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## Litigating slips, trips and falls: Don't fall on your face

If you have a credible client, the elements of liability and have taken steps to preserve the evidence, this can be a rewarding case

### Client screening

Client credibility should be your first concern before taking a slip-and-fall case. We can all play the devil's advocate in our cases, but slip and falls — like low-impact auto cases — should be addressed with careful scrutiny. That scrutiny must start with your client and their story. Juries tend to look at slip-and-fall cases with disdain, as they do with low-impact auto-accident cases. The only difference is that juries, given the opportunity in slip-and-fall cases, will chalk up the injury to the client's own doing.

**Credibility:** Upon your first meeting with a potential slip-and-fall client, take copious notes and lock down their story, much like you would in a deposition. Make sure you know exactly, what, when, where and why the accident occurred. Ask the hard questions the defense will ask: "Why didn't you see the water?" "Where exactly was the liquid?" "What direction were you looking at the time of the fall?" "Why weren't you looking down and ahead of you at the time of the fall?" "What kind of shoes were you wearing?"

Also, take some time to get to know your client. Is the client likable? Good at communicating? Does the client's story make sense? Use your knowledge of human factors and what an average person would have done in the same situation to size up comparative liability.

**Defendant:** This is an important point. Don't just look to see if there is a corporate defendant and large policy limits. You need to research the company, and specifically the location to address the value of the case. Is this a "mom and pop" hardware store, or is it The Home Depot? Large stores will typically have policies and procedures for cleaning "sweep sheets." In a jury's mind, larger stores are more culpable for failures in keeping safe premises. (See research

study by Christopher Denove, "Quantifying the Subconscious Bias against Corporate Defendants," *Advocate* August 2013.) If you are going after a small store with one location, a jury may be more inclined to give them a pass because of their limited resources.

This is the time to start thinking about other possible defendants. For example, was there a subcontracted company that was hired to maintain the premises, clean the floors, do landscaping, install flooring or tile grit? If a company represents that its flooring carries a certain co-efficiency of friction and testing shows an unacceptable level, then you may have a products case to add into the fray of litigation.

**Code violations:** Review case law, safety codes and discuss possible violations with an expert. Building a negligence per se claim will greatly help you. Measure the size of cracks in the sidewalk or roadways. Request maintenance records from the city or local governments showing the last time the area was checked. Keep in mind that any government employee can give notice of the dangerous condition to the government entity; i.e., police officers, city workers, landscaping crews hired by the city, etc.

### Preserving evidence

**Clothing:** When you first receive a phone call about a potential slip-and-fall case, you should immediately request that your client preserve all the clothing (including shoes!) he or she was wearing at the time of the fall.

Tell them NOT to wash the clothing as there may be remnants of the slippery substance on them...i.e., mustard, mayonnaise, mud etc... Tell them to bring the clothing to you upon your first meeting. Preserve this evidence so that it is not lost or tampered with.

Shoes are very important to any slip-and-fall litigation. Be wary of a client wearing high heels or other unsafe footwear at the time of the fall.

**Location:** If available, grab your expert and head to the scene immediately. If you do not have an expert, visit the scene yourself. Bring a camera to take photos and videos of the scene. The closer in time to the accident you do this, the better. You want to get into the facility, if possible, before remedial measures are taken. This will help your client's credibility when describing the scene at the time of the fall if the store changes things later.

Take measurement of any cracks in pavement. Bring a ruler to place inside or next to the crack for a frame of reference in your photographs.

Keep in mind that the more evidence you personally preserve, the more likely you will interject yourself into the litigation as a witness. So, whenever possible, bring along an expert or a private investigator, or have them go to the scene for you.

**Request evidence preservation:** Immediately after meeting with your new client, you should send out a preservation of evidence letter to potential defendants. The letter should basically direct them to retain any and all evidence and communications related to the incident, including video, photos, samples of flooring, the actual product that spilled and whatever else may be helpful to your case.

If you are dealing with a public entity, you should send a Freedom of Information Act request to the appropriate authority and ask for records about your client's fall and other falls in the same location. Also, a public-records search may produce construction permits that can be helpful to you and your expert. Search prior lawsuits regarding

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that company and location and inquire/search on the CAALA list-serve for attorneys who have dealt with lawsuits against the same company. Always do a Google and Facebook search about the company as they may contain claims of safety or the incident which you can use against them.

**Witness Accounts:** Obviously, if there were any witnesses (usually family members or friends), get statements from them while the incident is still fresh in their mind. After that, you are limited to employees of the defendant, who are not typically helpful. And do not forget about emergency personnel: Their testimony can be helpful about what occurred as well as the injuries sustained or wet clothing (and possibly statements made at the scene). The longer you wait to take these depositions the less value they have, so act fast.

### Discovery

You should ask, in your initial round of discovery, for the ownership, builder, subcontractor and product information concerning where your client fell. This includes asking for flooring type, year it was manufactured/built and put into use.

Also, obtain the sweep sheets and other documentation of cleaning and maintenance. These records and reports can make or break a case. You will want to depose the people named in those reports and question them as to what they did on the day of the incident. Make sure you lock down the times that the last sweep occurred and when the fall happened. Get the handbook of the business and go through the cleaning protocols. It is typically very easy to pick out things that were not done, or not done correctly. This type of proof helps to shore up your negligence claim.

**Video:** Most major grocery chains will have video of each aisle which can be obtained with a preservation-of-evidence letter and discovery requests. It is important to watch these and have your expert in human factors analyze them. Sometimes a video of your client's action could save you time and money if the actions of your client were negligent. On the other hand, it can show how long the spill was on the floor, the size, the color, how it got there; it can show employees in the area (giving notice), and what exactly happened. This is the single most important piece of information in cases against large supermarkets and stores. Always request all video for an hour or more before and up to the time of the accident.

You will find that some stores will "lose" the video if it is not in their favor. You should always request video for the entire store at the time of the incident to show the inference about how convenient it is that the only camera not working was the one where the accident occurred. Your basis for wanting all the camera footage should be to show where the other employees were located at the time (notice).

**Notice:** You need to prove that the store had or should have had "actual or constructive notice" of the dangerous condition. Take a look at the CACI/BAJI jury instructions on this topic for guidance. Your expert can help guide you through what questions can prove constructive negligence. The requirements for this typically weigh in on the amount of time the spill was there; i.e., if it was an ongoing freezer leak in a store aisle or if it was a Sprite can that leaked 30 seconds before the fall. You have to show that the store had, or should have, known about the spill and done something to

prevent the danger. Stores need to put warnings up when floors are wet; failure to do so is clear liability.

**Comparative negligence:** Be wary of your own client's negligence. Slipping on water is much different than slipping on bright yellow mustard in a store aisle. If the cause of the slip was on a substance that is bright or easily seen in contrast to color of the floor, you may be in for a long fight. In general, people need to use care in where they walk and how they conduct themselves. If your client should have seen the danger and had the opportunity to avoid it, you should think about passing on the case.

### Litigating

**Reptile approach:** Concern the theme of your case around public safety. Invoke the reptile response to companies who have no care for the public at large. Taking action now will stop this from happening in the future. Do not overstate your damages. In most cases, it is hard to get a jury angry enough to justify swinging for a home run. Be reasonable in what you ask for; be reasonable in your approach and you can be successful in these cases.

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