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Preliminary Preparation of Plaintiff's Case

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TRIAL TECHNIQUES FEATURED IN THIS ISSUE

EDITOR'S NOTE: The third annual Law Institute sponsored jointly by the University of Denver College of Law and the Junior Bar Sections of the Colorado and Denver Bar Associations was held in Denver, April 17 to May 3, 1951, and was devoted to the subject of Civil Trial Techniques in Colorado District Courts. Abbreviated versions of the institute were later presented in Grand Junction and in Pueblo, Colorado. All sessions met with capacity attendance and the program was so universally acclaimed that the editor of *Dicta* felt it necessary to perpetuate the record and to make available to all of the attorneys of the state the valuable information developed for this Institute on Trial Techniques. Therefore the eight featured speakers of the Institute were requested to prepare articles outlining the material so ably presented by them in their previous speeches. The first five of these articles are presented in the following pages. The remaining three articles will be presented in the November issue of *Dicta*.

PRELIMINARY PREPARATION OF PLAINTIFF'S CASE

By IRA C. ROTHGERBER, JR.,
of the Denver Bar

It is impossible to isolate the preliminary preparation from the perspective view of the entire case. The well planned Civil Action is not vastly different from the well planned military operation, and for purposes of illustration, the analogy between the two will be preserved.

The first phase of preparation is the marshaling of facts. Although the automobile accident has been assigned as the typical case, it doesn't present wide enough scope for thorough discussion, but we will first consider this type of action.

John Plaintiff is generally familiar with the ordinances and statutes; he has passed a driver's examination; he reads the newspapers; and he has had friends who have recovered monumental compensation for relatively minor injuries. He will tell you exactly what happened, conditioned on his experience and learning. Thus so you start with John's distorted view of the facts, designed to make his conduct accord with his distorted view of the law. The General leading his troops into battle must first know his own strength. Don't depend on your client's version if you can possibly help it. Cross examine him and recross examine him. Let him write his version of the facts. Compare his writing with his recitation of the facts the next time you see him and each time after that. I don't know what device can make the client tell all.

Perhaps sodium pentothal will do it, but lawyers aren't licensed to administer it. I reiterate that we must use vigilant examination and cross examination.

In the case of auto accidents, and in some other cases, official reports are available and should be examined. If it is possible, you should view the site of the accident, and if that is impossible, photographs and surveys enabling you (and eventually the jury) to visualize the site should be obtained and examined.

All known witnesses should be interrogated and, if possible, their signed statements should be obtained. If the witness is reluctant to sign a statement, a reporter, preferably a certified reporter, should be present to transcribe the statement. Among the important questions to ask other known witnesses is whether or not they know of other witnesses to the occurrence. Of course the client, official reports and the pretrial conference should not be overlooked as clues to the identity of witnesses. Just as the careful General knows every inch of his terrain, the careful plaintiff's attorney has examined every witness.

TAKE DEPOSITIONS EARLY

The modern devices of discovery are generally thought to be designed for the help of the defendant. Not so. The plaintiff may examine the adverse party, and, in my opinion, this should be done at the earliest possible moment. There is a respectable line of Federal Court decisions holding that the party first requesting discovery shall be the first party permitted to examine. The Judge is granted discretion, but this is the guiding rule. A sound Field Commander ascertains his enemy's strength and weakness as soon as possible. A sound plaintiff's lawyer may make his comparable task easier by serving a notice to take the deposition of the defendant concurrently with serving summons. This is a two edged sword. *It may* prevent defendant's counsel from racking John Plaintiff first, and *it may* give basis for amendment of pleadings, changing the battle plan or retreating gracefully and cheaply. It also permits plaintiff's counsel quickly to identify those other witnesses known to the defendant, for it has been held, although not universally, that such inquiry is permissible.

A word departing from automobile accidents, but an important one. As Al Smith frequently proclaimed, "look at the record." For goodness sake, try to pry. Ask John Plaintiff to furnish you every word that has been written. If books of account are or could be involved, examine them until you understand them. If necessary, go over them with an accountant, and be prepared to prove their meaning to the trial tribunal. Be certain that you are able to reconcile all books of account with income tax returns filed by your client. Understand every record. Assail it until you know its validity. A good advocate never permits himself to believe anything. Each fact must be proved to him, and he must be prepared to prove it.

Return for a moment to the automobile accident. At the time you first consider bringing the action, expert witnesses, if any, should be interviewed so that you know and *understand* what they will say. A mere written statement using technical terms can prove perilous for you. Be able to translate technical language into lay terms. On the other hand, make certain that the expert can talk in lay terms.

In closing this phase of the discussion, let me bridge the gap between facts and law by reminding you that some of the legal presumptions can be very helpful to you. In preparing a case, it is wise to review the list of presumptions and to make note of each, whether they are in support of your position or not.

In the automobile case the study of the law is frequently tedious but rarely difficult. I cannot prescribe a panacea making legal research pleasant, but I can give a few cautions about the degree of thoroughness of preparation and some ideas about organization of material.

THE CAUTIONS ARE THESE:

1. Brief every prase of your case, both substantive and adjective law. You may ask how you will know what every phase is. The only answer I know (and it is far from good) is to start by reading a good text or encyclopedic article. I know of no man who has practiced so long that he can fail to overlook this phase of preparation.

2. Do the same thing with respect to your adversary's case.

3. Know the validity of your objections to evidence in advance of pleading and trial. Many cases are won or lost because of skillful exclusion of the adversary's proof. If you know it before pleading, you can narrow the issues and that is generally advantageous to the plaintiff. Both judges and juries can be misled by multiplication of the issues and by obscuring them.

4. If you are on unfamiliar ground concerning burden of proof, brief every aspect of this element and be fortified with authority. Incidentally, when there is a question of burden of proof, I recommend having it clarified at pretrial.

5. A complete set of instructions should be prepared at the time that the complaint is prepared. More frequently than not, this is extra work, but it seems to me to permit a better perspective view.

The material thus organized can be grouped simply in the automobile accident case. I have recently encountered a series of cases (Fair Trade enforcement actions) in which my adversary has asserted ten or twelve different defenses and in which several cases referred to various points. One of the young men in our office suggested that I make an outline of the entire problem. He attributed to me the ability to make the outline in logical order. This was done, and each subject was assigned a main numerical

designation, followed by decimal and subdecimal designations in the manner of the loose leaf services published by C. C. H., Prentice Hall and others. Each case was briefed and at the top of each page the decimal designator and subject head was noted. Cross indexing was used liberally, and the entire brief was assembled in loose leaf form, thus permitting the addition of other knowledge as it was accumulated.

We are now ready to commence the action. We shall assume compliance with Rule 17 respecting the identity of parties and their representative capacities. The real difficulty here arises in connection with the definition of "indispensable parties" as distinguished from "necessary parties" or "those who ought to be parties" as those words are used in Rules 19 and 20. No generality can be helpful here. I merely utter caution. If there is need for quick decisive action, probably anyone who *might* be liable should be joined as a defendant. If the purpose of filing the complaint is to obtain settlement, consideration should be given to letting the defendant introduce third parties defendant. Now that inclusion and exclusion of parties is no longer fatal, all one can do is estimate each situation. Sometimes one creates hostility by joining as a party defendant one who interests are at least partially identical to the plaintiff's, whereas he might secure cooperation with the plaintiff if that same person is named by the defendant as a third party defendant. But as we have previously pointed out, tri-partite actions tend to obscure issues and confuse the jury; therefore, from a plaintiff's standpoint, they should generally be rejected.

WHAT COURT TO USE

One important question is whether or not the plaintiff should choose the Federal or the State Courts. The criteria are well known. In the Federal Court, you generally know what Judge will try your case. In the State Courts, particularly in Denver, that is not ascertainable in advance of assignment of the case. In the Federal Court the jury is drawn from throughout the State, and therefore is supposed to be representative of many points of view. Of course, the condition of the docket (whether you will be likely to reach early trial) is a factor to be considered.

Assuming you have chosen the State Court, Rule 98 seems fairly clear with respect to a choice of venue, but there are areas of discretion. Again, one cannot generalize. Practical consideration must govern. Among the factors to be considered are popularity of your client with members of the community from which the jury will be drawn, the convenience of attendance of witnesses (and their consequent cooperation), the likelihood of a successful motion to change the place of trial, and, again, the rapidity with which your case is to be reached. There are but a few types of action in which the place of trial is mandatory as in the case in election contests.

The rules provide that all causes of action may be joined and it is generally wise to do so. At some stage of the proceedings, you may have to elect the ones on which you will proceed, but again, it is wise to be armed with every weapon you can possibly use. The philosophy of the Rules is to compel settlement of all controversies between the parties, or arising out of a transaction, and it has been hinted that the assertion in one action of all claims the plaintiff has is desirable, if not mandatory. It will be noted that Rule 13 requires the assertion of all counterclaims.

It is necessary to have clear, concise allegations as to each element of each cause of action, and to avoid confusion among the various causes of action. A word of caution here concerning the statute of limitations; when there is a possibility that they might apply as a defense, it is wise to break the plaintiff's case into as many segments as possible.

WHEN TO SERVE THE COMPLAINT

Whether to serve the complaint with the summons is again a tactical matter. Sometimes time limitations prevent service of the complaint, but generally it is less work and probably more in accordance with the spirit of justice to serve it at the time the summons is served. Of course, the case should be docketed within ten days of service of the summons. Withholding the filing of the original summons with the service thereon so as to prevent the defendant from attacking the return (which, unfortunately, some of our brethren sometimes do as a dilatory procedure) can be advisable.

The plaintiff's attorney should carefully check the return on the process, whether service be by sheriff or by private process server. After all, if there is no jurisdiction, the plaintiff is the one who falls by the wayside.

In the event the plaintiff invokes the so called extraordinary remedies (i.e., replevin, attachment and garnishment, injunction or the so called peremptory writs) it is advisable to serve copies of everything excepting the bond. Courts are reluctant to entertain this type of litigation, and that is the reason I advocate going further than the rules compel.

A discussion of preparation of the plaintiff's case without reference to consideration of the possibility of counterclaim would be incomplete. Whenever a client comes to me, particularly in an automobile case, I try to analyze with the same care and using the same criteria here discussed, the possibility of successful counterclaim. This includes, of course, the possibility of plaintiff's counterclaim to a cross claim and plaintiff's counterclaim against a third party defendant. This analysis helps in concluding whether my client should be the aggressor. It is not an invariable rule in lawsuits that he who strikes first has the more enviable position. As in warfare, advantages shift. Sometimes it pays to be the Finland instead of the Russia.