

HANDLING A CIVIL CASE: Personal Injury and Commercial Litigation LECTURE OUTLINE

Wende A. Doniger, Esq.
James F. Fagan, Esq.
A. Craig Purcell, Esq.
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- I. Do I take the case? Intake and Investigation
 - A. The initial interview: Intake Sheet
 1. Just the facts
 2. Meritorious nature of the claims
take a careful history
 - a. Liability
 - b. Damages
 3. Credibility of client
Hint: Find out how many attorneys client
has consulted before you
 4. Conflicts
New Ethics Rules
NY CLS Jud Appx R 1.8
 5. Go with your gut
If you don't like the client, neither will the jury!
 - B. Paperwork
 1. Written Letters of Engagement/Retainers
Requirements:
Judiciary Law Appendix: Part 1215.1
Right to Arbitration:
Judiciary Law Appendix: Part 1230.1
22 N.Y.C.R.R. 137.0
Specify terms of engagement:
Exclude appeals
 2. Authorizations- HIPAA
See Court web site for copy of HIPAA forms

(<http://www.courts.state.ny.us/forms/index.shtml>).
Power of Attorney to sign HIPAA az only

3. Thank you letters
To client: unable to represent you in this matter because ...
To referring attorney

4. OCA Retainer Statements
22 N.Y.C.R.R. 691.20

C. Fee Arrangements:

1. Hourly billing
2. Contingency
Med Mal:
P.I.:
3. Hybrid
4. Flat fee
5. Referral fees
NY CLS Jud Appx R 7.2

D. Other Considerations

1. Time constraints/Statute of Limitations- CPLR Article 2
 - a. Twenty years: CPLR §211
Money Judgments
Support, alimony, maintenance
 - b. Six Years: CPLR §213
Contract, Mistake, Fraud, by Corporation against director, officer or stockholder, *inter alia*
 - c. Three years: CPLR §214
Personal Injury, Property Damage, Malpractice other than Medical, Dental or Podiatric, *inter alia*
 - d. Two years and six months: CPLR §214-a
Medical, Dental or Podiatric Malpractice, with exceptions (e.g., continuous treatment)
 - e. One year: CPLR §215
Assault, Battery, False Imprisonment, Malicious Prosecution, Libel or Slander, Arbitration Award, *inter alia*

- f. Exceptions:
 - (1) New York City: One Year and Ninety Days
General Municipal Law § 50-i
 - (2) New York State: Two Years
Court of Claims Act §10
- f. Conditions Precedent
 - (1) Notice of Claim: within ninety days after claim arises -General Municipal Law §50-e
 - (2) Statutory Hearing –General Municipal Law §50-h
 - (3) Notice of Intent to File a Claim: within ninety days after accrual of claim
Court of Claims Act §10(3)
- g. Tolling provisions: CPLR §208

Always put disclaimer in Retainer Agreement if Statute of Limitations is an issue

Does potential client have standing to bring action?

- 2. Choosing the Proper Court
 - a. Venue: CPLR Article 5
 - (1) Based on Residence - CPLR §503
 - (2) Place of Occurrence - CPLR and CPLR §505 (City of New York, NYCHHC, NYCTA)
 - (3) Municipalities – CPLR §504
 - b. Supreme
 - c. Court of Claims
 - d. Supreme and Court of Claims
- 3. Investigation
 - a. Gathering records
 - b. Identifying witnesses
 - c. Witness Statements
 - d. Photographs
 - e. Special damages
 - f. Experts
 - g. Private Investigators

4. Financial considerations
 - a. Cost of Litigation
 - (1) Private Investigators
 - (2) Medical Records
 - (3) Depositions
 - (4) Experts
 - b. Length of time from investigation to disposition
 - c. Chance of settlement or favorable verdict

II. Starting the Case: Plaintiff

- A. Summons: with Notice or with Complaint -CPLR §305
 1. Either way, have to name defendants
 - a. Consider the order defendants are named
 - b. Priority of depositions
 - c. John and/or Jane Doe's
 - d. Corporate witnesses
 2. How much "notice" is enough notice?
 3. Bare bones complaint is always better than summons with notice, or is it?
- B. Complaint
 1. CPLR §3013 – Purpose of the Complaint.
Give notice of occurrences to be proved and material elements of each cause of action or defense
 2. CPLR §3014 – General requirements for the form of the Complaint
Concise, individual statements or allegations in consecutively numbered paragraphs
Establish jurisdiction, venue, parties, cause(s) of action, damages
 3. CPLR §3015 and CPLR §3016– Specific requirements for pleading particular matters or actions
 4. CPLR §3017 –Demand for relief.
 - a. In commercial litigation, can specify relief to which pleader deems self entitled
 - b. In personal injury or wrongful death actions, cannot specify the amount of damages to which pleader deems self entitled;

only that amount of damages exceeds jurisdictional limits of all lower courts which would otherwise have jurisdiction

- c. party bringing action has fifteen (15) days to respond to supplemental demand for total damages to which pleader deems self entitled

- 5. Certificate of Merit - CPLR §3012-a
Only for malpractice actions

C. Signing Papers

- 1. Attorney Certification - 22 N.Y.C.R.R.130 -1.1-a
 - a. All pleadings, motions and other writings must be signed by attorney, with the name printed or typed below.
 - b. Purpose: Indicates attorney's belief that papers and/or contents are not frivolous.
 - c. Sanctions: Court can strike unsigned papers
- 2. Verifications - CPLR §3020 – CPLR § 3023
 - a. All pleadings and Bills of Particulars in negligence actions must be verified. CPLR §3044
 - b. Attorneys can only verify papers if client is not in county where attorney has her or his office

D. Jurisdiction and Service of Process

- 4. Action commenced by Filing - CPLR §304; CPLR §2102;
22 N.Y.C.R.R. 202.5
 - a. Allows for electronic filing, *inter alia*
 - b. Court may permit errors to be corrected – CPLR §2001
 - c. clerk of court is county clerk, not clerk of supreme court
BUT, papers are to be **filed** with clerk of Supreme court except for the five boroughs
- 5. Index Number CPLR §306-a; 22 N.Y.C.R.R. 202.5
 - a. Plaintiff must pay
 - b. cost is \$210 - CPLR §8018
 - c. Index Number and date of filing must appear on the pleadings to be served

6. Method of Service
 - a. Personal: CPLR §308-312
 - b. Mail: CPLR §312-a

7. Time to complete service of process
 - a. within 120 days of filing - CPLR §306-b
 - b. after 120 days, case dismissed unless application for extension of time to complete service

5. Proof of service
 - a. affidavit of service – CPLR §306
 - b. must be filed with clerk of court within 20 days of service- §308(2) and 308(4)

6. Jurisdictional complications
 - a. acts of non-domiciliaries - CPLR §302
 - b. service outside of New York State – CPLR §313

III. Starting the Case: Defendant

- A. Preliminary Investigation
 1. Review Pleadings and Jurisdictional Issues
 - a. Determine if service proper and timely
 - b. Request extension of time to answer
 - (1) Stipulation
 - (2) Court Order – CPLR §3012(d)
 - c. Demand Complaint - CPLR §3012(b)
 2. Interview client/defendants
 3. Gather documents and records
 4. Interview witnesses
 5. Formulate defenses

- B. Appearance of Defendant
 1. Ways to Appear – CPLR §320
 - a. serving an answer
 - b. serving notice of appearance
 - c. making a motion to dismiss – CPLR 3211(a) which has the effect of extending the time to answer until 10 days after the order is entered.

d. demand for the complaint (without notice of appearance) does not constitute an appearance

2. Purpose and Effect

- a. Prevents default judgments – CPLR §3215
- b. Identifies name and address of attorney for service
- c. Confers personal jurisdiction over defendant by waiving defects in basis and method of service

C. Drafting the Answer

- 1. CPLR §3018(a) – Responses: deny, deny knowledge or information, admit
- 2. CPLR §3018(b) - Affirmative Defenses: *e.g.*, collateral estoppel, culpable conduct, *res judicata*, statute of limitations, lack of personal jurisdiction, etc.

Warning: Certain defenses are waived if not raised in the answer or included in a CPLR §3211 Motion to Dismiss.

Warning: Affirmative defense of lack of personal jurisdiction is waived if defendant does not move to dismiss on that basis within sixty days of service of the answer.

3. CPLR §3011 and 3019 – Counterclaims and cross-claims

Warning: A cause of action raised in a counterclaim must be responded to as if it were a complaint. If no reply or answer is served, the cause of action could be deemed admitted.

D. Default judgment

- 1. CPLR §3215
- 2. CPLR §317

IV. Discovery

A.

Defendant's Demands

- 1. Bill of Particulars: CPLR §3042; 3043*

An amplification of the pleadings which is related to burden of proof and not to obtaining evidence.

2. Omnibus Demands for Documents and Things: CPLR §3120 *
 - a. Witnesses
 - b. Photographs, videotapes, audiotapes
 - c. Statements
 - d. Collateral Sources
 - e. Authorizations for Medical Records
 - f. Employment Records
 - g. Documents, records, memoranda, correspondence...
 3. Interrogatories: CPLR §3130 – 3133
 - a. requests written answers as well as copies of papers, documents, photographs, etc
 - b. cannot be used with Bill of Particulars, except in matrimonial actions
 - c. cannot be used with a deposition in a negligence action, without leave of court
 4. Notice of Taking Deposition: CPLR §3107 – 3114
 - a. Videotaped: 22 N.Y.C.R.R. §202.15
 - b. Transcribed
 - c. Can also request production of books, papers, documents and other things to be produced at deposition
 5. Demand for Expert Disclosure: CPLR §3101(d)*
 6. Notice re service by fax CPLR: §2103(b)(5)
 7. Notice of Physical or Mental Examination: CPLR §3121
- B. Plaintiff's Demands
1. Bill of Particulars for the Affirmative Defenses: CPLR §3042
Same as above
 2. Omnibus Demands for Documents and Things: CPLR §3120
 - a. Witnesses

- b. Photographs videotapes, audiotapes
 - c. Statements
 - d. Collateral Sources
 - e. Medical Records
 - f. Employment records
 - g. Contents of Insurance Agreement
 - h. Demand for Accident Reports
 - i. Documents, records, memoranda, correspondence...
- 3. Interrogatories: CPLR §3130 – 3133
Same as above
 - 4. Notice of Taking Deposition: CPLR §3107 – 3114
Same as above
 - 5. Demand for Expert Disclosure: CPLR §3101(d)
 - 6. Notice re service by fax CPLR: §2103(b)(5)

C. Responses from either party

- 1. Bill of Particulars: CPLR §3043
 - a. respond within 30 days by complying with each item or
 - b. object to specific items within 30 days, by stating reasons for objection to each item with reasonable particularity
- 2. Protective Orders: CPLR §3103
 - a. can be used for any disclosure device
 - b. service of motion suspends disclosure of matters in dispute
 - c. best to make motion before time to respond has expired, but not required;
can also move to suppress disclosure that was obtained but prejudices substantial right of party
- 3. Written objections to disclosure: CPLR §3122
 - a. within 20 days of service of demand, serve written response which specifies with reasonable particularity the reasons for each objection to disclosure, inspection or examination and/or the legal ground for withholding each document

- b. can be used for a notice or subpoena *duces tecum*

4. Compliance

- a. within 20 days, unless an extension of time has been obtained by stipulation or court order
- b. copies of documents can be provided: CPLR §3122
- c. business records must be certified: CPLR §3122-a

D. Discovery from a Non-Party

1. Scope of Subpoena: CPLR §2301

- a. subpoena requires attendance of a person to give testimony
- b. subpoena *duces tecum* requires production of books, papers and things
- c. trial subpoena requires production of papers or other items to court

2. Authority to Issue Subpoena: CPLR § 2302

- a. can be issued by attorney of record for any party, *inter alia*, in certain circumstances
- b. court order required for production original documents, certified documents to be admitted into evidence, prisoners, *inter alia*

3. Service of Subpoena: CPLR § 2303 and 2303-a

- a. Served like a Summons except do not have to file affidavit of service
- b. Any person subpoenaed shall be paid for each day's witness fee (\$18.00) plus travel expenses
- c. Copies of any and all subpoena *duces tecum* in civil action shall also be served on each party who has appeared in the action so that it is received after service on the witness and before production of books, papers and other things
- d. Trial subpoena for party or person within party's control can be served on attorney pursuant to CPLR §2103(b)

4. Hospital records or medical records from municipality: CPLR §2306
 - a. must be “so-ordered” by court
 - b. must be served at least three days prior to production
 - c. HIPAA az may be required for medical records

5. Records from municipality or the state: CPLR §2307
 - a. must be “so ordered” by the court.
 - b. motion for subpoena must be made with one-day’s notice to the government agency as well as to the adverse party –
Usually telephone legal department of the government agency involved and fax copy of subpoena to your adversary, giving notice of date and time you will be presenting the subpoena to court to be “so ordered”.
 - c. many courts require an affirmation attesting to the fact that such notice was given, before they will “so order” the subpoena.

6. Discovery Subpoena :CPLR §3120
 - a. Must serve copy of subpoena *duces tecum* for documents on all parties at same time as subpoena issued, and within five days of compliance, must give notice to each party that items produced are available for inspection and copying, pursuant to CPLR §3120(3)

7. Motion to quash, fix conditions or modify: CPLR §2304

V. Court Intervention

- A. Request for Judicial Intervention (\$95.00)

- B. Preliminary Conference Order
22 N.Y.C.R.R. 202.14

- C. Motions (\$45.00)
 1. Common types of motions
 - a. CPLR §511 – Change of Venue
 - b. CPLR §3211 – Dismiss Action
 - c. CPLR §3212 – Summary Judgment*

- d. CPLR §3215 – Default Judgment
- e. CPLR §3103 – Protective Orders
- f. CPLR §3124 – Compel Disclosure
- g. CPLR §3126 – Penalties for failure to Disclose
 - resolving issues in favor of movant
 - preclusion order
 - striking the pleadings, dismissing the action
 - default judgment.
- h. 22 N.Y.C.R.R. 130-1.2- Costs and Sanctions

NOTE: Affirmations of good faith are required on motions for Discovery and bills of particulars.

2. Cross-Motions

- a. notice must be served between three and seven days prior to return date of motion, depending upon service of motion
CPLR R 2215 and 2214
- b. notice of cross-motion can be served without supporting documents

3. Orders to Show Cause

- a. must give notice to all parties if seeking injunctive relief, unless can demonstrate significant prejudice to party seeking relief if notice were given: 22 N.Y.C.R.R. 202.7; CPLR §6313

D. Conference Calls

Some judges love them; some don't.

D. Courtroom manners

e.g. Always be respectful to court and court personnel
Be on time, or call court and adversary if late

VI. Depositions

A. Scheduling the Deposition

1. On Notice

- a. Priority – CPLR §3106(a)
- b. Form of Notice - CPLR §3107
- c. Non-Parties - CPLR §3106(b), 3107, 2303(a), 8001

d. Videotaped Depositions- CPLR §3113(b) ;
22 N.Y.C.R.R. 202.15

2. Pursuant to Order

Hint: Check individual judge's rules before adjourning
Court- ordered ebt's, even on consent

B. Defending the Deposition

1. Review the file
2. Meet with client, preferably at least 24 hours before ebt
3. Review facts with client
4. Familiarize client with what to expect
5. Review exhibits
6. Discuss objections, privileges, strategies, theory of the case
7. Warnings to client

C. Taking the Deposition

1. Order reporter
2. Review the file
3. Make outline or notes
4. Gather exhibits
5. Get individual judge's rules and phone number
6. Objections: 22 N.Y.C.R.R. 221; CPLR §3113
 - a. speaking objections restricted
 - b. Usual Stips
 - c. Proper Objections
 - (1) Form
 - (2) Self-Incrimination-CPLR §4501
 - (3) Privileged Communications-CPLR §4502-4505: 4507-4508
 - (4) Palpably Improper
 - (5) Other
 - c. Improper Objections
 - (1) Irrelevant
 - (2) Hearsay
 - (3) "Oh come on!"
 - (4) "I instruct witness not to answer that question."
 - (5) "Mark it for a ruling."

- D. After the Deposition
 - 1. Review your notes
 - 2. Follow up on new discovery needed
 - 3. Read the transcript:
 - 4. Determine if motion is warranted
 - 5. Forward to witness for execution: CPLR R 3116
 - a. can make any changes to form or substance
 - b. must include reason for making changes
 - c. must be done within 60 days after submission

VI. Getting Your Case on the Trial Calendar

- A. Certification Conference and Order
- B. Review and Update Bill of Particulars
- C. File Note of Issue, Certificate of Readiness, Jury Demand
- D. Serve Expert Disclosure
- E. Prepare for Summary Judgment Motions
- F. Pray.

VII. Concluding Remarks

GOOD LUCK!

*Statutes recently amended.