

BY SPEAKING

Trying To Murder Judge

County Correctional facility has been charged with the murder of County Circuit Judge Dennis Leiber. Charged Demetrius O'Neal Collier, 21, with one count of murder, alleges that federal authorities notified Michigan officials to find someone to murder the judge. Collier said he believed Leiber had unfairly given him 20 years in prison on a drug delivery charge. He was "up, dead," and offered \$2,000 for the murder, the money of the judge and promised that no one could be held responsible for the murder and not given any money. The complaint said. The money could be obtained from his girlfriend. Collier is in 91st District Court in Sault Ste. Marie. A pre-trial hearing on murder is life in prison.

County Jail Affecting Justice

Overcrowding is causing problems for law enforcement and the courts. The population was at about 104 inmates, said Montcalm County Jail. The population is now back around 86, the number of inmates is slightly above capacity for a long time now," said Barnwell. The jail has about 300 bench warrants and approximately 800 inmates, which the department is not actively pursuing. Barnwell said the jail population has made an impact on the department hasn't declared an emergency situation. Barnwell said. "Right now, because of our present jail overcrowding and it's impacting the settlement agreement's detriment." Barnwell said while he is mindful of the overcrowding situation, decisions because of it. Barnwell said based on my determination that they deserve in-

Taken Away Wants Damages

Challenging the long-standing legal maxim that governs the taking of a child. The child's daughter was taken from him and his wife in 1988. The infant had suffered two dozen broken bones, the couple had beaten her. Ashley Martin was taken to Michigan Court of Appeals in 1988 heard expert testimony result of osteogenesis imperfecta, a rare genetic disease. Damages, representing the \$350,000 legal bill for the child and his family have suffered and the punishment for the child has been accused of hating all social workers, and I can't understand why a social worker can't be held responsible like anybody else." Martin is the Michigan Family Independence Agency, the child was in June, when the Michigan Supreme Court ruled to make an exception to the so-called sovereign immunity. The court would file a petition in September with the U.S. Supreme Court in his case. The court consistently upheld the sovereign immunity doctrine so that government can perform its duties without being sued. The court potentially endless series of lawsuits. The court sides with Martin. "This (case) affects a whole

Winning Trial Strategies

BY GERARD MANTESE



This article focuses on some of the duties of an attorney throughout the various stages of litigation. Suggestions and strategies on how to represent clients more effectively are also provided. The article concludes with a

checklist of key issues to consider during the litigation process.

Properly Assess The Case And The Client's Needs

The first consideration a lawyer must make before filing suit is whether the matter warrants litigation. The lawyer should assist the client in undertaking a cost-benefit analysis, discussing both the expense of litigation as well as the likely outcome. Rule 3.2 of the Michigan Rules of Professional Conduct states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Consider whether a meeting with the adverse party may resolve the matter. Our firm utilized this approach recently and received such detailed, written assurances from our adversary as to future performance that we were able to avoid expensive litigation.

Although some clients may want to sue first and ask questions later, the attorney has

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an obligation to make sure that the lawsuit is well-grounded in fact and law and not intended for improper purposes. Under Michigan Court Rule 2.114 and Federal Rule of Civil Procedure 11, the court can impose sanctions against the lawyer, the client, or both, for failing to satisfy any of these requirements. Courts are showing more willingness to impose sanctions against attorneys who file litigation lacking an adequate basis in law or in fact, or who file for an improper purpose.

Fully advise your client as to the expected costs of litigation based on your proposed strategy. It is also the responsibility of the lawyer to advise clients as to the possible, as well as the likely, results of litigation.

Set intermediate goals for yourself and your client, and never lose sight of the long-range goals. You should consult with

your client regularly to reassess these goals. Listen carefully to your client's aspirations and concerns, and assess whether the client's goals can be achieved in light of factual and legal developments. Also, constantly reassess the client's goals in light of

attorney fees expended to date and the amount of fees expected throughout the case.

If your client is unsure of all the facts, you can utilize a more circumspect approach, for example, by drafting a demand letter to see how the adversary responds, or calling the adversary or the adversary's lawyer. Before sending a demand letter, consider the possibility that the adversary might file a complaint and beat you to the courthouse, thereby controlling the jurisdiction and venue.

Consider whether there is an agreement providing for arbitration. It is possible to revoke some arbitration agreements. (See MCL §600.5001 and *Tripp Excavating v. Jackson County*, 60 Mich. App. 208 (1975).) Advise the client as to the advantages and disadvantages of arbitration over a lawsuit, including relative speed and inexpensiveness of arbitration over litigation. Discuss whether you should inquire of the adversary party whether they would be willing to stip-

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The Physician Assistant As An Expert Witness

BY RAYMOND P. MOONEY

Although physician assistants have been involved in providing medical care since the late 1960s, they are still a relatively unknown medical entity in the legal communi-

scribe medications. In 31 states they are allowed to prescribe controlled substances.

There are more than 29,000 practicing physician assistants in the United States, according to the American Academy of Physician Assistants 1996 Census. The U.S. Bu-

Winning Trial Strategies For You And Your Client

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ulate to arbitration.

Fully assess all of your client's claims, including all common law, statutory, and constitutional claims. Advise your client that claims not raised during litigation may be precluded later by res judicata. Although counterclaims are not compulsory in Michigan (they are in federal court), it may be advisable and cost effective to bring them at the time of answering the complaint. Also assess whether there are other parties who may be liable. You should fully discuss whether it is advisable to file claims against other potentially liable parties.

Always discuss with your client early on whether the claim is covered by insurance or an indemnification or hold harmless agreement. Make prompt written demand on insurers or indemnitors even if coverage is uncertain, so as to remove any defense that you failed to give prompt notice. If your client is named as one of several defendants, determine the relationship between your client and the other defendants. Sometimes, cooperating with other co-defendants may be a better strategy than bringing cross-claims against co-defendants.

Obtain And Review All Documents

Ask the client to bring all relevant documents to your initial meeting. Ask your client to point out and explain key documents. This will save you time, and your client money.

Discuss with your client whether any documents should be treated as confidential. If so, you should attempt to obtain a protective order to prevent the unnecessary disclosure of the documents. Also, determine whether any documents are protected by a privilege.

Interview Witnesses

It is important to interview witnesses early in the case, in order to pin them down. Witnesses may not agree with facts attributed to them by another source, even by your client. Therefore, interviewing witnesses early on is important.

Consider having witnesses sign affidavits. Yet, sometimes interviewing a hostile witness can be contrary to the client's interests because it may cause that witness to seek out your opponent. Ask the client if there are any witnesses you should not contact, and explore why not. Of course, never educate any witness about the weaknesses in your client's position. You and the client should discuss which witnesses should be deposed, rather than only informally interviewed.

Never Let Your Opponent Get To You

Litigation can become very emotional for both clients and attorneys. As an attorney, you should never allow the litigation to swallow your long-term goals. In other words, never allow the goal of litigation to be litigating.

Yet, some attorneys do get caught up in the emotion of litigation and lose sight of their goals. Litigating against an opponent rather than litigating a case can be dangerous. You may find yourself filing motions without any real purpose. As a result, you may violate MCR 2.114 and sanctions could be imposed. A trial court's imposition of sanctions under MCR 2.114 can be reversed only where the trial court's findings are clearly erroneous. *Energy Reserves, Inc. v. Consumer Power Company*, Mich. App., 1997 WL 28737 (1997).

Preparation, Preparation, Preparation

Winning a case requires preparation. Essential things that you need to do to be prepared are:

• Know Your Facts

Investigate and command the facts. It is a disservice to your client to conduct discovery and make pre-trial motions without a firm grasp of the facts. For example, courts will usually allow you to take only one deposition of an individual. Therefore, if you take a deposition without knowing the key facts of the case, you may miss important issues, and you may never have the opportunity to ask the questions again.

The attorney also has a duty to verify the applicability of affirmative defenses before pleading them. An attorney who mechanically pleads a laundry list of inapplicable affirmative defenses can be sanctioned. *Gargin v. Morrell*, 133 F.R.D. 504 (ED Mich 1991); MCL §600.2591. *Szymanski v. Brown*, Mich. App., 1997 WL 51556 (1997). When raising affirmative defenses, you might want to recommend objecting to your opponent's failure to raise all claims pursuant to MCR 2.203. However, if the adversary has other claims which have not been alleged, objecting on the basis of MCR 2.203 may invite your opponent to raise additional claims which otherwise might not have been raised.

• Know The Law And Do Not Be Afraid To Research

It is important to maintain your credibility with your opponent, your client, and the court, so thoroughly research the issues and master the law. Cite authority for your positions. A court will be inclined to rule in your favor when provided with a case directly on point. Citing authority even in a demand letter can help improve your position and can sometimes avoid a lawsuit. Even novel, creative arguments lacking direct support should be supported at least by analogy or by extensions of the reasoning of existing case law.

Aim For Clarity

Pretrial motions should be selective, concise, and to the point. Narrow the relief you are seeking, and state it clearly at the beginning of your argument or brief. Do not force a judge to read an entire brief to figure out what relief you are seeking. For example, on motion call in Oakland County and Wayne County, judges are often required to interject, "What are you seeking?" during attorneys' presentations. Choose your points carefully. Too often attorneys attempt to explain every single detail in a brief or in oral argument and wind up confusing the court.

Hunt For Admissions

Before trial, review all the letters, affidavits, memoranda, deposition testimony and interrogatory answers provided by the adverse party and look for statements that help your case. Under the Michigan Court Rules and the Federal Rules of Civil Procedure, admissions are admissible as substantive evidence. I spend at least several hours before every trial hunting for admissions to read to the jury. Your case will be enhanced when you can show that even the other side agrees with significant aspects of your position.

Take Time To Be Creative

Try to set aside a couple hours every two or three weeks, when you have time to let your creative juices flow, to analyze each of your cases and explore alternative ways to achieve your client's goals. Consider whether there are other creative ways to cut to the heart of the case. Ask yourself, "If I were the client, would I want anything else to be done, or to be done differently?" "Are there any other claims that can be brought?" Consider how you can protect your client in the future from

Checklist Of Other Issues To Consider

This article cannot cover all of the key considerations involved in litigating a case, but other issues you should consider include the following:

- Is there a potential or actual conflict of interest? If yes, has the conflict been cleared?
- Is there an imminent statute of limitations or other deadlines to meet?
- If matter is declined, has a close-out letter been sent to the client, with notice given about the statute of limitations?
- What is your initial estimate of expected attorney fees?
- Has a fee agreement been reached?
- Is there a written fee agreement in the file?
- Should you ask for a jury trial?
- Consider whether the defendant is subject to jurisdiction in the forum, and where to file—state versus federal court.
 - Consider differing discovery rules in federal court.
- If a defendant, determine date of service immediately; avoid default.
- If a defendant, consider whether jurisdiction and venue are proper and should be challenged.
- Evaluate choice of forum; consider removal to federal court (must remove within 30 days of client's receipt of complaint, by service or otherwise; concurrence of all defendants required).
- Evaluate chances of removal based on diversity (must meet amount in controversy requirement; local defendant cannot remove based on diversity; consider whether plaintiff used fraudulent joinder to defeat diversity).
- Evaluate chances of removal based on federal question (removal may be based on federal claim, even if not expressly pleaded; federal counterclaim cannot support removal).
- Analyze the key factors favoring your client's position.
- Analyze the key factors in opposition to your client's position.
- Determine who the key witnesses are and who must be interviewed or deposed.
- Obtain non-documentary tangible evidence and photographs of the site, injury, etc.
- Before sending demand letter, consider possibility that the defendant might file a complaint for declaratory judgment and beat you to the courthouse.
 - First to file usually wins race to the courthouse; arguably service counts too.
- Consider all claims arising out of subject matter, including common law, statutory, and constitutional claims.
- Consider alternative theories: inconsistent theories may be pleaded, but may damage credibility.
 - As to corporations, can the corporate veil be pierced? (Consider successor liability).
 - Are there any guarantors?
 - Attach written instruments to complaint if required.
 - Plead fraud with particularity.
- Consider verified complaint:
 - Useful when seeking TRO.
 - May be useful if Rule 11 or MCR 2.114 are concerns.
 - Disadvantage — it binds client to a position early on in case.
- Consider whether client has counterclaim or set off.
- Counterclaims are compulsory in federal court. Optional in Michigan court, but may be advisable.
- Check rules for list of affirmative defenses, yet rules are not exhaustive.
- All affirmative defenses must be based on reasonable investigation of facts and law.
- Consider cross-claims and/or third party complaints:
 - Indemnity
 - Contribution
 - Cooperation among defendants may be better strategy.
 - Consider separate action.
- In connection with discovery, and especially exchanging documents containing trade secrets, consider confidentiality of client's information. Your response to discovery requests must raise any confidentiality issues, and a protective order must be obtained strictly limiting disclosure (perhaps only to opposing counsel and expert witnesses).
- Consider procedural motions, including venue, forum non conveniens, personal jurisdiction, subject matter jurisdiction, joinder, more definite statement.
- Consider whether and when an expert should be obtained.
- Consider binding arbitration early on to limit attorney fees and expedite resolution.
- Consider non-binding mediation services to facilitate a settlement.
- Consider dispositive motions:
 - Dismissal on face of pleadings.
 - Partial summary disposition.
 - Summary disposition.

having to litigate this kind of matter. Should the client's standard agreements, invoices, etc., be revised to avoid this problem in the future or to strengthen the client's position in the event of future litigation? Setting aside time on a regular basis to brainstorm your cases will make you a much more effective advocate for your client.

Conclusion

Thoroughly discuss and comprehend your client's case and your client's goals. Gain command of the facts and the law. Explore non-litigation solutions and, if necessary, litigate. Litigate hard, but do not lose sight of your goals or your duties to your client, the court, and your adversary.

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