Chapter 8

Initial Considerations in Defending a Lawsuit

By M. Warren Butler and Alex Terry Wood

You've just survived three years in law school and the Bar Exam, and it is your first day as a new associate in the law firm. A partner hands you your first file—and you are excited, but "clueless." The partner expects you to handle the file and prepare the case for trial, but you do not know where to begin! Of course, you are not about to tell the partner this! He or she has probably forgotten how it felt to be assigned that first file.

This chapter is designed to help you navigate through the initial stages of defending—and preparing—that first case. There are two things you must always do as a lawyer: *Proact—Do Not React*, and *Always Keep Your Client Advised*. With these two things in mind, you can get started on that new file!

First Steps in Opening a New File

A lawyer will receive a phone call, fax, letter, or e-mail asking him or her to defend a claim or suit. Before the file ever gets to you, the partner has done a lot of work to get it opened. Each firm will have a different procedure to open a file, but the matters that must be handled during the opening are basically the same.

Conflicts

The first thing a lawyer must do when he or she receives a new assignment is to obtain the proper names of all parties. Once the names of the parties are identified, the lawyer must run a conflicts check to see if the firm can provide the requested representation.

Most firms have a computer system, but others may have a card system, firm wide e-mails, meetings, or a combination of these to ensure that there is no firm conflict in representing the party. The Model Rules of Professional Conduct set out the general conflicts principle in Rule 1.7. It states, in essence, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict exists if "the representation of one client will be directly adverse to another client," or if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." However, even if there is a conflict, Rule 1.7 allows representation if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," each affected cli-

ent gives informed consent in writing, and under other limited circumstances. The lawyer must also consider whether any conflict exists with a former client under Model Rule 1.9.

As a young lawyer, if there is any uncertainty as to whether a conflict exists, ask the partner immediately. It is far better to be safe than sorry when it comes to conflicts, and the partner will never frown upon your inquiry—especially if you learn of a fact during your investigation that creates a conflict that the partner was not aware of when he or she accepted the representation. You may also occasionally find that the wrong party has been sued. Remember, if a conflict arises after representation has been undertaken, the lawyer must take the necessary steps to withdraw from the representation right away. Your withdrawal should be accomplished "without material adverse effect on the interests of the client." Model Rule 1.16(b)(1).

If you are a sole practitioner, you should develop your own reasonable procedures to determine the parties and issues involved, and whether there are conflicts of interest. To do so, make sure you know the correct full names of the parties requesting representation and all other parties in the case to ensure an accurate conflicts check.

Engagement Letters

An engagement letter must be sent to the client in every matter and should specify the exact party or parties you are representing and the scope of that representation. It should also include the estimated amount of fees to be charged, whether the client will be billed hourly and at what rate, and when the bills will be issued and paid—monthly, quarterly, or at the conclusion of the service. Finally, the engagement letter should contain any other information necessary to set out the purpose of your representation. If you work in a firm, always read the partner's engagement letter to the client. It will contain information as to exactly what the firm has been hired to do, who you are representing, and what the partner expects to accomplish early on in the lawsuit.

Tracking the Lawsuit

Every young lawyer should be able to learn the status of every lawsuit in his or her jurisdiction—including, of course, the case you are about to make your own. A typical system is the one used in our exemplar jurisdiction, Alabama. The State Judicial Information System (SJIS) can be found at **Alacourt.com**. Initially, you are looking for three bits of data:

1) The date your client was served. (Be sure to look at the actual return of service document posted to Alacourt, and do not rely on your client as to the proper date of service.)
2) The identity of the other attorneys representing the other parties to compile a list of all parties and their counsel and to ensure that each attorney is included on the certificate of service on your pleadings. (A courtesy call is also encouraged to notify counsel of your appearance and to hear what their defense strategy will be). If a party is not represented, you serve the party using the address shown on the complaint until they obtain counsel.
3) The identity of the judge who will hear the case to evaluate whether the judge will be favorable to your client's interests.

Docket Control

It is important to keep in mind that deadlines for the initial responsive pleading and discovery may differ based upon your jurisdiction. For example, in federal court, an answer is due fourteen days after service and discovery does not commence until the parties conduct a Rule 26(f) discovery planning conference, whereas in Alabama state court an answer is due thirty days after service and discovery may be served with the complaint. Motions to extend the time to answer, to dismiss, to transfer, and to request a more definite statement may also be filed and may extend the initial thirty day deadline for filing an answer.

In Alabama, all responses to any written discovery requests filed by the plaintiff with the complaint are due forty-five days after service. Remember, if the applicable rules allow additional time to respond to discovery that is served with the complaint than discovery served at any other time, you may be able to obtain the plaintiff's discovery responses first. For example, suppose the complaint is served on March 1, 2014. The defendant propounds a discovery request on March 14, 2014. The plaintiff must respond to the discovery by April 13, 2014 (*i.e.*, within 30 days of the defendant's request). The defendant does not have to respond to plaintiff's request for discovery until forty-five days after service, or on April 15, 2014.

As you begin your practice, you should review the applicable Rules of Civil Procedure to familiarize yourself with all deadlines. Always check calendar or docket appointments set up by staff to ensure the appropriate jurisdiction's deadline has been used (*i.e.*, state court versus federal court).

Dealing with Insurance Litigation

In most jurisdictions, when a lawyer has been hired by an insurance company to defend one of its policyholders or insureds, the lawyer's client is the insured.

However, the lawyer must also report on the progress of the claim to the insurer or its third-party administrator (TPA). The lawyer should study any reporting requirements/guidelines of the insurer or TPA. Ask your legal assistant to docket/calendar all reporting requirements, and keep the insurer's claims representative or TPA informed. If they stay out of trouble with their supervisor, you stay out of trouble with yours!

Be sure to copy the client with correspondence and reports. Rule 1.4(a) of the ABA Model Rules of Professional Conduct requires a lawyer to keep a client "reasonably informed about the status of a matter" and to "promptly comply with reasonable requests for information."

Determine whether the case is being defended under a reservation of rights. Under such a scenario, the lawyer owes an enhanced duty to the insured, and you must be careful in managing the defense and the information you supply to the carrier. You should not do anything to jeopardize the coverage being provided to the insured. If there are any coverage issues, the lawyer is not allowed to discuss those issues with the claims representative or client unless you have been specifically retained to do so. If you are hired to defend a suit, then that is exactly what you should do—defend it!

First Steps in Your Investigation

Your investigation will begin right away. Remember, most plaintiffs' attorneys have had up to two years to investigate their case, obtain evidence, and take statements of witnesses. The defense is behind by the time suit is filed so you must *proact—and not react.*

Do not forget to keep your client advised of all facts and witnesses you discover throughout your investigation. It is better to be criticized for sending too much mail to the client than not enough.

Reviewing the Complaint

Simply because a complaint has been filed does not mean it is a properly pleaded complaint. It may contain deficiencies that the young defense attorney can attack from the outset. Before you do so, you must outline your *strategy*, including a best case scenario and worst case scenario as to how the court may rule on any motions, and make sure the partner agrees with your strategy.

In reviewing the complaint, here are some matters to consider.

- Was the complaint filed within the applicable limitations period?
- Was the complaint filed in the proper venue and/or in the most convenient forum?
- Does the court have subject matter jurisdiction?
- Does the court have personal jurisdiction over the defendants?
- If the complaint was not pleaded with sufficient specificity, should you move for a more definite statement?
- Has a jury demand been made? If not, should you demand a jury?
- Do any counter-claims, cross-claims, or third-party claims (or demands for a defense and indemnity) need to be asserted?

The young lawyer should make it a particular point to know the elements of each cause of action alleged by the plaintiff and the defenses available. Look closely at each count of the complaint and consider whether any counts or parties should be dismissed at the outset.

You should also consider whether the case is removable to federal court, and whether it *should* be removed. In considering removal, look for a federal question, an amount in controversy of $75,000.00 or greater, diversity of citizenship, possible fraudulent joinder, and the consent of all other defendants. Consider whether the particular federal district court will really have a more sympathetic judge and jury pool. (Don't forget that a notice of removal must be filed within thirty days of service or thirty days after the case "first becomes removable," and that an answer must be filed in federal court within seven days of removal. Consult the local rules for a list of all documents that should be filed with the Notice of Removal.)

You should also consider whether there is an enforceable arbitration agreement and whether your client wants to move to compel arbitration. In some jurisdictions, this right may be waived if not asserted prior to the initial responsive pleading.

If discovery was served with the complaint, you should review it as well. The interrogatories and requests propounded by the plaintiff may give you information as to the theory of his or her case. This will also prepare you for your initial contact and meeting with your client.

Keep the partner and the client and/or claims representative aware of the status of the various causes of action. Always seek approval from the partner and the client and/or claims representative before filing an answer or motion, demanding a jury, or asserting any cross-claim, counter-claim or third-party claim. Request oral argument on the face of your motion, if necessary and if the jurisdiction's rules allow.

Initial Contact with Plaintiff's Counsel

Plaintiffs' attorneys are usually quite proud of their cases and will tell other lawyers a lot about the case before discovery begins. An initial phone call to opposing counsel can be very helpful to your client to get initial information such as a description of the accident/incident, the nature of the injuries, the identity of the plaintiff's healthcare providers, the amount of medical bills, whether Medicare is involved, and the plaintiff's theory of liability. This telephone call will likely be handled by the partner. He or she will confirm that no adverse action will be taken against your client without first advising you of his or her intention to do so. He or she may also request an initial demand from counsel for plaintiff. The associate needs to get this information from the partner, or review his or her notes from the phone call, and ask follow up questions, if necessary.

The partner or associate should then follow up with a letter confirming that no default will be taken against your client and asking to take the plaintiff's deposition first—if the plaintiff has not already served a deposition notice with the complaint.

Contact the Client: The Insured

One of the first steps after receiving the assignment is to contact the client (or insured) to advise him or her of your representation, and ensure their consent to your representation. Explain the litigation process to your new client to comfort him or her.

As described in the Comments to Rule 1.4 of the Model Rules of Professional Conduct, the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the case, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious settlement offer from another party.

Review of Claims File or Investigative File

A claims or investigative file is usually maintained by the insurance company or TPA. This file will contain their investigation, claims notes, statements from witnesses, medical records, and correspondence with opposing counsel. A lot of work may have already been done on the claim, and there may be a great deal of information there. There is, however, always much more to do. Prepare a to-do list, and copy it to the partner, the legal assistant, and the paralegal who are working on the claim.

Do not separate or mark the clients' claims file or investigative file into different sub or point files until copies are made. You need to know where file materials and records came from and when they were received, and you will have no way of knowing when information and documents were exchanged unless you keep them separated. Remember, organization of a file is the key! Work as a team with your legal assistant and paralegal to keep yourself and this file organized.

When reviewing the claims or investigative file, look for the following information or documents:

- Identity of witnesses and any written or recorded witness statements,
- Identity of employer(s) or former employer(s),
- Identity of medical providers,
- Medical records or bills,

- Other documents that support a claim for special damages,
- Liens or claims for subrogation (especially Medicare liens which require special attention prior to any settlement negotiations), and
- Photographs or video surveillance.

Pay attention to whether any documents establish an amount in controversy over $75,000.00 as this information may permit you to remove the case to federal court within thirty days of service. For this reason, it is prudent to review the claims file well within the initial thirty day period to determine if the amount in controversy exceeds $75,000.00.

Once you have reviewed the claims file, request any documents referenced in claims notes that are not physically in the claims file (*i.e.*, video surveillance, photographs, or other electronic materials) and make a list of witnesses to interview. Identifying and interviewing witnesses, including expert witnesses, is also covered in detail in another chapter of this publication.

Assign the paralegal to issue non-party subpoenas to medical providers, employers, and other entities identified in the claims file in order to obtain certified copies of records. The Health Insurance and Portability Act (HIPAA) went into effect in the spring of 2002 and additional changes went into effect within the last year. Your subpoenas must include specific language to comply with HIPAA. Your paralegal or other lawyers in your firm can provide you with an example of a HIPAA compliant subpoena. Once the documents arrive, copies should be made, Bates stamps added, and copies provided to opposing counsel (if requested). In a personal injury action, you will need to review the records to become familiar with the alleged injuries, identify any doctors to be deposed, and determine whether any additional records need to be retained. Another chapter in this publication addresses document collection, review and production in greater detail.

Meeting with the Client: The Insured

After your introductory phone call to the insured, an initial face-to-face meeting is advisable. You should decide whether it is best to meet the insured at your office or his or her business location. Prior to the meeting, you should review the complaint, outline your strategy, and review any discovery served with the complaint to determine what information or documents you may need in order to respond to the plaintiff's discovery requests. If possible, you should also review the claims or investigative file prior to this meeting.

Obtain as much information from your client regarding the incident that led to the plaintiff's claim so that you can prepare your answer and answer any discovery requested by the plaintiff. The client can help you obtain a list of potential witnesses and provide you with present or last known addresses and Social Security numbers. Do not forget to run litigation/criminal searches on your witnesses.

At this meeting, you can also map out your defenses. Your client may not be a lawyer, but many times he or she has very good ideas or suggestions that can be useful.

Remember to follow-up with a letter to the insurer or TPA with a report of what you discussed and what you learned from the meeting.

Scene Investigation

If the case involves an accident, one of the first steps to be taken by the young lawyer is an accident scene investigation. This will include inspection of the site or vehicles, taking photographs, taking measurements at the scene, and meeting with employees if the incident occurred on site. Depending upon the type and sever-

ity of the accident, it may also involve an expert such as an accident re-constructionist. Be sure to preserve any evidence relevant to the scene or accident.

The Initial Responsive Pleading

The initial responsive pleading will likely be an answer. However, at times, it is necessary to file a motion to extend the time to answer, a motion to dismiss, a motion to transfer, and/or a motion to request a more definite statement. Each of these motions may also extend the initial thirty day period to answer the complaint. Keep in mind that some defenses may be waived if not asserted in the initial responsive pleading. Review Rule 12 of the Federal Rules of Civil Procedure for a listing of defenses and motions that can be raised in your initial responsive pleading.

In answering a complaint, the defense should admit or deny each count, or plead insufficient information. You may include a general denial if your partner uses such a practice, but whenever possible assert affirmative defenses to each element of the causes of action. Defenses include statute of limitations; no showing of causation or damages; and contributory negligence/assumption of risk/open and obvious conditions.

Remember, if you don't plead affirmative defenses in your answer, you can't try to prove the defenses at trial. You should reserve the right to assert additional affirmative defenses in your answer.

There are forms in the published rules of civil procedure that will assist you in drafting pleadings and motions. Other sources include the firm's database and fellow lawyers in the firm. Always provide a copy of the answer or initial responsive pleading to the client and the insurer or TPA.

Discovery

Written discovery is often served with the answer. Responding to and propounding written discovery is covered in a separate chapter of this publication. Continue to keep the client and insurer or TPA advised of all information obtained in the discovery process.

Once written discovery is exchanged, the parties will take depositions. Preparing for and conducting depositions, including expert depositions, is also covered in another chapter of this publication. Always seek client approval before scheduling depositions or retaining experts.

Court Appearances and Motion Practice

The young lawyer is often asked to prepare motions and to attend status dockets, motion dockets, and/or trial dockets. If oral argument is necessary (and the rules permit), be sure to request oral argument on the face of the motion.

Status Dockets

If you are dealing with a status docket, then you should find your opposing counsel before the court calls your case to ensure that all parties agree that the case is ready, or not ready, for trial. You may be able to simply call the court before the docket to advise the clerk of your agreement with opposing counsel. If you do not agree that the case is ready for trial, be ready to state your reasons to the court at the hearing.

Motion Dockets

Simple motions are usually granted without oral argument. However, if a motion is filed where oral argument is necessary (or requested), the court will either specially set the motion, or place it on the court's next available motion docket. Some judges have a weekly motion docket, while others have a monthly motion docket. Also, some judges hold motion docket, status docket, and trial docket on the same day. Do not be afraid to call the clerk's office to find out how the judge handles his or her docket. If all of the motions are set on the same day, ask the clerk or other lawyers in that district whether the judge calls his docket in order or on a first come/first serve basis. Always arrive at least ten minutes early to find out where you are supposed to be and the procedure for that judge in that jurisdiction.

Remember to give the judge some background information as to what your case is about before you start arguing your motion. You should not assume that the court has read your motion before oral argument. This may surprise you to some extent since you have spent your entire law school career learning how to prepare well-drafted motions and pleadings when, in fact, most judges don't have time to read them.

Motions to Compel

The defense lawyer should not file a motion to compel discovery unless he or she has endeavored to resolve the discovery dispute with the plaintiff's counsel prior to filing a motion. This is usually done in a letter advising the plaintiff that his or her discovery responses are either past due or insufficient. The letter should specify a date to respond and/or provide supplemental responses, usually ten days. If the plaintiff fails to provide responses and/or supplemental responses, you should consider a motion to compel. Make sure that you state that you have attempted to resolve the dispute with opposing counsel prior to seeking court involvement and indicate exactly what you are seeking from the court in the concluding paragraphs. Consider submitting a proposed order for the court (if permitted in your jurisdiction).

Motions for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure requires that a motion for summary judgment be supported by a narrative summary of undisputed facts. This narrative can be set forth in the motion itself or attached to the motion as an exhibit. You will need to ask your partner how he or she likes to prepare the narrative. The narrative must be supported by specific references to pleadings, portions of discovery materials, affidavits, and deposition transcripts. Your narrative should tell a story of what occurred and the facts should be phrased in a light most favorable to your theory or defense. When you prepare your brief, you need to restate the factual background because the court may read only the brief. When preparing your legal argument, put your strongest arguments first.

Any documents, evidence, or deposition excerpts that you are relying on in support of your summary judgment motion should be filed with the court as part of the record. You will prepare a document called a notice of filing; it simply notifies the court of the documents you are attaching in support of your motion or opposition. If you are attaching any deposition excerpts, you should attach the cover page of the deposition and the corresponding pages. When you reference that deposition on your notice of filing, you should tell the court which deposition is being attached and the specific pages attached thereto. If any supporting or opposing affidavits are filed at the summary judgment stage, the affidavit must be made on personal knowledge, set forth facts that would be admissible into evidence, and shall affirmatively state that the affiant is competent to testify to the matters stated therein.

In some jurisdictions or courts, the court or judge will have a deadline for filing the motion for summary judgment. Consult the rules and any Pre-Trial Orders to ensure you are in compliance. There may also be a deadline for the opposing party to file any opposition. In Alabama, any opposition to the summary judgment must be filed at least two days prior to the date set for hearing.

Always ensure that you send a copy of your motion, narrative of undisputed facts, and brief to the client for review.

Trial Dockets

In many jurisdictions, there is a specific jury term that can last up to two weeks. When counsel receives notice of a trial date, do not assume that your case will actually go to trial on that date. It will most likely be the date of the jury term and you will find out closer to the trial date when, and if, your trial will actually begin. It is beneficial to find out which cases are set to go to trial before your case during the same jury term. The older cases will usually be set first. The young defense lawyer can ask the lawyers in those older cases if they have settled, or how many days it is expected to go to trial. You should never count on a continuance. Once your trial date is set you should proceed as if it will go to trial at that time. You should always contact the client as soon as you find out the date the case is set for trial, to ensure that everyone's calendar is cleared for a trial date.

Settlement Negotiations

After you depose the opposing plaintiff, you should consider entering into settlement negotiations. It is probably best to handle this in a phone conversation with opposing counsel when you are speaking with her about additional discovery that needs to be completed after the deposition. You can inform him or her that, instead of spending additional time and expense on discovery, plaintiff should consider a reasonable settlement that you could forward to your client. Once you receive the demand or offer from opposing counsel, you should always consult with the partner on the file. Everyone needs to be on the same page in evaluating the value of a plaintiff's claim. Negotiating the best settlement for your client takes years of practice. The golden rule here is to always keep your client advised of the status of settlement negotiations. The Committee Comment to Rule 1.4 of the Model Rules of Professional Conduct requires a lawyer who receives a settlement offer in a civil case from opposing counsel to "promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer." Keep in mind that, if Medicare is involved, special steps must be taken to protect Medicare's interest even before negotiations begin.

When you are defending against a claim where insurance is involved and a claims representative has instructed and authorized you to settle, you should always advise your client of these instructions and your strategy. Many times the client may not want to settle, and you need to advise him that the insurance company has the right to do so, but that you will express the client's dissatisfaction or desire to the claims representative for the insurer to consider.

If a claim is settled, you need to immediately confirm the settlement in writing. You will also need to prepare the following documents: (1) the order of dismissal; (2) a stipulation of dismissal with prejudice; (3) a release and indemnity agreement; and (4) a letter to the plaintiff's lawyer with your client's taxpayer ID. Ensure that the plaintiff is responsible to see to the satisfaction of all liens or subrogation claims so that your client will not have to pay additional monies if such claims are made later against the settlement proceeds.

Conclusion

As a new lawyer you are probably going to be assigned the "grunt work" of gathering all the facts on a new case to enable the partner to either dispose of the matter or take it to trial. The longer you practice law, the more you will be expected to develop business for the firm. Nevertheless, even a first year associate can participate in business development. For instance, the young lawyer's efforts in the discovery process enable the supervising partner to develop more business and accept more cases for the firm. This process, along with so much of what occurs in the first years of a young lawyer's practice, should be a team effort within the firm. Meanwhile, the partners have a responsibility to ensure that you, as the new lawyer, comply with the Rules of Professional Conduct and start your professional career off on the right foot. Good luck, and we hope you enjoy your practice!