

LEGAL SECRETARIES AND THE LITIGATION TEAM

“New and Improved” Initial Considerations

Fort Worth Professional Legal Secretaries Association
Lunch and Learn - January 16, 2003

John M. Cummings, Esq.

LAW OFFICES OF STEVEN C. LAIRD, P.C.

One Colonial Place
2400 Scott Avenue
Fort Worth, Texas 76103
(817)531-3000
(817)535-3046 – facsimile
Email: cummings@texlawyers.com
Website: www.texlawyers.com

1. Introduction

The legal secretary's role in a case may be overlooked and underappreciated, but it often makes the difference in a successful lawsuit. How can you as a legal secretary sharpen your skills and give your best efforts to this process? This paper provides tips and tools to aide you in investigating and preparing a case, from the first contact with the client through initial pleading preparation.

2. Conducting a Thorough Initial Interview

The initial interview is the first and best opportunity the legal secretary or lawyer has to look impartially and critically at a potential client and case. Keep in mind that the client, whether plaintiff or defendant, is "Exhibit A" to your case. Good facts may not be enough to overcome a bad client, and your job is to get as much information as possible in order to determine both the positive and the negative aspects of a potential case.

Red Flag: Think about your first impression of "Exhibit A." This will probably be similar to the first impression the jury has, as well. Sure, you might be able to clean up the client some before he or she goes in front of a jury, but as one famous trial lawyer said about "dressing up" a distasteful client, "You can put a saddle on a pig and call him 'Trigger,' but he's still a pig." Don't risk losing credibility by trying to make the clients into something they are not.

Now you've met Exhibit A. What next? Your goal is to elicit information, but what exactly are you looking for? In personal injury cases, attorneys on both sides focus primarily on the two main issues of liability and damages. Ask yourself, "Who is at fault, and how badly were others hurt?" From this starting point, you can move forward in time to learn how this incident has affected the client, and backwards in time to learn what the client was like before the incident. Along the way, you discover more and more information, some of it very subtle, which helps you and your lawyer properly evaluate and continually craft the case. You learn of the incident that brought this person to you (the wreck, the surgery, the fall, the breach of contract and so on), and you begin to learn of the severity of the damages. You are gathering the material to weave a story that may someday be told to a jury.

So what are the keys to a successful initial interview?

(a) **Be prepared.** To the greatest extent possible, gather as much information as you can prior to the meeting. Medical records, accident reports, news articles, Internet research, and so forth will help you discuss the case efficiently and effectively. Consider the type of case you are evaluating: Is it a car wreck? Medical malpractice? Business tort? Domestic dispute? What is it about this case that makes it unique? What does the potential client want? Brainstorm with your attorney, if necessary, to come up with a list of topics to cover, particularly in cases that are not routine for your firm. A *client questionnaire* is particularly useful in covering all the topics in a typical case (an example of such a questionnaire is found in Appendix A).

(b) **Be flexible.** The initial interview is often the first contact prospective clients have had with the legal system. They may be intimidated or reluctant or bitter that circumstances necessitate hiring an attorney. They may be desperate, uncertain, or unrealistic. Help them by making the experience as pleasant as possible. Gather as much as you can over the phone, but ultimately meet your clients face-to-face and at their convenience. Consider meeting at their home or other location that may be less intimidating than a law office. Many clients do not care to come “downtown,” and coffee shops, restaurants and familiar landmarks all make ideal meeting places. Think about who else might be present, and how that person’s presence might affect the client’s candor.

(c) **Be empathetic.** Think for a moment about why prospective clients seek an attorney. What brings them to you? What are their expectations of the legal system? What may seem routine or mundane to you may be the most important thing in a person’s life at this moment. How has the underlying problem affected not only this person, but also members of his or her family? Are they in pain? Are they angry? Are they desperate or vindictive? Are they uncertain about the future? Emotions may cloud objectivity, which is all the more reason why you must be impartial. However, you should be sincerely empathetic with their situation and try to understand what they are going through.

(d) **Be thorough.** Assure prospective clients that you are not trying to embarrass them, nor are you prying unnecessarily, but that you will need to ask some tough questions. Prospective clients may only say what they think you want to hear, or what they think will help their case. They may be reluctant to discuss

things which they believe are detrimental. They may fear that your lawyer will not take their case if they disclose bad facts. Remind them that you must get as many facts as possible at the earliest possible time. One of the worst things that happens in a lawsuit is when the other side elicits damaging evidence or testimony (usually in depositions or even in front of the jury) that catches your lawyer unprepared. It can happen to us all, but anything that can be done to minimize the opportunities for surprise will enhance your case, to say the least. The lesson? Think about the story you are weaving, and read between the lines. Ask the tough questions now. You can be sure the other side will ask them later.

Red Flag: If prospective clients are less than truthful with you now, odds are that this will continue. Count on the fact that it *will* be discovered, and the jury will likely punish them for it.

(e) **Be careful.** Make no promises, either about representation or possible outcome of the case. A discussion of the damages typically sought in a particular case may be fine, but DO NOT speculate on the value of a case or the results. If a client hears a figure, particularly in typical personal injury cases with speculative damages such as pain and suffering, that figure will get burned into the client's brain. If your lawyer takes the case and cannot meet unrealistic expectations, he or she must now deal with an unhappy client. Unhappy clients file grievances.

Red Flag: Beware of prospective clients who say they expect no less than a certain amount of money; or worse, when they say something along the lines of, "My brother-in-law was in a car wreck last year and he got a million dollars." They usually have unrealistic expectations of their case.

Red Flag: Similarly, be very wary of prospective clients who say "I talked to another attorney who said this case is easily worth x dollars." Even if it is a good case, your attorney may still face unrealistic expectations. In these cases that I turn down, I usually suggest that the client go back to the other attorney who was so eager to tell them how much the case was worth.

2. Conducting the Initial Investigation

The initial investigation may consume weeks or months as you gather the information necessary to properly evaluate the case. Pay close attention to applicable statutes of limitations and notice periods (discussed in more detail at §4, below), but spend the time and effort to effectively work up the case as early as possible. What you include in the initial investigation often affects the amount of money your lawyer is willing

to invest in the case, and developing a budget is essential. Regardless, there are common things that must be done in every case, whether a minor car wreck or a catastrophic medical malpractice case.

Investigating a case is as important in deciding whether to take a case as it is in actually preparing it for trial. It is far easier for your lawyer to get rid of a bad case prior to signing it up than it is once suit is filed. But assume for the moment that your lawyer has taken the case, and now it is your job to “work it up.” What do you do now? Ask yourself, “What is it that I need to prove my case and where must I look to find it? What makes this case unique? What is persuasive and what is damaging? Where are the strengths and weaknesses of my case and of the other side’s case? What will a jury want to know?”

Brainstorm with others in the office on these issues. Begin researching medical conditions or injuries. Get medical authorizations and employment record authorizations from the client, and gather these records (examples of these forms are found in Appendix B). Get statements from witnesses (see §3, below). View the scene of the accident. Gather photographs. Obtain police reports. Look at the client’s insurance policies. Find out his or her criminal background, past claims or lawsuits and medical history. Spend time getting to know the client, and you will be amazed at what you learn. The best themes and story lines are often developed this way, and personal glimpses into the client’s life may ultimately form the “hook” that draws the jury into finding for your client.

Red Flag: Regarding a client’s “skeletons in the closet,” I promise that they will come out sooner or later. Don’t leave it for your attorney to find out about the really damaging information during cross-examination of “Exhibit A.”

Likewise, find out as much as you can about the potential defendants. If the case justifies the expense, there are numerous computer databases one can access (for a price) that will tell you virtually anything you want to know about someone. Run criminal and civil background checks. Do research on the Internet. Think about the defendants: Who are they? What do they do? What is their story? Is the defendant a sweet grandmotherly type or a faceless, greedy corporation? Where do they live or do business? What is the public’s perception of the defendants? Will they be able to satisfy a judgment against them? Do they have adequate insurance? Are there other lawsuits pending against them? Can you network with other law firms handling

similar cases?

We live in the information age in which there are precious few secrets anymore. If the case bears the expense, consider hiring a private investigator to assist in your investigation. I cannot imagine the case, however, that does not justify “surfing the net” for a few minutes, and several on-line research tools are found in Appendix C to this paper. These suggestions are by no means exhaustive. The key is to be creative and to be thorough. Assume the other side knows everything you do about the parties, and probably more. It is better to over-investigate than to be unprepared later.

3. Obtaining Good Witness Statements

What better way to tell a story than through the eyes of witnesses? The more your client’s story is supported by the observations of others, the stronger and more persuasive that story becomes. When possible, locate witnesses early and find out what they can do to help (or hurt) your case, knowing that their memory was sharper yesterday than today, and sharper today than it will be tomorrow. Promptness is key, as good witnesses may help get the case settled faster and poor witnesses may be dealt with well in advance of trial.

The rules regarding discovery of witness statements have changed recently. With very few exceptions, witness statements are now discoverable and may no longer be withheld under the work-product privilege. Practically speaking, this means that if a witness statement is written or recorded, the other side will get a copy of it. Your notes taken during a conversation or interview, however, are not discoverable. The prudent investigator will find out essentially what a witness will say before it is committed to writing or recorded. In other words, if you know a witness who has knowledge of facts relevant to the lawsuit (thus, one who is identified in response to a request for disclosure), and that person’s statement doesn’t help your case (or worse, it eviscerates your case), you have no duty to memorialize his or her testimony by obtaining a written or recorded statement from that person. However, you should assume that the other side ultimately will elicit that person’s testimony, either in a statement or live at trial.

Assuming you choose to obtain a statement from a witness, think about what you want to accomplish and what this witness can add to your client’s story. Can this witness help you in establishing liability or

damages? Will the testimony help you impeach the other side? What was seen or heard? Does this version of the facts differ from the facts described by your client?

Prior to making the statement, discover the perspective of that particular witness. Then orient the witness to the time and place of the incident. Proceed chronologically. Once you have thoroughly covered his or her observations, commit the statement to writing or record it. Crisp, concise statements focused on what this particular witness observed are most persuasive. Then have the witness review the statement for accuracy.

If you gather multiple statements concerning the same facts, always compare them for consistency.

4. Statutes of Limitations

Nothing passes faster than a statute of limitations. From the very first contact with a client, you must pay particular attention to the applicable statute of limitations and calendar this date in big, bold letters. Will you have enough time to adequately investigate? Do notice letters need to be sent to potential defendants? Has a statute run as to some plaintiffs, but not as to others (e.g., minors or incompetents)? Will your case allege multiple causes of action which have different statutes of limitations?

Red Flag: Beware when prospective clients come to you on the eve of the statute of limitations. This invites disaster, as you and your attorney may simply not be able to adequately investigate and prepare for filing a lawsuit in such a short time.

The general state rules pertaining to statutes of limitations are found in the Texas Civil Practice & Remedies Code, beginning at section 16.001. Other statutes may affect the general rules, so it is important to investigate the causes of action applicable to a particular case and to research the corresponding statute of limitations. Be aware also of possible notice requirements: In some cases, a plaintiff must provide the potential defendant with notice of the claim as a prerequisite to filing suit (for example, claims under the Texas Tort Claims Act, DTPA actions, and medical malpractice claims, to name a few). The plaintiff's failure to give notice within a certain time may simply cause the action to be abated or postponed, or it may result in suit being barred. Pay close attention to the causes of actions contained in your case and research the applicable notice requirements, as well as all statutes of limitations.

It is equally important to be aware of notice requirements and statutes of limitations on the defense side. Counter-claims, cross-claims and third-party claims all must be asserted in a timely manner, and affirmative defenses must be raised.

5. Setting Up the Case File

Once a client is signed up, promptly prepare a standardized case file. Many of the same topics must be covered in virtually every litigation case, and it is easy and efficient to simply prepare the same types of files at the outset of a case. Additional topics should be added, depending on the case, but I find that the following files are helpful in every case:

- Pleadings;
- Discovery;
- Correspondence;
- Attorney's Notes and Memos;
- Legal Research;
- Medical Records;
- Photographs and Witness Statements;
- Expenses;
- Consulting Experts;
- Testifying Experts;
- Privilege Log;
- Exhibits; and
- Local Rules, Court Information and Contact Numbers.

Consider preparing a corresponding trial notebook in a three-ring binder. Divide the notebook into sections, such as:

- Themes;
- Pleadings and Elements of Proof
- Motions in Limine;
- Trial Briefs;
- Witness List;
- Exhibit List;
- Voir Dire;
- Opening Statement;
- Direct Examination;
- Cross Examination;
- Closing Argument;
- Jury Charge; and
- Post-Trial Motions.

Pre-fabricated tabs covering numerous topics can be found at most office supply stores, making the job even easier. Prepare another notebook containing research and trial briefs on anticipated problems. Experiment with what works best for you and your lawyer, and adapt your approach accordingly.

Calendaring is essential in setting up the case file, particularly under the new discovery rules. Pay close attention to the applicable discovery periods in a particular case, and especially observe any scheduling order that may change the general rules. “Tickling” the calendar is a good idea, especially weeks or months in advance of a deadline. The greater your case load, the easier it is to lose track of important dates. Maintain a master calendar that everyone on the litigation team can readily consult, and bring updated copies of the calendar to weekly or monthly status meetings.

Likewise, prepare “to-do” lists. Pre-trial checklists are invaluable in being prepared for trial. Work backwards from a trial date, and calendar 30 days, 60 days, 90 days, etc., until trial. Assign tasks to specific people on your litigation team, with deadlines for completion of each assignment. For example, select calendar dates by which you will supplement discovery responses, meet with witnesses to prepare for trial, have subpoenas prepared and served, have exhibits enlarged, or complete other necessary projects prior to trial.

6. Initial Pleading Preparation

Every lawyer has been told, at one seminar or another, to draft a jury charge at the very outset of a case. Many personal injury lawyers may find this too routine, particularly for a case that they hope will settle. However, a draft of the charge focuses the legal secretary and the lawyer on potential parties, the causes of action that may be asserted, the elements to be proven, the damages sought and the potential venues. It is extremely useful, and even a copy of a charge from a similar case will be instructive as you develop a new case. Remember: anything that helps you develop the client’s story should be utilized.

The careful legal secretary should immediately begin formulating ideas on what claims can be asserted in the petition (or affirmative defenses and counterclaims in the answer, as the case may be), what evidence will be needed to prove the allegations and how to obtain it, a plan for discovery, and each step necessary to prepare the case for trial. The pleadings frame the claims and defenses of the parties, and serve as roadmaps in

the lawsuit. They are dynamic and often evolve over the life of the case; however, every pleading is a good opportunity to tell your client's story, and all should be crafted accordingly. **Remember: You are speaking for your client, and every effort must be made to maximize the impact of his or her story.**