implied admission of fault. Furthermore, any acceptance of payment on your part could be considered a full and final settlement and preclude you from recovering additional money in the future.

9. ***Document the Accident.***
   Even if the police complete a report, you should create your own documentation of the collision. The essential information will be the date, time, location, and a diagram of the accident scene showing the position and direction of the vehicles just prior to and immediately following the collision.

10. ***Take photographs.***
    If you have a camera or camera-phone, by all means use it. You should take your own photographs even if the police are taking photographs. You should attempt to photograph the following: the scene; the property damage; inside and out of

the vehicles; license plates; skid marks; and, perhaps most importantly, visible injuries to persons involved in the accident.

11. ***Report the Accident to Your Insurance Company.*** Call your automobile liability insurance company and provide them with the details of the collision. Any delay in reporting the accident could result in a denial of your insurance coverage. Depending on your coverage and the coverage of the other driver, you may be entitled to medical payment coverage, uninsured motorist coverage and / or underinsured motorist coverage. *DO NOT PROVIDE THEM WITH A RECORDED STATEMENT PRIOR TO SPEAKING WITH A LAWYER.*

12. ***Call an Injury Lawyer.*** Most personal injury lawyers offer free telephone consultations. Many lawyers also offer free written materials that can assist you in deciding how to proceed with your case.

10 Common Mistakes That Can Ruin Your Personal Injury Case

The following list is considered to be 10 common mistakes that can ruin your personal injury case. This list is based upon years of experience witnessing such mistakes, as well as conversations with lawyers and judges.

1. ***Hiring the Wrong Lawyer From the Beginning.*** Sure their ad claims that they handle *"Serious Personal Injuries,"* but they may actually have little or no trial experience. If this is the case, then you can assume the insurance company knows this.

   In Wisconsin, it is very difficult to fire your lawyer and then find another lawyer to represent you. Do your homework before hiring a lawyer. For more information, including a detailed discussion of how to make an informed, educated decision on hiring a lawyer, order the free book, "*A Consumer's Guide: Choosing a Personal Injury Lawyer in Wisconsin,"* on our website at: ***www.rozeklaw.com.***

2. ***Not Being Completely Honest With Your Lawyer.***
Good personal injury lawyers can be quite creative when dealing with negative facts. However, when clients fail to disclose negative facts to their lawyers, then the lawyer is put in a very difficult position.

   The most common example of failing to disclose all pertinent facts is when clients fail to tell their lawyers that they have had prior accidents or injuries to similar body parts. Wisconsin has a very favorable jury instruction on aggravation of a pre-existing condition. However, if the lawyer is not aware of this prior injury at the outset, then proper case strategies cannot be implemented.

3. ***Not Being Completely Honest With Your Doctor.***
Your doctor must know about each and every time you can recall experiencing pain in the area of your body that was injured in the incident. If your doctor is armed with this information at the outset, then he or she can take the necessary steps to label this a new injury, an aggravation of an old injury, or possibly the activation of a degenerative condition. However, if your doctor is unaware of prior similar problems, then their opinion will later be weakened by a competent defense lawyer.

4. ***Exaggerating Your Symptoms.***
One of the most common defenses in any personal injury case is that the injured party was experiencing more pain than they should have experienced, considering the nature of the injury.

   The defense will imply that the injured person is exaggerating their symptoms in an attempt to get more money. Jurors can be very receptive to this argument, especially in cases where there are claimed injuries that cannot be seen, e.g. mild traumatic brain injuries, whiplash injuries, etc. If there is any documentation that could suggest exaggeration of symptoms, then you can bet that the insurance company will make it a central part of their case.

5 Ways To Get Your Doctor's Attention

Many doctors are not great listeners. Some may simply be too busy. Others may not want to get involved in a personal injury case. The bottom line is that many doctors fail to properly document their patients' injuries. The following list provides some guidance on what to say to doctors in order to get their attention about your personal injuries:

1. ***Always use the word "new."*** *"…following the accident, I have a constant new pain…"* A description of new pain since the accident, will usually lead the doctor to only one conclusion. The accident caused the new pain.

2. ***Pinpoint the location.*** *"….at the base of my skull…."* The more precise you can be, the easier it will be for your doctor to make a diagnosis. Describing the exact location can also let your doctor know if it is time to refer to you a specialist.

3. ***Use strong adjectives.*** *"….a stabbing pain…"* The use of strong adjectives by a patient usually ends up in the medical records, which can be of great assistance later on.

4. ***Rate your symptoms.*** *"…maybe a 6 out of 10…"* This provides the doctor with some idea as to the severity of your pain. Later it can be used to determine improvement with treatment, i.e. a decrease in pain from a 9 to a 1 would show improvement.

5. ***Tell your doctor things you cannot do.*** If you *"can't lift your child"* or you *"can't concentrate at work,"* this informs your doctor that your injuries are affecting your life.

In describing your symptoms to your doctor, the defense doctor, your lawyer, the other side's lawyer at your deposition, and your friends, be as descriptive and accurate as possible, but *NEVER EXAGGERATE.* Although one of the most important qualities of a good doctor is the ability to listen, some doctors are not good at it. Most people have experienced the doctor that seems to have already decided on the course of treatment prior to entering the examination room. This behavior can lead an injured person to attempt to get the doctor's attention by exaggerating. Don't do it.

5. ***Not Being Completely Honest About Your Activities.***
In today's world, it is quite common for insurance companies to hire private investigators to conduct videotape surveillance of injured victims. If an injured victim makes a claim that they cannot do a certain activity anymore, and there is a videotape of them actually doing that specific activity after their accident, then they can forget about their personal injury claim. Worse yet, Wisconsin law does not always require the disclosure of this type of video surveillance until the time of trial.

6. ***Immediately Going to a Doctor or Chiropractor Referred by a Lawyer.***
Some personal injury firms that have ***"high volume"*** practices send most of their clients to a select group of doctors or chiropractors. Although these lawyers know the doctors or chiropractors well, the insurance companies will also know them.

   We usually recommend that injury victims first see their primary care physicians and attempt to obtain proper treatment. Primary care physicians can be very powerful witnesses because they have known the injury victims before and after the injury; therefore, they know how the accident has changed their patient's physical condition and quality of life.

   NOTE: There are certain exceptions to this rule. For example, a high percentage of our firm's clients have sustained very

unique types of injuries and; therefore, need our help in finding the right specialist for their injury. This is perfectly acceptable. Keep in mind, we are not a *"high volume"* firm; therefore, we may only refer a handful of patients a year to a specialist for a specific injury. The problem arises when a *"high volume"* firm refers dozens of their clients to the same doctors or chiropractors every month.

Jurors tend to be skeptical of diagnoses and opinions from doctors that get hundreds of patients from the firm which referred the plaintiff. Especially if the doctor is the key witness.

7. ***Not Seeing a Doctor After an Accident.***
In any personal injury case, the injured party has the burden of proving their injury to the jury. This is mainly done through testimony from doctors. If you try to tough it out and wait for your symptoms to resolve BEFORE seeing a doctor, then you have just created a very difficult personal injury case to win.

If you go into court 2 years after an accident and are claiming a permanent injury, but you didn't see a doctor for the first 2 months following your accident, a jury would be suspect of any claim of permanent injury.

NOTE: There are exceptions to this, but very few. I recently had the fortune of representing a brain injured woman that had not been diagnosed with the brain injury until 2 ½ years following her accident. In this case, the woman's injury actually played a role in her not having good enough judgment to go see a doctor from the beginning. Her case ended up settling the night before trial (10 p.m. on Easter Sunday) for a million dollars. However, had she been seeing a doctor from the beginning of her case, it is likely the case have settled earlier and possibly for more money.

8. ***Not Having Accurate Tax Returns.***
In many personal injury cases, injury victims are unable to work for some period of time due to injuries from the

accident. Sometimes they will also have lost the ability to earn as much into the future, or lost some type of benefits package or retirement plan. The only way to make a claim for wage loss is if the injury victim has accurate tax returns. Tax returns will be closely scrutinized by both sides. Any inaccuracies reflect negatively on you and will hurt your claim. If there are any blemishes in your tax returns and you have lost wages, inform your attorney immediately. Your lawyer can only help you if he / she is aware of the problem.

9. ***Signing a Release Too Early.***
Insurance companies often attempt to convince an injured person to sign a release early on, settling their personal injury case as quickly as possible after an accident. A quick settlement almost always equals less compensation for the injured person. *DO NOT SETTLE YOUR CASE UNLESS YOU ARE SURE THAT YOUR INJURIES HAVE RESOLVED AND YOU WILL HAVE NO PROBLEMS IN THE FUTURE.*

Usually doctors are not able to assess a permanent medical condition until a year to 18 months post-accident. A quick settlement prevents an injured person from making a claim for permanent injury.

Full and Final Release, Not Always

There are ways around certain releases. The standard language in most insurance company releases provide that the injured person is releasing the insurance company from *"all known and unknown injuries"* arising from the accident. I once represented a woman that settled her case for $3,500 only three weeks after her accident. She signed a release that had the standard language preventing her from making claims for *"all known and unknown injuries."* Later she developed a medical condition that was not diagnosed until after she signed the release. We sued the insurance company, who also happened to be her employer, arguing that she and the insurance company executed the release based upon a medical mistake, i.e. the undiagnosed condition. We were able to settle her case shortly before trial for $400,000, which is fairly reasonable considering the client had originally settled for $3,500. However, the settlement likely would have taken place much earlier and possibly for a greater amount had she not signed a prior release.

If you settled your case too early, feel free to call me to see if it can be reopened.

10. Giving a recorded statement.

One of the first things an insurance adjuster will attempt to do following an accident is obtain a recorded statement from everyone involved in the accident. Insurance adjusters receive training for asking questions that will elicit responses

in their favor. Some *"high volume"* law firms provide adverse insurance companies with their client's recorded statement as a matter of course. There may be no good reason for this practice. Sometimes it is done because the law firm is being lazy and wants a quick settlement so they can move onto their next case.

Our Practice on Recorded Statements

Insurance adjusters routinely call me in an attempt to get my client's recorded statement. I always offer to give them my client's recorded statement, IF they will allow me to obtain the recorded statement of the at-fault person. I have yet to have an adjuster agree to allow me to take a recorded statement of their insured. Why do you think that is?

Insurance adjusters know that they are entitled to the injured party's deposition (sworn testimony, under oath) once a lawsuit has been filed. They also know that I am entitled to their insured's deposition once a lawsuit is filed. No insurance company will allow a competent plaintiff's lawyer a chance to take their insured's recorded statement and then later give them another *"kick at the cat"* by allowing them to take their insured's deposition.

But that is exactly what the insurance company is trying to do by seeking your recorded statement.

The Importance of Choosing the Right Personal Injury Attorney in Wisconsin

Wisconsin is different than most other states in that it is very difficult to fire your lawyer and hire a new lawyer in a personal injury case. While a client has a right to fire their lawyer at any time for any reason, as a practical matter, in a personal injury case, it may be more difficult than the client originally expected to fire their attorney and find a second attorney.

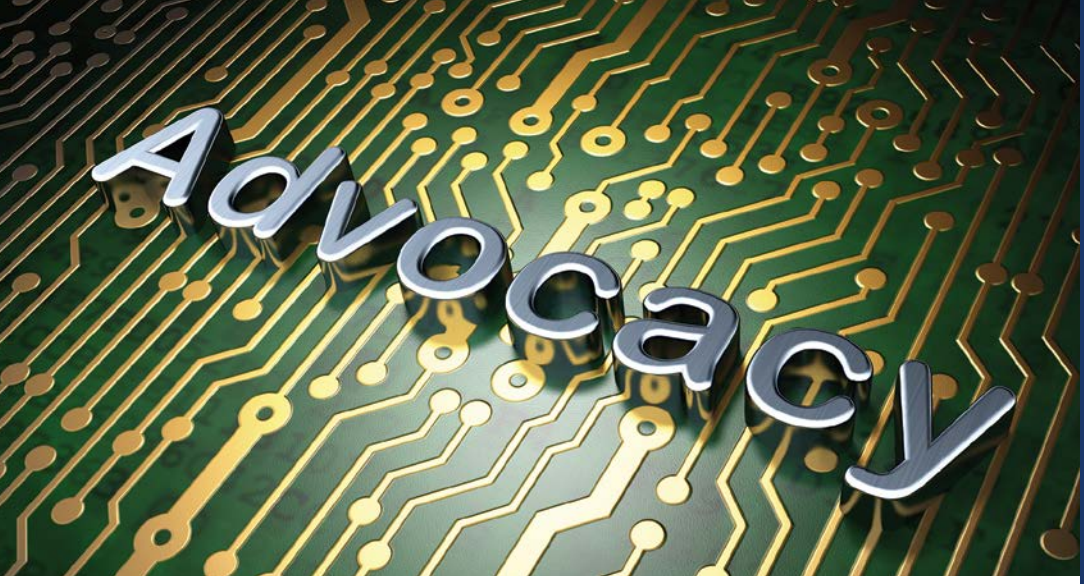
In most states, if a client hires *Lawyer A* but later fires *Lawyer A* and hires *Lawyer B*, then *Lawyer A* gets an hourly rate for the time they spent on the case prior to their firing. *Lawyer B* is entitled to the amount of the contingent fee minus the amount paid to *Lawyer A*. *IN WISCONSIN, THE OPPOSITE IS TRUE. Lawyer A* gets the contingent fee, minus the time spent by *Lawyer B* in bringing the case to conclusion.

What does all of this mean to contingent fee clients in Wisconsin? You will have a very difficult time finding a second lawyer to take your case if you have already hired and fired another lawyer. Therefore, it is essential that you hire the right lawyer from the beginning.

Unless the client can show that the first lawyer committed clear misconduct, the original contingent fee will be awarded to the first lawyer, minus an hourly rate to the second lawyer. In the real world, lawyers are very reluctant to take cases once a client has signed a retainer agreement with a different lawyer. It is essential that a client make an informed decision before hiring a lawyer in a personal injury case.

CAUTION!

Do not hire a personal injury lawyer unless you are 100% comfortable with that lawyer.



What Do We Do for You in a Personal Injury Case?

The following is a list of the tasks that our firm does in the majority of our personal injury cases. *(**NOTE:** Each case is different and not all of these tasks will be required in every case and in other cases, additional tasks may be necessary).*

Initial Stage

- Initial telephone consultation with the potential client.
- Face-to-face meeting with the client.
- Educate client about personal injury claims in general and their particular case in more specific terms, including any potential statute of limitations.
- Investigate the accident and gather necessary documentation, including accident reports, incident reports and witness statements.
- Retain professional investigator and / or accident reconstructionist to gather critical evidence.
- Investigate all potential damages, including any property damages, out-of-pocket expenses, past and future medical expenses, past and future wage loss, and past and future pain and suffering.

- Obtain necessary damage documentation, including receipts of out-of-pocket expenses, medical records and bills.
- Obtain relevant past medical records and claims documentation.
- Investigate all possible means for recovery, including asset checks of the responsible individual or company and all potential insurance coverages.
- Investigate all means for payment of medical bills, including health insurance, medical payment coverage, and public assistance benefits.
- Analyze the client's insurance coverages and make suggestions as to what coverages should be purchased for future protection.
- Interview known witnesses.
- Collect other evidence, such as photographs and diagrams of the accident scene, relevant weather data, traffic patterns, and traffic light reports.
- Contact the client's physicians and / or obtain written reports from them to fully develop the client's injuries, prognosis, issues of permanency, and work limitations.
- Analyze the client's health insurance policy and / or disability benefit plan to ascertain whether any money must be repaid out of any settlement or jury verdict.
- Analyze the legal validity of any liens on the case, such as claimed liens from doctors, insurance companies, disability benefit plans and employers.
- Contact all potential insurance companies to put them on notice of the claim.

Pre-Litigation Stage

- Consult with the client and decide together whether an attempt will be made to negotiate the case with the insurance company or whether to file a lawsuit immediately.

The Days of Fair Pre-Lawsuit Settlements may be Over

In the past, it was not uncommon for personal injury lawyers to settle the majority of their cases for fair amounts without the need for a lawsuit. Unfortunately, this has become the exception rather than the norm. In recent years, insurance companies are offering less and less money for the same types of cases that they used to pay fair compensation. Why? Some have suggested it is the success of the tort reform movement. Others have suggested that it is the proliferation of personal injury *"mills"* that continue to churn out hundreds of cases a year. Lawyers at such mills actually accept these low offers, driving down the value of such injury cases. Whatever the reason, the insurance industry practice of no longer making reasonable settlement offers without a lawsuit. Now more than ever, it is critical that an injury victim hire a reputable and experienced personal injury lawyer from the outset.

- If it has been agreed that a *"demand"* will be made to the insurance company, we will prepare a comprehensive settlement demand package that itemizes and accounts for all elements of damages including any property damages, out-of-pocket expenses, past and future medical expenses, past and future wage loss, and past and future pain and suffering.
- Negotiate with the responsible party or the insurance adjuster in an attempt to resolve the case.

- Negotiate with all other entities that make a claim for repayment out of settlement, i.e. health insurance carriers, Medicare, Medicaid, etc.
- If the case is successfully resolved, prepare and / or review all releases to ensure they contain adequate and necessary language.

Litigation Stage

- If it is agreed that a lawsuit will be commenced, we prepare the client, witnesses and healthcare providers for the litigation process.
- Investigate the proper legal entities and the proper legal names of all parties involved, including valid subrogated parties.
- Prepare and draft the summons and complaint, stating the allegations of negligence and damages.
- Prepare written interrogatories for the defendants to answer.
- Prepare requests for production of documents that the defendants must provide.
- Discuss with the client all options for potential venue for the case and advise the client as to the best possible venue for his or her particular case, i.e. State or Federal Court and, if State Court, the most favorable county.
- File the lawsuit in the agreed upon venue.
- Serve the lawsuit and written discovery upon the responsible parties via a process server.
- Upon receipt of a written answer from the opposing parties, review it for genuine issues of dispute and timeliness, and if necessary prepare a motion for default judgment.
- Upon receipt of written discovery from the defendants, which usually accompanies their answer, work with the client in preparing written answers to the defendants interrogatories.

- Gather, organize and determine which documents will be provided to the opposing party with and / or without a court order, such as medical bills, medical records, tax returns, and all documentation of future medical expenses and loss of future earnings.
- Go to court to get a Scheduling Order.
- Take depositions of the defendant, any important witnesses, police officers, treating doctors, and defense doctors.
- Prepare and file any necessary motions with the Court, including motions to compel full answers to the written discovery.
- Attend all necessary court hearings regarding the matter.
- Prepare client for Mediation.
- Prepare and submit a Mediation Statement outlining the value of the case.
- If Mediation is successful in resolving the case, then prepare and / or review all closing documents, i.e. stipulation and order for dismissal and release of all claims.
- If Mediation is unsuccessful, then go to court to get a Trial Date.
- Prepare for Trial.
- Prepare the client and witnesses for Trial.
- Organize the preparation of medical exhibits for Trial.
- Organize the preparation of demonstrative exhibits for Trial.
- File briefs and motions with the court to eliminate surprises at Trial.
- Take the case to Trial with a jury or judge.
- Analyze the verdict to determine if either side has good grounds to appeal the case.
- Make recommendations to the client as to whether or not to appeal the case.

Why Hire Us?

We are not like a lot of personal injury law firms. We do not represent everyone that requests our assistance. We carefully screen our cases and make a conscious choice to represent only those clients that are compatible with the way we practice law. Our goal is to do as much good for each individual client as possible. Representing everyone that asks for our help would not allow us to give each of our clients our most dedicated and focused effort. Our skills, talent and experience allow us to offer seriously injured clients a quality choice in hiring a personal injury lawyer.

Many personal injury firms take the approach that they will represent everyone that walks in the door, no matter how minor the injury. We refuse to do this. Each year we decline many more cases than we accept. We believe it is more important to have a personal commitment in each and every case which makes us better, more aggressive advocates for our select group of clients. Whether we are talking to an adjuster, a defense lawyer, the jury or the judge, we have a personal stake in the outcome of each and every case.

Some firms take the *"mill"* approach. There is nothing inherently wrong with this approach as long as they act in the client's best interest. But the truth is that some high volume firms are much

better at this *"mill"* approach than others. If you are not seriously hurt and would like a lawyer, feel free to call us and we can refer you to a reputable firm that handles these types of cases.

Injury Cases We DO NOT Handle

Since our goal is to do the best job we can for everyone we represent, we refuse to handle a high number of people at any one time. We turn away a lot of cases. The following provides you some information regarding the types of cases we usually do not handle.

(NOTE: There are always exceptions):

Statute of Limitations. We do not take personal injury cases that are near the expiration of the statute of limitations. For most personal injury cases in Wisconsin, there is a three-year statute of limitations. If you contact our office two years and nine months following the accident, it is unlikely that we will take your case. We prefer to have at least six months to adequately investigate and evaluate your claim before filing a lawsuit.

Significant Pre-Existing Injuries. We do not take personal injury cases where there is a recent pre-existing injury in the same body part. For example, if you injured your neck on the way home from your chiropractor's office, where you were being treated for neck pain, then we are not the right law firm for you. I do know reputable personal injury lawyers that would take your case - feel free to call for a referral.

Temporary Soft-Tissue Injuries. We do not take soft-tissue injuries with no permanent residuals and with no clear objective evidence of injury. Do not be offended, it is nothing personal and it doesn't mean you were not injured. It is just our experience that most insurance companies do not offer reasonable compensation. Juries just don't award much money on these cases. That being said, there are plenty of personal injury lawyers that will take such cases. In fact, some lawyers make a living off these types of cases. If you have

such a case, I will be happy to provide you with the names of some of the competent lawyers.

Minor Impact Collisions. We do not take auto accident cases involving little or no property damage. Some insurance companies call these *"low velocity impact"* cases or *"minor impact soft tissue"* cases. Regardless of how insurance companies label these cases, they spend hundreds of thousands of dollars each year to defend such claims. This approach has worked. It has saved insurance companies millions upon millions of dollars. It is very difficult to convince a jury that a serious injury was caused in an automobile accident that did not result in any significant property damage. Our expertise is not in proving that there was enough force to cause injury. Our expertise is in explaining the devastating effects of serious injuries. There are plenty of personal injury lawyers that will take such cases and I will be happy to provide you with the names of some of the competent ones.

Less Than $10,000 of Special Damages. As a general rule of thumb, our firm does not accept personal injury cases with less than $10,000 of *"special damages,"* referring to past and future medical bills and / or past and future lost wages. We only take cases that we would take to trial. We prepare all cases as if they are going to trial. Although preparing for trial can be expensive, it is this preparation that places the client in the best position for settlement. Also, preparing for trial early on gives us an advantage over the defense in terms of negotiating position. Our experience has proven that if a case has at least $10,000 of special damages then our clients will likely receive a satisfactory settlement or award.

NOTE: Many potential clients come to us shortly after an accident, before they have incurred much in special damages. In these situations, we will generally be able to determine whether it is likely that the case will eventually result in greater than $10,000 in special damages. There are also situations where there is significant injury but not a lot of medical treatment, for example, severe scarring. If you are unsure of the amount of your special damages, contact us and we will help you with the calculation.

Prior Accident Claims. If you have had several accident claims in the recent past, then we most likely will not accept your case. Our experience has shown that jurors tend to have an unfavorable attitude towards people that have a significant prior claim history, even if the accidents were not their fault.

Chiropractic Care Only. We also will typically not take your case if the only treatment you have received throughout the pendency of your claim is that of chiropractic treatment. Our experience has shown that most jurors do not award a fair amount of damages to injury victims that received only chiropractic care. Most jurors are skeptical of plaintiffs and chiropractors. They are less skeptical of medical doctors.

One exception to our rule is if it is early on in your case, then it may not be too late to get a qualified medical doctor involved in your care.

You Fired Your First Lawyer. Finally, we generally do not take cases when there is a prior lawyer that has been fired. Our reasoning should be clear after reading pages 35-36. If you have fired your first or even second lawyer on your personal injury case, our firm can recommend a reputable personal injury lawyer that may be interested in your case.

Injury Cases We DO Handle

Our goal is to do as much good for each individual client as possible. This requires us to turn away many cases each year, but clients that are chosen are grateful. If you had a serious accident that resulted in a serious injury, we may be right for you.

We have successfully represented people that have been injured in many different ways. The following list should provide you with an idea of the types of cases we routinely handle.

- *Automobile Accidents*
- *Trucking Accidents*
- *Motorcycle Accidents*
- *Defective Products*
- *Unsafe Premises*
- *Dog Bites*
- *Nursing Home Neglect*
- *Construction Site Accidents*
- *Automobile Defects*

We have also successfully represented individuals that have sustained many different types of injuries. The following list should provide you with an idea of our experience handling many different kinds of injuries.

- *Traumatic Brain Injuries*
- *Traumatic Spinal Cord Injuries*
- *Broken Bones*
- *Amputations*
- *Paralysis*
- *Reflex Sympathetic Dystrophy (RSD/CRPS)*
- *Scarring*
- *Significant Disc Bulges/Herniations*
- *Post-Traumatic Migraines*

- *Loss of Senses (Smell, Taste, Hearing, Vision)*
- *Traumatic Vestibular Disorders (balance difficulties)*
- *Decubitus Ulcers*

Our office is known for working with national experts in many different highly-specialized fields. For example, if you have suffered a brain injury as a result of a collision with a semi-truck, you can expect us to retain nationally known, prominent professionals in the areas of accident investigation and reconstruction, trucking rules and regulations, neurology, neuropsychology, neuro-otology, neuroradiology, vocational loss, and future life care costs.

CONCLUSION

I hope this book has shed some light on the personal injury claim process. As stated earlier, the goal of the book was to provide you with information about personal injury claims in an attempt to put you on more equal footing with the insurance companies.

The most important decision you are now probably faced with is choosing a lawyer. Please do not hesitate to contact us for our advice and counsel. Even if your case is not one that we routinely handle, we will be happy to refer you in the right direction.

If we do take your case, we will be here to represent you every step of the way. You can be certain that you will receive my personal attention throughout your case. You will be kept advised as to the status of your case, and you will be given advice as to whether your case should be settled or whether it should go to trial. If you decide to go to trial, I will be the attorney trying your case. Together, as a team, we will decide on the best strategy and direction for you and your case.

Notes

About the Author

Attorney Randy Rozek has devoted his professional career to representing individuals who were harmed by the negligent or intentional conduct of others. Randy has successfully taken on large corporations and insurance companies throughout the United States on behalf of those who were wronged. Randy manages and runs his own office, Rozek Law Offices, S.C., with offices in Milwaukee and Madison, Wisconsin. Randy routinely lectures to others attorneys throughout the United States and he devotes a substantial amount of time to various advocacy groups.

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