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HOW TO LOOK PREPARED AT YOUR FIRST TRIAL

(OR, HOW TO HANDLE THE STUFF YOU DIDN'T SEE COMING)

BY PHIL AURBACH, ESQ.

Some attorneys are really smart: they remember facts and can recite case holdings as if the details were branded into their brains. (I did not fall into this category, and the more my hair turned gray, the more time it took for the neurons to connect.) Some call this a "bathtub memory." It fills up prior to a trial, and when the trial is finished or continued, the plug is pulled, the bath is drained and, later, it must be refilled again. Even with a good memory, the more clients you get, the harder it is to remain organized unless you have a system in place. If an attorney starts organizing the facts and the law from the initial client interview, and continues to do so through the end of the trial, the probability of that attorney winning increases. This article contains tips on organizing facts and law, so that your first trial will be, if not incredibly successful, then at least not embarrassing.

INITIAL CLIENT INTERVIEW AND TRIAL PREPARATION

1. **Get the Facts Straight:** When the client comes in your door, get the facts. Seems simple, but unfortunately the facts are usually numerous and often also somewhat fluid. Something that seems trivial at first might become critical as motions are filed and trial nears. It is always good to have the client confirm that the facts are correct. Some clients can email a detailed chronology, others require you to take notes and then send them an email confirming the facts, but utilizing one of these techniques will help when you are preparing for trial. You can review these facts later to refresh your memory about the details.

2. **Know Your Client's Goals:** I am amazed at how often some attorneys believe their client's goal is X, only to find out after putting in a lot of hard work toward that goal, the client really just wants Y.

3. **Where Do You Put the Facts?** Once you have a set of facts, you need to organize them according to where you got them: facts from your client, your opponent and those from third-party witnesses like experts. You need a way to organize the

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facts you've accumulated and the law you have researched. You also need a place to put notes that pop into your brain. There are about as many ways to organize a new case as there are attorneys. Many attorneys try to keep the facts in their head. This technique can work very well, but only if you have just one case. If, as is more likely, that is not the situation, you can always:


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- Put everything on a yellow pad and have several yellow pads per case;
- Put things in manila folders and then into a banker's box;
- Put them into a Word document, an Excel spreadsheet or a specialty computer program like Casemap; or
- Create a Microsoft OneNote for each case.

4. Drafting a Complaint

a. Business information sheet

Before any lawsuit (or answer) is filed, you first must determine the precisely correct spelling of the plaintiff and defendant's names. Not many events are as embarrassing as having a client who pays you every dime of your fees and costs for a judgment, and finding out later that you didn't name the correct defendant or that you didn't correctly name your client. Therefore, go to the Nevada Secretary of State website, do a business entity search for your client, all plaintiffs and all defendants, and then make sure you are 100 percent accurate on the plaintiff and defendant's names. You might have to go to the Clark County Clerk's website and search for fictitious names. According to NRS Chapter 602, one cannot file suit or maintain a lawsuit if doing business under a fictitious name, unless one has filed a certificate of fictitious name with the county (and/or renewed it every three years).

b. Comes now Plaintiff

This allegation is not necessary. Why not say this: "Plaintiff, through its attorneys, alleges as follows."

c. Plaintiff is a Resident of Clark County, Nevada

This allegation is generally not necessary. This allegation is a throwback from a time when almost all attorneys had some part of their practice devoted to divorce law. In the '30s, Nevada legalized gambling and adopted no-fault divorce. As long as the plaintiffs seeking divorces could testify that they moved to Nevada with the intent to make Nevada their home and residence, and that they had been physically present in Nevada for six weeks prior to the complaint being filed, except for brief vacation periods (see NRS 10.155), the court had in rem jurisdiction over the marriage to grant a divorce. Thus, the person seeking the divorce would always have to allege that plaintiff was a resident. When attorneys started drafting a complaint for torts, contracts, etc., they would use a form complaint that worked well for them. However, NRCP Rule 9(a) states that you do not need to plead capacity

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to sue (unless it is a divorce complaint in which an allegation relating to in rem jurisdiction is required, i.e. the plaintiff is a resident).

d. Contract Claims

In a contract action, the plaintiff must allege that "all conditions precedent have been satisfied or excused." See NRCP Rule 9(c).

e. Pleading Damages

NRCP Rule 8(a) states that if the claim is for "damages of more than $10,000," the demand shall be for damages "in excess of $10,000" without further specification of amount. This is a little confusing because the Nevada Supreme Court's Rules Governing Arbitration and Mediation (NAR) state that cases with a probable value over $50,000 (in 2007) are sent to the non-binding, court-annexed arbitration program unless you opt out.

f. Service by Publication

One would think that NRCP Rule 4(e) would contain all of the rules relating to publication of a summons. Nope. NRCP Rule 4(b) states "When service of the summons is made by publication, the summons shall, in addition to any special statutory requirements, also contain a brief statement of the object of the action substantially as follows: "This action is brought to recover a judgment dissolving the contract of marriage (or bonds of matrimony) existing between you and the plaintiff," or "foreclosing the mortgage of plaintiff upon the land (or other property) described in complaint," or as the case may be.

g. Statement of Facts

Put some thought behind the Statement of Facts in a complaint. Try to structure the facts in a complaint in discrete paragraphs to elicit an admission or denial of that precise fact. It is especially important to always have exhibits in their own separately-numbered paragraphs by alleging: "A true, accurate and authentic copy of the contract/letter/CC&Rs etc. is attached hereto, labeled Exhibit 2, and incorporated herein by this reference." If the defendant admits this paragraph, the plaintiff does not have the evidentiary obligation to authenticate that evidence at the time of trial. NRS 52.015 requires authentication as a condition precedent to admissibility.

h. Stop Using Affidavits

Affidavits (which require a notary) should only be used if you want the person to prove who they are in front of a notary. "Declarations" should replace affidavits in motions and other pleadings. NRS 53.045 was added to the NRS in 2001, and it specifically allows this change and provides a form. The Nevada statute was enacted because of a federal statute (enacted in October of 1976—we are prompt in Nevada) that mandated this change: 28 U.S.C. § 1746 dealing with unsworn declarations under penalty of perjury. Hopefully you have read this paragraph, because one of our local rules, EDCR 2.21(b), states that each affidavit/declaration "shall identify the affiant/declarant, the party on whose behalf it is submitted, and the motion or application to which it pertains and must be served and filed with the motion, opposition, or reply to which it relates." Otherwise, it can be stricken. EDCR 2.21(c). NL

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