



# Top Ten Tort Tips for Defense Counsel

Defending a tort case is more challenging than ever. Your clients may be apathetic or reluctant to cooperate. Plaintiffs demand money while carriers require accountability and judges want to resolve the case. Keeping everyone happy is not an easy task. Here are some suggestions to help you achieve the best possible results for your "clients" and constituents.

**1. Initial Investigation.** After you are assigned a matter, evaluate whether the initial investigation is sufficient. Are there photographs of the adjacent area and place of the accident depicting it as it appeared on the day of the accident?

Your clients or other parties may have taken cell phone or other photographs, or they may be available from surveillance or red light cameras or from Google Earth or other web sites. Obtain them to make sure that you have a clear understanding of how the accident occurred so that you can prepare your initial defense strategy.

**2. Witnesses Can Help Win the Case.** In many tort cases, especially those involving motor vehicles, liability may depend on he said/she said. It is important to identify witnesses and to determine

whether they can tip the scales of justice in your favor.

It is also important to learn about other "witnesses," perhaps family, friends or bystanders who came to the scene shortly after the accident. They may have overheard conversations, admissions or can testify as to property damage, activities after the accident, or conversations with the police or on other issues concerning the accident.



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**3. Investigate Insurance Coverage and Notify All Potential Carriers.** Be sure that the defendants have notified all possible excess or umbrella carriers, and that potential uninsured or underinsured

carriers have been put on notice to preserve the rights of your clients.

**4. Touch Base With Your Clients.** If your client hears from you for the first time on the eve of the deposition, it will be more difficult to break the ice, encourage cooperation, and build bonds with them. If you touch base with them shortly after the suit is started, listen to their concerns and other details about the accident, review your strategy with them it will help you mount the best possible defense.

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You also may want to find out about their schedule so can arrange their depositions at the most convenient time for them. This will help avoid scheduling problems down the road and encourage their cooperation.

**5. Follow-Up for the Discovery You Need.** You need not wait for a discovery conference or motion practice to get the discovery you need. Specific discovery notices with appropriate followup by telephone or letters from you or your paralegal can help to expedite necessary discovery from the plaintiff, so you will be in the best position to evaluate the liability and damages as early as possible in the lawsuit.

Once this is done, some carriers welcome the opportunity to evaluate the case for settlement or consider some form of alternate dispute resolution to protect their insured and control their legal expenses.

**6. Search for Information Concerning Prior Accidents.** Carriers usually undertake CIB checks, but sometimes this information is vague or inconclusive. Other information on prior injuries or accidents may be buried in the No-Fault records or contained in the emergency room or ambulance call records.

You can also search for prior lawsuits by the plaintiff and check their driving record for reports of accidents. Even a fender bender may have resulted in some trauma to their body even if they did not receive immediate medical treatment.

**7. Prepare the Witness - and Yourself.** If depositions are going to be held, as mentioned above, try and schedule the preparation and deposition at a time

when it is most convenient for your client. Allow sufficient time for preparation to review the liability and other issues related to your defense plan.

Let your client know what is likely to happen during and after the deposition. After the depositions and perhaps after the IMBs you may be in a better position to see if the case can be resolved, and you or the carrier can revisit the possibility of mediation either through the Courtscourts or private service.

**8. Inquire About Priors.** At the deposition, it is most important to question the plaintiffs/Plaintiffs about prior accidents, along with prior injuries and prior claims for disability, including Social Security Disability Benefits. This is your

one chance to make it harder for them to overcome the serious injury threshold as well as explore pre-existing conditions whether related to an accident or not.

If they were involved in prior accidents, this is your one opportunity to explore the circumstances, including the impact of the prior accident, whether they gave prior testimony at a deposition or trial, their treatment for the prior injury and especially if they underwent prior x-rays or MRIs. After the deposition, follow up for these records is more important than ever.

There may be additional defense information available from your client, or you may learn about additional photos taken by one of the parties with their cell phones or from an insurance company or

law office investigator. You may learn about other medical treatment or alleged disabilities previously unknown to the plaintiff's counsel. Take advantage of this opportunity to clear up any loose ends so that your investigation will be complete.

**9. Re-evaluate.** Once all of this information is known, it is time for you and the carrier to re-evaluate the case. This is also the time to attempt to use the court or a third party to help resolve same and perhaps to see if it can be settled within the policy limits. If the potential exists for summary judgment motions, you want to make sure you have all the factual, medical, and legal information to be successful in such a motion.

**10. Weigh Settlement.** If the case is going to trial, again, you may still have a chance to try and settle it before the case is submitted to a jury. Some of the issues concerning liability and damages may have survived summary judgment motions and will have to be overcome or dealt with by one party or another. Given the uncertainties of trial and the potential weaknesses for both the plaintiff and defendant, this may be another opportunity to see if settlement is possible. Once again, your goal is to achieve the best possible results for your client, and keep your "client" and other constituents in the best possible position under the circumstances.

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