

**Chapter 6**  
**THE DEFENDANT STRIKES BACK:**  
**RESPONDING ON BEHALF OF A CLIENT WHO HAS BEEN SUED**

**I. RECOMMENDED POINTS OF EMPHASIS**

**[BOLDED QUESTIONS IN THIS SECTION ARE NEW QUESTIONS, NOT IN THE CASEBOOK, THAT COULD BE USEFUL FOR INTRODUCING THE TOPIC]**

This chapter requires the reader to change hats. She has been the associate handling the case for Sally up to this point. From the beginning of the chapter at p. 121, however, the reader is now told she must consider what it would be like to be a lawyer for any of the three defendants.

**Professional Identity Question (p. 134)<sup>1</sup>**

**If you had no basis for asserting personal jurisdiction over a defendant in the forum in which you want to sue, would you consider filing such a suit appropriate? Could you justify the filing based on the possibility that the defendant would waive the personal jurisdiction defense by failing to raise the defense in a timely fashion?**

*As indicated elsewhere, an ABA opinion has in an analogous context opined that one can assert a claim that is beyond the statute of limitations because the defense is one that has to be raised by the defendant. In other words, if the defendant fails to raise the defense, it is waived. In the scenario just explained, the plaintiff has a valid claim and only a defense will defeat it (a waivable one). If one were to analogize to this situation for the case where the plaintiff has valid claims, just no basis for personal jurisdiction, one may think twice before filing there. Although personal jurisdiction does not need to be alleged, and is a defense that the defendant must raise early or waive, there is a difference. The plaintiff in the Professional Identity Question is bringing a party from another state into her state. If that defendant shows up, challenges jurisdiction, and wins, most states have some version of Rule 11 under which the defendant could challenge the plaintiff's basis in law and fact for personal jurisdiction and seek recovery of expenses in filing the motion. Conversely, one could argue that the situation is completely analogous to the statute of limitations defense and that, if the defendant waives personal jurisdiction, the case will stay where filed.*

*I let students go back and forth on this one for a while. Usually there will be students on both sides. I'll then add questions like: “How would it sit with you if you knew that everyone—the court, the defendant, etc.—anticipates that you’re filing in an appropriate court, and in fact you know that you are not but are hoping the defendant drops the ball?” “Is there anything sneaky about that?” “Do you want to become known by judges and*

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<sup>1</sup> The Model Answers, provided within the Teacher's Manual to *Civil Procedure for All States*, are supplied as the examples here. The Model Answers are being used in lieu of private and personal responses from students.



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**lawyers as the lawyer who has no problem with sneaky tactics?”** Usually such questions make students think more deeply about the question, and about how they want to practice - one of the primary goals of the professional identity questions. Students may not at first come to a conclusion that, over time, they end up adopting. But if we start the process, then they can develop a sense of the values that they want to stand for. Few truly respected, effective lawyers make a practice out of filing suits in courts in which they know the court lacks jurisdiction. Whether that is because they simply believe that as part of the good faith assertion of facts and law, implicitly filing in a court is saying that it is a proper court. Or it could be because they know that, in most cases, it is a waste of time to start in the wrong court because the defendants are not likely to miss the defense and one starts a case by losing and having the case dismissed. Then the lawyer has to regroup and refile. If like me you believe in keeping momentum and leverage in a case, then you would not set your client up to lose so easily. Instead, you would choose the optimal forum among the choices with personal jurisdiction and venue. Then you pour it on the opponent by pushing for a tight trial schedule, issuing discovery, and aggressively pursuing the case. In the long run, that approach is more likely to put one's client in a position to settle favorably, or to go to trial and win, than to play cute games at the beginning of a case trying to trick the defendant.

#### **Professional Identity Question (p. 149)**

**In answering, some lawyers deny every fact in a complaint, regardless of whether their clients have affirmed the accuracy of the plaintiff's allegation. The rationale of such lawyers is that most courts expect the defendant to deny allegations in a complaint and are unlikely to sanction the lawyer for denying such facts. However, if your client makes clear that a fact alleged is accurate—or if the fact is undeniable in light of, for example, physical conditions (e.g., a street runs north), would you deny such facts? If not, can you admit the facts that are true in a certain paragraph of the complaint, but make clear you do not admit other facts in that paragraph? Why would you be careful to separate factual allegations in a paragraph in this manner?**

*If a fact is indisputable (Street X runs north and South), then it is contrary to the Rules of Court and unprofessional to deny such a fact. The problem is that plaintiffs often mix indisputable facts in a paragraph with others that one cannot admit. For instance, in paragraph 6 of the Rex v. Hurry Complaint (Casebook at p. 144), plaintiff alleges that his motorcycle collided with Hurry's car. Let's say Defendant Hurry saw him out of the corner of her eye and cannot dispute this fact. However, the paragraph goes on to allege a number of facts of which she cannot have any knowledge. The answer (Casebook at p. 145) in paragraph 6 shows how to handle such a complaint paragraph with multiple allegations. The defendant should admit "only" the fact that is indisputable. She then should either deny the allegations that she knows are not accurate or state that she "lacks information sufficient to form a belief as to the truth of all allegations other than those specifically addressed," which has the effect of a denial. (Note also that the answer, in paragraph 26 (Casebook at p. 147), leaves nothing to chance by stating that any allegations not explicitly admitted in the answer are denied.)*



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*You should admit indisputable facts because you are obliged by the Rules and as an officer of the Court to do so. You should be careful not to admit other allegations, for which your client lacks information such that you can categorically admit them, because an admission in a pleading determines the matter for the case. No proof is necessary thereafter. Thus, counsel must be careful to check her answer against the Complaint to ensure that she has not left some allegation unaddressed or, worse yet, admit an allegation without making clear that the admission is limited.*



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