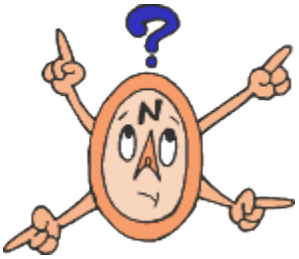
Planning for Battle



Know Where You're Going Before You Begin

Planning Overview

Only foolish people start a journey without first deciding what path will get them to their desired destination.

Foolish people get lost in court because they don't plan ahead.

Losing isn't fun.

That's why planning is *essential.*

Before setting off on *any* adventure, it's always a good idea to know what you'll have to do to get where you're trying to go.

When the adventure is trying to win legal battles in court, it's a good idea to write it all down *before* you begin ... step-by-step ... the way this course teaches everything!

Step one. Step two. Step three. And so forth!

Don't wait till battles are raging hot and heavy before deciding what you must to do to win the war. Court battles require proper planning, and proper planning requires *writing things down* ... ***before you begin.***

This is true for criminal defendants and for plaintiffs and defendants in civil cases.

The fundamentals are the same for all three, with a few minor differences explained by this class in simple detail you will easily understand.

You will learn how to plan, why it's important, and what to do in the midst of the struggle when a change in circumstances requires you to change your plan down the road.

In the following sections you will learn how to plan.

Please do as this class teaches.

Plan ahead so you don't lose!

Keeping Track

Names, dates, times, what people say, what people do or don't do, and other such facts are too easily forgotten. Those things can be evidence to help you win your case. You cannot afford to forget them.

Papers and other documents are lost, displaced, or just ignored as unimportant and tossed in the trash bin. Those papers and documents can be evidence later on. When you are in the midst of fighting your legal battle hot-and-heavy is not the time to wish you had preserved those papers and documents.

You need to keep track ... from the very start!

Notebook

Keeping a special notebook as your legal diary is essential.

Every event that might later be important to your cause must be remembered. If you're like most of us, you don't remember everything that happens ... even when you try hard to do so. Like most of us, you need a written record so important events don't slip through the memory cracks and get lost forever.

Here are a few things that can become critical evidence in your case, things you may need when the fight begins, things that can make the difference between winning and losing:

- dates and times of events
- names and descriptions of people and places
- things people say, including you
- things people do, including you
- the weather
- news that may relate to your case
- when mail is sent and received
- when email is sent and received
- etcetera

If you're not sure about something, *record it!*

File Folders

You absolutely must start and keep an organized file system dedicated to your case.

Use lots of file folders, instead of jamming everything in a single folder or (God forbid) cardboard box, manila envelope, or old grocery bag. There's not much point saving things if you won't be able to find them later on when you need them. File folders and the little tabs that let you label what's in them are not expensive. What's expensive is losing your case. Spend the money. Do the work.

Your system need to store documents, originals and copies, such as these:

- letters sent and received
- copies of emails sent and received
- canceled checks and bank statements
- invoices and demand letters

- applications for credit
- contracts signed and unsigned
- insurance policies
- envelopes bearing addresses and postmarks
- etcetera

Keeping track may be a lot of work, but case-winners do keep track.

You won't know how much record-keeping can pay off until you are cross-examining a witness or objecting to the judge and remember that certain piece of paper you wisely saved in your file or the name of a particular person, where they were, what they did, where they were, what they said and to whom. If you have that information in your notebook, you can grab the notebook, turn right to it, and make points that can mean the difference between winning and losing.

From the moment you suspect you may end up in a legal battle, start keeping track of everything ... even things that don't seem like they might be needed as evidence later on.

You never know!

Be prepared!

Planning for Plaintiffs

Before beginning to draft *any* pleadings (Complaint, Petition, etc.), plaintiff should *always* do the planning outlined here. Plaintiff should have the “big picture” in mind *before* beginning (keeping an open mind toward surprise bumps in the road that will surely come once the game is afoot). Plaintiff should *always* have a clear unobstructed and uncluttered overview of the *complete* case firmly in mind *before* attempting to draft any documents ... and most certainly before filing *anything!*

1. Plaintiff should first of all determine from the fact circumstance of his case (i.e., what happened that caused plaintiff’s damages), *all* possible cause(s), of action plaintiff may have. Repeat: *all* possible causes of action. These should be listed on a single sheet of paper. These are the *possible* causes of action only.
2. Plaintiff should then (and only then), choose those causes that *will* or are *most likely* to win the case. If there are other causes that *might* win but will not gain plaintiff more money damages (or desired injunctive relief), toss them out. They will only clutter the playing field and give defendant opportunities to muddy the waters with obfuscation and cause extra unnecessary work and risk for the plaintiff.
3. Print the name of each selected cause at the top of a separate sheet of paper. Keep everything related to each such cause *separate* from the other causes, i.e., *separate* sheets of paper. Each selected cause of action stands on its own footing. None is dependent on others. They may share some facts of the case, but they stand alone, so treat them as separate *at all times during the proceedings.*
4. For each selected cause of action, list the essential elements on that same separate sheet of paper (essential elements, not facts). Most causes of action have only three or four essential elements (e.g., Breach of Contract: existence of an enforceable contract, defendant’s action or failure to

act that resulted in breach of what was promised, and plaintiff's money damages). Do *not* list the facts here. Just list the essential elements for each separate cause of action. (The elements for causes of action may be found in the course, in published appellate court opinions, and in statutes or codes.) Be absolutely *certain* to list the essential elements required by courts in the plaintiff's jurisdiction. Not all state and federal courts follow the same set of elements for different causes. Check the *official* law before deciding which elements are essential for each cause.

5. For each essential element of each separate cause (on each separate sheet of paper), list the actual facts of plaintiff's case that are required by controlling law to satisfy the essential requirements of each element. List no facts that are not required to satisfy the requirements of any element; they only get in the way. Have a plan. Work the plan. Everything else must be kicked to the curb.
6. For each fact listed for each cause of action, decide which discovery tool will most efficiently get each such fact into the court record. Give priority to the three (3) *written* tools, e.g., Request for Admissions, Request for Production, and Interrogatories. Plan to use these three first. Only use depositions *after* getting everything into the court record that can be gotten in using the three (3) *written* tools. When defendant drags his feet (as he most assuredly will do), *promptly* use the procedures taught in the course to *compel* full compliance with the discovery rules published in your jurisdiction *without unnecessary delay*. Only use subpoenas to non-parties or special court orders if there is *no other way* to get necessary essential facts into the court record.
7. *Only now* is plaintiff ready to draft a Complaint or Petition using what's taught in the course about drafting legal documents and, in particular, pleadings. Until foregoing is complete, plaintiff should *not* proceed to the drafting phase. *Nothing* should be done until the planning phase is complete with all causes listed, all required elements listed, all essential facts that *need to be proved* listed, and all three (3) written discovery tools listed each with the respective facts plaintiff hopes to get into the court record using each such written discovery tool (keeping in mind the limited number of discovery tools allowed by official rules in plaintiff's jurisdiction).
8. If plaintiff's jurisdiction allows written discovery to be served on defendant along with the Summons and Complaint at the outset of the case (instead of delayed until later as it is in some courts), it is *always* a good idea to serve discovery *at the same time as* the summons and pleadings. Many cases are settled without delay and without the risk of going to costly and time-consuming battle if plaintiff makes *crystal clear* from the outset what plaintiff is going after, what he intends to prove by admissible facts, and how he intends to get those facts into the court record. Typically, defendant (and not his lawyer) is the *first to see* the initial papers when they are served on him, and the defendant (and not his lawyer) will *always* prefer to settle immediately if it appears from the initial documents it will save him money in the long run. Once defendant's lawyer gets hold of the initial papers, however, you can bet your bottom dollar that the defendant's lawyer will be anxious to take the case to trial, promising his client the moon (even if he knows he cannot win), because that is how lawyers make money. Lawyers make nothing if their clients settle. Serving the defendant with excellent pleadings and carefully written discovery requests along with the clerk's summons at the very outset is *always* a good idea, because it frequently results in early settlement offers from thrifty defendants who haven't

yet been hornswoggled by their lawyer. (If the rules of the jurisdiction allow, add a personal note to the defendant explaining why it is in the defendant's best interest to consider settlement *before* consulting a lawyer who would likely *not* want to settle and lose the money the lawyer would gain from turning the case into a protracted legal nightmare.)

That's plaintiff’s suggested planning procedure in a nutshell.

Every plaintiff in every civil lawsuit should follow this outline *to the letter.* Failure to do so opens plaintiff to problems down the road, problems that could easily have been avoided by detailed planning. Cases can be filed and closed favorably and quickly when plaintiff does his homework *before* taking his case to court.

Plaintiffs who try to “shoot from the hip”, without careful planning as outlined here, ultimately get ambushed later on, *because they did not have a clear view of the path ahead and what needed to be done to win!*

Planning for Civil Defendants

Civil defendants begin planning by carefully studying the allegations in plaintiff's complaint:

1. Jurisdictional Allegations
2. Factual Allegations
3. Causes of Action

From the outset if the plaintiff's allegations do not meet the requirements that give the court jurisdiction over the case or the parties, defendant should immediately file a Motion to Dismiss for Lack of Jurisdiction. The motion should be promptly set for hearing (unless defendant wishes to delay proceedings in hopes plaintiff will give up or run out of money to pay plaintiff's lawyer, in which case defendant should wait for plaintiff to set the motion for hearing). Motions remain on the court calendar until a judge rules on them. In most jurisdictions, it is improper for the court to set a case for trial when there remain pending motions on which the court has not yet ruled.

If any *material* allegation of plaintiff's complaint is unclear such that no reasonable person would understand precisely what plaintiff is "getting at" with his complaint, defendant should immediately file a Motion for More Definite Statement.

If any portion of the plaintiff's complaint is immaterial, impertinent, or scandalous, defendant should immediately file a Motion to Strike those portions.

1. Before starting off on "defense" it is imperative that defendants first attempt to go on the "offense" if possible. That begins with an analysis of the causes of action alleged by the plaintiff in his complaint. What causes of action does plaintiff allege? Write the name of each such cause at the top of a single separate sheet of paper. This is the beginning of your plan.
2. For each cause of action written on each separate sheet of paper, list the essential elements for that particular cause. (See the class in this course on Causes of Action.) As stated above in planning for plaintiffs, essential elements of causes of action *are not facts.* The elements are the *essential* things each cause of action must allege and prove in order to win. As stated above in

the plaintiff's planning section, a cause of action for breach of contract must allege at a minimum (1) existence of an enforceable contract, (2) defendant’s action or failure to act that resulted in breach of what was promised, and (3) how and to what degree the breach cost plaintiff money.

3. For each element of each cause of action, list the facts alleged by the plaintiff in support. If any required fact is missing, then plaintiff has failed to state that cause of action. Defendant should immediately file a Motion to Dismiss for Failure to State a Cause of Action with regard to each cause that is not supported by the necessary fact allegations. This is critical. Defendant may choose to set this motion for hearing or delay. (See section above on planning for plaintiffs.)
4. At this point defendant knows what plaintiff must prove to win the case. Defendant has a list of the facts plaintiff must prove. This is an essential step in planning, because it goes to the heart of effective legal defense work. You dare not merely defend based on "the law" of the case and how you "think" the law should be applied. Wise defendants strike out to show the plaintiff cannot prove the essential facts alleged in the plaintiff's complaint. Only the essential facts matter. Nothing else does.
5. If the motions mentioned above fail to make the plaintiff's case go away so that an Answer must be filed, defendant dare not fail to file Affirmative Defenses with defendant's Answer (or defendant may lose the opportunity to do so at a later time). See the class in this course on Affirmative Defenses.
6. If the motions mentioned above fail to make the plaintiff's case go away so that an Answer must be filed, defendant dare not fail to file a Counterclaim, if the facts of the case provide grounds for defendant to sue the plaintiff (or defendant may lose the opportunity to do so at a later time). See the class in this course on Pleadings.
7. If the motions mentioned above fail to make the plaintiff's case go away so that an Answer must be filed, defendant dare not fail to file a Third-Party Complaint, if any part or all of the damages plaintiff seeks were caused by one or more others who contributed in whole or in part to the plaintiff's losses (or defendant may lose the opportunity to do so at a later time). See the class in this course on Pleadings.
8. For each of the foregoing steps do not fail to *write everything down neatly in an organized manner using lots of paper.* (Paper is cheap. Losing isn't.)

Planning for Criminal Defendants

Criminal defendants' planning is substantially different, but in some ways follows the same logic.

Every crime or misdemeanor has "essential elements", just like civil causes of action.

1. On separate pieces of paper list each charge.
2. For each charge list the "essential elements" as stated in the code or statute upon which the prosecutor is relying. This is essential. Do not fail to do the research. Your freedom depends on it. For a charge of murder, for example, the elements include at a minimum (1) somebody died, (2) the defendant accused caused the death, and (3) it was no accident. There may be more, but you get the idea. Every crime or misdemeanor has essential elements that the prosecutor must prove by presenting admissible fact evidence to get a conviction. Do not fail to do the research

in your jurisdiction to find *and list* the essential elements the prosecutor must prove ... *if you enjoy your freedom.*

3. For each essential element of each charge, list all facts that the prosecutor is basing the charge upon (insomuch as you know what they are). If you do not yet know what they are, *find out* using the Rules of Criminal Procedure and Rules of Evidence in the court's jurisdiction. You are entitled to know what those facts are! Find out *before trial.* If you are stuck with a public defender or are paying a lawyer to defend you, *make absolutely certain your counselor finds out what those facts are and identifies all persons having any knowledge of them so you are properly defended!*
4. For each fact the prosecutor must prove, list the names, addresses, phone numbers, occupation, and all other information you can get on all persons having *direct knowledge* of each such fact. These people may be all the defense you can get. You must find them and, if possible, question each of them under oath *prior to trial.* Always refer to your local Rules of Criminal Procedure and Rules of Evidence when engaged in this process. If you are incarcerated, make certain someone else does this work!
5. If you can present an "alternate theory" explaining the charge, identify all persons and facts supporting that alternate theory. When you are charged in a criminal case, the prosecutor has a burden to prove all essential facts that support the elements of every charge *and do so beyond and to the exclusion of any reasonable doubt.* If there is more than one way to look at the facts that does not involve your guilt, e.g., the event or events for which you are charged could have resulted from a *different set of facts or the actions of other people,* then if you can get those facts in the record by introducing "admissible evidence" according to the rules, no conviction should be entered against you. An alternate theory creates "reasonable doubt", if the facts of the alternate theory are, in fact, "reasonable".
6. Write everything down *before* taking any steps toward arguing in court.
7. Plan!

Conclusion

When I was a lad of 15 in my high school shop class, Mr. DeWitt, our beloved shop teacher, *required* us who wanted to build something to first make a drawing. He *required* us to have a plan *before* beginning work on any project.

I remember once I wanted to use the turret lathe to make a center punch out of a length of octagon steel. I knew how to do it. I knew what it would look like. I knew how to use the turret lathe. But, Mr. Dewitt said, "Where is your drawing?"

"But sir," I replied. "It's simple. I don't need a drawing."

"You do in here, Graves," was his stentorian reply.

So I went to the drawing board. Set up my T-square, sharpened my pencil, and made the drawing he required.

When he approved the drawing, I then chucked up a length of octagon steel, set my angles according to the lines in my drawing, and turned out what I thought was as perfect a center punch as anyone could reasonably ask for.

Mr. DeWitt then suggested we try it. So, he picked up a 5-pound sledge and attempted to dent a dimple in the shop anvil with my perfectly-pointed center punch. When he struck the back end of my punch with the sledge my beautiful point at the other end flattened out like a mushroom. My "perfect" punch was now uselessness.

So, back to the lathe and, with my drawing, I restored the point to perfection once again.

That old man (whom I will lovingly remember till my dying day) then showed me how to temper my punch properly. He heated the end to cherry red hot with an acetylene torch, plunged it halfway in a pail of heavy oil, then heated it to bright red again at the very tip, and finally touched just the glowing tip to a pail of ice cold water.

The tip of my punch was now perfectly hard as well as perfectly pointed.

I used that old punch for many years thereafter, putting it to hard use in my boat building days, punching dimples in steel and other metals.

That punch *never* got dull.

It was perfect.

I learned from Mr. Dewitt that it's not only practice that makes perfect. Planning makes perfect, also.

If you must fight for your rights in court, write everything down. Make a plan.

As a wise old Navy Master Chief taught me more than 50 years ago, "Make a plan. Work your plan!"

Planning makes perfect.

Especially in court.