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Preliminary Work by Defendant's Counsel

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PRELIMINARY WORK BY DEFENDANT'S COUNSEL

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Much of the initial work done by defendant's counsel will parallel similar efforts by plaintiff's attorney. It will consist of marshalling of facts and law, arriving at conclusions concerning both substantive rights and procedural matters, and making initial plans of both strategy and tactics in planning the defense.

The first move in determining the facts in any given situation is to take a good look at the defendant. Considerable information will be disclosed by the initial interview with the defendant, at which time counsel can partially determine whether he, the client, is sane, reliable, trustworthy, and financially responsible. The latter element will often be a material fact upon which to base such fee arrangement as may be mutually agreeable. Ordinarily, the sooner the fee arrangement is agreed upon, the less misunderstanding can result concerning the reasonable worth of the services rendered or to be rendered by counsel.

The client may be so unstable or unreliable as not to warrant counsel in accepting employment. It may take time to realize this situation, but if such is a fact and counsel intends to withdraw from representing the client, this should be done at the earliest opportunity. It is not to be overlooked that the tactics to be used in carrying forth the defense will depend to a substantial extent upon the nature of the client. For example, in a situation involving a substantial question as to the liability of the defendant, the defendant's bargaining position in negotiating a settlement may be greatly enhanced by the taking of the defendant's deposition if he is an intelligent, level-headed, responsible individual; whereas, a defendant's settlement position would be prejudiced by the taking of the deposition of a stupid, opinionated, self-centered client. It is extremely important to analyze the impression the defendant will make as a witness not only at the trial but during the taking of a deposition. It may be necessary on occasion to inquire concerning the character and financial responsibility of the defendant from other sources such as mutual friends or business acquaintances. First impressions in the privacy of a lawyer's office do not always continue through into the public courtroom.

In addition to getting a general appraisal of the client, counsel will of course listen to the client talk himself out. This often will include hearing a distorted version of the facts and a complete misconception of the law. After listening to the client's tale of woe, an extensive cross-examination of the client is in order to determine how much of his tale is fact as compared to wishful

thinking, conclusions, opinions or hearsay. Obtain all documentary or real evidence which is available from the defendant and, so far as possible, obtain information concerning the substance of writings to others (if no copy has been retained) and also details of oral statements made by the defendant to others, all of which might be used for impeachment purposes or constitute admissions against interest. In negligence cases, it is essential to determine what signed statements may have been given to investigators or other attorneys before suit was started.

After all possible information has been obtained from the defendant and thoroughly screened, an appraisal of the case should be made to determine how much time and expense is justified in investigating and preparing for trial. It goes without saying that a $50.00 property damage claim will not stand the time and expense that can and should be expended on a multi-million dollar suit concerning rights to oil properties. Counsel in each case must weigh the varying factors to determine how much time he can reasonably allocate to the particular case at hand considering the amount involved and the potential fee which can be charged.

OBTAIN DOCUMENTARY EVIDENCE

Assuming the case is such as to warrant substantial time and expense, further investigation will include a search for all documentary evidence which directly or indirectly will influence the outcome of the case.

In negligence cases, witnesses will be interviewed and statements obtained from them if possible, a copy of the police report or state patrol report should be obtained, any potential source of photographs of the scene of the accident immediately after it occurred should be developed and pictures secured, and quite often a neighborhood search from house to house will develop witnesses who are otherwise unknown. In other types of litigation, full investigation of all potential witnesses is called for together with a thorough search for any documentary evidence such as agreements, letters, wills, memorandums, unrecorded deeds or any other writings depending upon the nature of the case.

In many instances, it has been observed that attorneys expect the evidence to walk into their offices only to find out at the trial that they have missed the boat. On many occasions there is only one way to develop facts and that is by leaving the soft cushion seat in the office and pounding the pavements to search for and to interview witnesses or to seek out other evidence. Lawyers are notorious for being too lazy to leave their offices but in many instances laxity in investigation will mean the entire difference between success and failure.

Witnesses who are available to present oral evidence otherwise unsubstantiated by any writing, should be carefully questioned to determine exactly which facts they know of their own

knowledge and therefore would be admissible in evidence. The competent evidence must be screened from the hearsy and the inadmissible opinions. These facts should be reduced to writing if at all possible through use of a question and answer statement or a narrative statement or a letter or memorandum or other informal writing. Such a writing should be in such form as to tie down the witness as to all material details known to that witness. Thus a question and answer statement can be transcribed and signed by the witness or the stenographer or reporter will be available to testify as to the statements made by the witness; a narrative statement can either be in the handwriting of the witness or be over his signature. The same is true of a letter or other memorandum. The witness should of course always be permitted to read the document, make any corrections desired, and then be requested to sign the same. In the case of a narrative statement or memorandum each page should be signed for identification purposes. Reducing such evidence to writing early in the game collects the information while it is still fresh in the minds of the witnesses, reduces any later tendency to shade the facts towards one side or the other and has the salutary effect of keeping the witness scrupulously honest as he testifies with the knowledge that such a statement can be used for impeachment purposes. Especially where trials are delayed due to crowded dockets or for any other reason, such a statement is invaluable for purposes of refreshing the recollections months or years after the incident or transaction occurred which is the subject of the action.

MARSHALLING OF LAW

Initially, it is of importance to determine the theory upon which plaintiff's counsel is proceeding. Having done so, it is necessary to determine whether plaintiff can establish a prima facie case upon the existing evidence under his particular theory and it is also necessary to determine what affirmative defenses may be available to combat such a theory. Under the Rules of Civil Procedure, the courts are supposed to ignore theories according to certain opinions of the appellate courts. As a general statement such a theory is fine but as a practical matter it is not. Even though common law rights of action have been abolished it is still necessary to resort to particular theories upon which to base a claim in order for a trial to progress with any degree of order. Thus in a claim for bodily injury, it is necessary to proceed upon the basis of negligence or intentional injury. It is also necessary for the plaintiff to express the theory in the complaint upon which he is proceeding inasmuch as certain defenses are denominated affirmative defenses and must be affirmatively pleaded in an answer. For example, contributory negligence must be pleaded affirmatively. How can a defendant plead contributory negligence unless it appears from the plaintiff's complaint that the plaintiff's

claim is based upon a theory of negligence? Regardless of any academic approach to the Rules of Civil Procedure, it is still necessary for the plaintiff to set forth a specific theory upon which he bases his claim and it is likewise necessary for the defendant to base his defense upon that same theory.

In marshalling the law, it is of course necessary to know generally what the facts of the case will be. If the action is a type of case in which counsel has had some experience, he will probably proceed to marshall all of his facts and complete his investigation before attempting to brief any law. However if the type of case is new to counsel (e. g. false imprisonment) counsel will ordinarily make a preliminary study of that particular subject before commencing detailed investigation so that he will know what facts will be important to develop during his investigation. The final study of the fine points will not be made until completion of the investigation however. No attempt will be made to present a course in legal bibliography or how to find the case in point in two minutes. (Too often this writer has found a fine case in point two weeks after the case was tried or two weeks after oral argument before the Supreme Court.)

TACTICAL PROBLEMS

When the defendant was first interviewed, counsel determined the date when service was made upon the defendant and made careful note of the return day so that a default will not be entered. He has then proceeded to investigate the facts and the law to determine his over-all strategy. Having done so, it is now necessary to plan the preliminary tactics in defending the case.

Examination of parties plaintiff and defendant named in the action will be made to determine if the proper persons have been made parties. If not, appropriate action will be taken under the pertinent Rules of Civil Procedure to obviate the deficiency.

Attention will be directed to the jurisdiction of the court over the person of the defendant as well as the subject matter. If suit is commenced against a person or corporation not otherwise amenable to the jurisdiction of the court, such as a foreign corporation not doing business within the State of Colorado or a non-resident served outside of the State of Colorado, appropriate action should be taken at the time the first pleading is filed to challenge the jurisdiction of the court. Although the Rules of Civil Procedure do not provide for a "special appearance" for testing the jurisdiction of the court, as a matter of practice a preliminary motion attacking the jurisdiction is made upon special appearance. Thus the defendant will file a motion beginning as follows: "Comes now the defendant above named, appearing specially for the purpose of this motion and for no other purpose, and respectfully moves the court, etc." This is of course a continuing practice from the former Code of Civil Procedure under which a general

appearance waived any objections to the jurisdiction of the court.

Assuming that counsel is of the opinion that the court does not have jurisdiction over the party defendant, a "Motion to Quash the Return on the Summons" is the proper pleading to file. Many attorneys file a Motion to Quash the Summons, but as long as the summons has been properly issued by the Clerk of the Court or an attorney, there is no basis for quashing it. The service of the summons upon a person not subject to the jurisdiction of the court being void, the Motion to Quash the Return on the Summons is the proper approach. If such a motion is granted, the action is dismissed. Assuming that the trial court overrules the motion to quash, counsel for the defendant finds himself in a dilemma at the present time. Under the Code practice, if the defendant continued on with the case after having such a motion overruled, his continuation was deemed a general appearance and a waiver of his objections to the jurisdiction of the court. One Colorado case hints that perhaps such a result is not the same under the Rules of Civil Procedure. See Wells Aircraft v. Keyser, 118 Colorado 197, 194 Pacific 2nd 326. This case indicates that the ruling on such a motion is an appealable order but the opinion appears to be dicta and not strong enough upon which to rely. Another procedure is to initiate original proceedings in the Supreme Court in the nature of a Write of Prohibition directed to the trial court. The Supreme Court has circumscribed the use of such a Writ in some of its decisions. Until more time elapses and the Supreme Court has had an opportunity to consider the matter further, it is impossible to determine with absolute safety what action should be taken in the event the trial court does overrule a motion to quash. This writer certainly has no pat answer to the question.

Venue May Be Important

Counsel will next consider the question of venue. The rules of venue are substantially the same under the Rules of Civil Procedure as under the former Code. Any case over which a Colorado court has jurisdiction may be commenced in any county in the State regardless of the residence of the plaintiff, the residence of the defendant, where the cause of action accrued, etc. Defendant has the right to change the venue under certain circumstances, which right is waived if not claimed at the time the first pleading is filed. Whether counsel will want to exercise this right to change the venue depends upon the particular circumstances. For example an accident may have occurred in an isolated mountain county between a plaintiff who lives at Kiowa, Colorado, and a defendant who lives in Limon, Colorado. Plaintiff's counsel may commence an action in the City and County of Denver and serve the defendant at his residence. Defendant would then have the right to change the venue to the county where the accident happened or to the county of his residence. As a matter of convenience how-

ever he may elect to leave it in the City and County of Denver. Thus the practical considerations of convenience of all the witnesses and parties may overshadow the right to a change of venue.

In certain instances, a defendant has the right to transfer the case to the United States District Court. Under a recent change in the statutes, a new procedure is prescribed for removal to the United States District Court from a state court. The defendant must remove the case within twenty days after service of summons or the right is waived. No longer need a petition be filed in the State Court, a verified petition for removal being filed directly with the United States District Court together with a bond, copies of all pleadings in the State Court, etc. U. S. C. A., Title 28, Section 1446, contains the present requirements.

Under certain circumstances, a defendant in a State Court also has the right to commence an interpleader action in the United States District Court against the plaintiff in the State Court and any other claimants wherever they may reside in the United States. Under this particular practice, further prosecution of the State Court action, may be enjoined by the United States District Court. See U. S. C. A., Title 28, Sections 1335, 1397, and 2361.

DILATORY MOTIONS

Assuming there is no question concerning jurisdiction, venue, etc., the first pleading to the complaint must be considered. If the plaintiff has followed the forms of complaint set forth in the Appendix to the Rules of Civil Procedure, there is little room for the use of a Motion to Strike or Motion to Make More Definite and Certain or Motion to Dismiss. Sometimes one or more of such motions are filed if investigation of the facts and law has not been completed by the return day. It is seldom that such motions are argued under such circumstances and less often are they granted. More and more, attorneys are filing answers without going through the preliminary feints of filing motions indiscriminately. A New York trial attorney recently stated he had not seen a Motion to Make More Definite in ten years and a federal judge from Oklahoma stated he had never granted such a motion since the Rules of Civil Procedure became effective.

Third-Party practice must also be considered at this stage of the proceedings. A defendant may obtain leave to join a third party defendant, ex parte, if done *before* he files his answer. After filing an answer, such permission can be obtained only after notice to the plaintiff. The amendments to the rules which became effective in August of 1951 make a very substantial change in the third party practice as it merely permits joinder of a third party defendant who may be liable to the defendant and third-party plaintiff for all or part of the plaintiff's claim and does not permit joinder of a third-party defendant solely upon the ground that he is or may be liable to the plaintiff directly.