Practical Law™

Initial Stages of Federal Litigation: Overview

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A Practice Note explaining the initial steps of a civil lawsuit in US district courts and the major procedural and practical considerations counsel face during a lawsuit's early stages. Specifically, this Note explains how to begin a lawsuit, respond to a complaint, prepare to defend a lawsuit and comply with discovery obligations early in the litigation.

This Note explains the initial steps of a civil lawsuit in US district courts (the trial courts of the federal court system) and the major procedural and practical considerations counsel face during a lawsuit's early stages. It covers the steps from filing a complaint through the initial disclosures litigants must make in connection with discovery. It also provides a basic outline of the rules that govern the preliminary tasks plaintiffs and defendants must complete. For a flowchart showing the timing of the initial phases of litigation, see *First Stages in Litigation Timeline (http://us.practicallaw.com/8-502-7255)*.

HOW TO BEGIN A LAWSUIT

GOVERNING LAW

Proceedings for a civil action commenced in federal district court (or removed to federal court from state court) are governed by the Federal Rules of Civil Procedure (FRCP). The individual district courts also have local rules, and sometimes judge-specific rules, which counsel must consult and follow carefully.

FILING SUIT

To begin an action, a plaintiff must file a complaint containing short and plain statements describing:

- The grounds for the court's jurisdiction (unless the court already has jurisdiction).
- The claim(s).
- A demand for the relief sought.

(*FRCP 8(a)*.)

For more information on commencing a lawsuit in federal court, including initial considerations and drafting the case initiating documents, see *Practice Notes, Commencing a Federal Lawsuit: Initial Considerations (http://us.practicallaw.com/3-504-0061)* and *Commencing a Federal Lawsuit: Drafting the Complaint (http://us.practicallaw.com/5-506-8600)*; see also *Standard Document, Complaint (Federal) (http://us.practicallaw.com/9-507-9951)*.

The plaintiff must include with the complaint:

- The $400 filing fee.
- Two copies of a corporate disclosure statement, if required (*FRCP 7.1*).
- A civil cover sheet, if required by the court's local rules.

For more information on filing procedures in federal court, see *Practice Note, Commencing a Federal Lawsuit: Filing and Serving the Complaint (http://us.practicallaw.com/9-506-3484)*.

SERVICE OF PROCESS

Service of process notifies the defendant that a legal action has been filed against it, enabling it to defend itself by answering the complaint with any available defenses or counterclaims.

Unless service is properly made, a defendant does not need to take any action on a lawsuit filed against it. However, defendants should appear in court to challenge the sufficiency of service of process rather than risk an entry of default judgment.

Required Documents for Proper Service of Process

To properly serve a defendant with process, the plaintiff must provide it with a:

- Copy of the complaint.
- Summons, which must:
  - identify the court and the parties;
  - be directed to the defendant;
  - state the name and address of the plaintiff's attorney (or of the plaintiff itself if not represented by an attorney);
  - state the time within which the defendant must appear and defend itself;

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  - notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; and
  - be signed by the court clerk and bear the court's official seal (*FRCP 4(a)(1)*).
- Any additional materials filed with the complaint.

In addition, the plaintiff should serve a copy of the civil cover sheet and corporate disclosure statement on the defendant. Some courts also require the plaintiff to serve the defendant with the assigned judge's individual practice rules and the court's electronic filing rules.

Effecting Service

Anyone may serve notice if he is:

- At least 18 years old.
- Not a party to the lawsuit (*FRCP 4(c)(2)*).

There are three main elements of properly effecting service: method, timing and location. The plaintiff may properly effect service of process on an individual in the US by any of the following methods:

- Delivering copies of the summons and complaint to the individual personally.
- Leaving copies of the summons and complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there.
- Delivering copies of the summons and complaint to an agent authorized by appointment or law to receive service of process.

(*FRCP 4(e)(2)*.)

The plaintiff may also properly effect service by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made (*FRCP 4(e)(1)*).

A plaintiff may serve a corporation or other organization in the same manner as serving an individual or by delivering a copy of the summons and complaint to an officer, a managing or general agent or any other agent authorized by appointment or law to receive service of process. If the agent is authorized by statute and the statute so requires, the plaintiff also must mail a copy of the summons and complaint to the defendant (*FRCP 4(h)*).

The plaintiff must serve the defendant with process within 120 days of filing the complaint, unless the plaintiff can show good cause for its failure to meet this deadline (*FRCP 4(m)*). Serving a summons on a defendant (or filing a waiver of service) creates personal jurisdiction over a defendant in the US who:

- Is within the jurisdiction of a court of general jurisdiction in the state in which the federal district court is located.
- Has been sued under a federal statute that specifically authorizes nationwide service.
- Has been joined as a party and served within a US judicial district and within 100 miles of where the summons was issued.
- Has been sued under federal law but is not subject to the jurisdiction of any state's courts, as long as exercising jurisdiction is consistent with the US Constitution and laws.

(*FRCP 4(k)*.)

Unless the defendant is served with a summons within the jurisdiction of the issuing court, the act of serving the summons and complaint on the defendant is usually not enough to support a finding of personal jurisdiction over the defendant. To support a finding of personal jurisdiction over an out-of-state defendant, the defendant typically has to have certain "minimum contacts" with the forum state (see *Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945)*).

Exceptions to Service Requirement

To avoid the expense of serving the summons, a federal plaintiff may seek a waiver of service from the defendant (*FRCP 4(d)*). To obtain waiver of service, the plaintiff must:

- Notify the defendant that the lawsuit was commenced.
- Make a written request for waiver, complying with the applicable form and content requirements.

(*FRCP 4(d)(1)*.)

The request for waiver should follow Illustrative Civil Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), an unofficial template available on the US Courts' webpage, and must:

- Be in writing and addressed to the individual defendant, or in the case of a corporation or other organization, its agent.
- State the name of the court where the complaint was filed.
- Be accompanied by a copy of the complaint, two copies of a waiver form (using Illustrative Civil Form 6, Waiver of the Service of Summons) and a prepaid means for returning the form.
- Inform the defendant (using the text prescribed in Illustrative Civil Form 5) of the consequences of waiving and not waiving service.
- State the date the request was sent.
- Give the defendant a reasonable period of time of at least 30 days after the request was sent (or at least 60 days if sent to the defendant outside any US judicial district) to return the waiver.
- Be sent by first-class mail or other reliable means.

(*FRCP 4(d)(1)*.)

For the waiver to be effective, the defendant or the defendant's counsel must sign the waiver of service and return it to the plaintiff within the time allowed and the plaintiff must file the executed waiver with the court within 120 days after the action was commenced (*FRCP 4(d)(4) and 4(m)*).

A defendant who timely returns a waiver does not need to serve an answer to the complaint until 60 days after the request for waiver was sent (or until 90 days after it was sent to the defendant outside any US judicial district) (*FRCP 4(d)(3)*). A defendant does not waive an objection to personal jurisdiction or venue by waiving service (*FRCP 4(d)(5)*). If a defendant located in the US does not waive service on request (without good cause), the court must order the defendant to pay the expenses later incurred by the plaintiff in making service and the reasonable expenses, including attorneys' fees, of any motion required to collect those service expenses (*FRCP 4(d)(2)*).

In addition, some courts have held that where a party appears voluntarily in an action, service of process is no longer required.

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For more information on serving the summons and complaint on the defendant, see *Practice Note, Commencing a Federal Lawsuit: Filing and Serving the Complaint (http://us.practicallaw.com/9-506-3484)*.

RESPONDING TO THE COMPLAINT

A defendant may respond to a complaint in several ways. The most basic response is for the defendant to simply serve an answer. However, the defendant may also make a pre-answer motion, such as a motion to dismiss, a motion for a more definite statement or a motion to strike (*FRCP 12(b), (e) and (f)*). After all of the pleadings have been filed (including all counterclaims, cross-claims and any related answers and replies), any party may move for a judgment on the pleadings (*FRCP 12(c)*).

TIME TO RESPOND

Usually, the defendant must respond within 21 days of being served with the summons and complaint (*FRCP 12(a)(1)(A)(i)*). However, the defendant may receive more time if:

- Service is timely waived, in which case the defendant usually must respond within 60 days after the request for waiver was sent, or 90 days if the defendant is located outside the US (*FRCP 4(d)(3)* and *FRCP 12(a)(1)(A)(ii)*).
- The parties agree in writing to an extension of time, to the extent and as permitted by the court.
- The defendant makes a motion for an extension of time to respond and the court grants it for "good cause" (*FRCP 6(b)*).

In addition, a party must respond to a counterclaim or cross-claim within 21 days of being served with the pleading that states the claim(s) (*FRCP 12(a)(1)(B)*). If the court orders a party to reply to an answer, that party must reply within 21 days of being served with the order to reply (*FRCP 12(a)(1)(C)*).

To calculate the required time by which a party must respond to a complaint, counterclaim or cross-claim:

- Exclude the day of the event that triggers the period of time.
- Count all of the days in the period, including weekends and legal holidays.
- Include the last day of the period, unless the last day falls on a weekend or legal holiday, in which case the period continues to run until the next day that is not a weekend or holiday.

(*FRCP 6(a)*.)

For additional information on calculating time periods, see *Practice Note, Computing and Extending Time in Federal Litigation (http://us.practicallaw.com/1-516-9899)*.

THE ANSWER

An answer is the defendant's responsive pleading, composed of the admission or denial of factual allegations, legal defenses (including affirmative defenses), counterclaims and cross-claims. In the answer the defendant must admit or deny each allegation in the complaint. The defendant may use any of the following forms of denial:

- General denial (a denial of every allegation in the complaint). The defendant may use a general denial only if it can "in good faith" deny all of the allegations in the complaint, including the identity of the parties and the jurisdictional grounds (*FRCP 8(b)(3)*).
- Qualified general denial. This type of denial is one that denies all of the allegations in the complaint "except those specifically admitted" (*FRCP 8(b)(3)*).
- Specific denial. The defendant may use specific denials by denying all or part of a specific paragraph (or paragraphs) in the complaint. If the defendant cannot in good faith deny an entire paragraph, it may partially deny the paragraph's allegations (*FRCP 8(b)(3)-(4)*).

The defendant's failure to admit or deny an allegation may lead the court to determine that the defendant has admitted to the allegation. However, a court may not deem admitted an allegation concerning the amount of damages only because the defendant did not deny it (*FRCP 8(b)(6)*).

In addition to admitting or denying the plaintiff's allegations, an answer must contain the defendant's affirmative defenses for which the defendant bears the burden of proof at trial. Examples of affirmative defenses used in commercial cases include:

- Accord and satisfaction.
- Assumption of risk.
- Consent.
- Contributory negligence.
- Estoppel.
- Failure of consideration.
- Failure to mitigate.
- Fraud.
- Indemnity or contribution.
- *In pari delicto*.
- Laches.
- Offset.
- Payment.
- Release.
- *Res judicata*.
- Statute of frauds.
- Statute of limitations.
- Unclean hands.
- Waiver.

(See *FRCP 8(c)(1)*.)

The defendant risks waiving certain defenses by not including them in a responsive pleading or a pre-answer motion to dismiss under FRCP 12(b). These defenses are:

- Lack of personal jurisdiction.
- Improper venue.
- Insufficient process.
- Insufficient service of process.

(*FRCP 12(h)(1)*.)

In contrast, the following defenses are not necessarily waived if the defendant fails to include them in an answer or pre-answer motion to dismiss:

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- Failure to state a claim on which relief can be granted.
- Failure to join a party required by FRCP 19(b).
- Failure to state a legal defense to a claim.
- Lack of subject matter jurisdiction.

(*FRCP 12(h)(2) and (3)*.)

An answer must contain a defense to each claim asserted. If the answer is a corporate defendant's first filing, it must be accompanied by a disclosure statement that does either of the following:

- Identifies any parent corporation and any publicly traded corporation owning 10% or more of the defendant's stock.
- States that no such corporation exists.

(*FRCP 7.1*.)

For guidance on how to draft a corporate disclosure statement, see *Standard Document, Rule 7.1 Disclosure Statement (http://us.practicallaw.com/4-504-7316)*.

COUNTERCLAIMS

A defendant also may include counterclaims in its answer. A counterclaim is a claim the defendant asserts against the plaintiff.

The two types of counterclaims are compulsory and permissive. A compulsory counterclaim is one that must be included in an answer if both:

- At the time of service, the pleading party has a claim against the opposing party that arises from the transaction or occurrence underlying the opposing party's claim.
- Asserting the counterclaim would not require the addition of a party outside of the court's jurisdiction.

(*FRCP 13(a)(1)*.)

A counterclaim that is not ripe at the time the answer is due is not compulsory and may be asserted at a later time. In addition, the defendant does not need to assert an otherwise compulsory counterclaim in its original answer if the:

- Potential counterclaim was already the subject of another lawsuit.
- Opposing party filed suit without obtaining personal jurisdiction over the pleading party.

(*FRCP 13(a)(2)*.)

If a party does not plead a compulsory counterclaim, it may be prevented from asserting the claim in later litigation. However, courts may permit amended pleadings in the interests of justice (*FRCP 15(a)(2)*).

The FRCP defines a permissive counterclaim as any counterclaim that is not compulsory (*FRCP 13(b)*). Some courts may find that a party waives its right to challenge personal jurisdiction if it files a permissive counterclaim.

CROSS-CLAIMS

A party may include a cross-claim against a co-party in its answer if the claim either:

- Arises from the same transaction or occurrence that is the subject matter of the original action or of a counterclaim.
- Relates to any property that is the subject matter of the original action.

(*FRCP 13(g)*.)

For example, a defendant may assert in its answer a cross-claim against a co-defendant alleging that if the plaintiff prevails at trial the co-defendant is liable to the defendant for the plaintiff's damages.

PRE-ANSWER MOTIONS

A party may make several types of motions before filing an answer or other responsive pleading. The types of pre-answer motions authorized by the FRCP are:

- Motions to dismiss (see *Pre-answer Motion to Dismiss*).
- Motions to strike (see *Motion to Strike*).
- Motions for a more definite statement (see *Motion for a More Definite Statement*).

Pre-answer Motion to Dismiss

The most common type of pre-answer motion is the motion to dismiss. A pre-answer motion to dismiss may be made on any of the grounds listed in FRCP 12(b). Courts may also consider other grounds for dismissal raised in a pre-answer motion to dismiss, including immunity or failure to exhaust administrative remedies. As noted above, certain defenses may be waived if they are not included in a motion to dismiss (or answer). These defenses are:

- Lack of personal jurisdiction.
- Improper venue.
- Insufficient process.
- Insufficient service of process.

(*FRCP 12(h)(1)*.)

Some courts require pre-answer motions to dismiss to be made within 21 days of service of the complaint. Other courts require only that they be made before the deadline for filing responsive pleadings, whether that deadline is within 21 days or later.

In ruling on a motion to dismiss, the court must accept the non-moving party's allegations as true and usually may not consider extrinsic evidence. However, any party may request that the court take judicial notice of certain facts not set out in the pleadings. To survive a motion to dismiss, a complaint must contain sufficient facts to state a claim to relief that is plausible on its face (see *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)*).

If the court denies (or partially denies) the motion to dismiss or postpones judgment until trial, the moving party must file a responsive pleading within 14 days after receiving notice of the court's action (*FRCP 12(a)(4)(A)*).

Motion to Strike

A party may move the court to strike parts of the opposing party's complaint on the grounds that they contain matter that is:

- Redundant.

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- Immaterial.
- Impertinent.
- Scandalous.

(*FRCP 12(f)*.)

If the court denies (or partially denies) a motion to strike, the moving party must file a responsive pleading within 14 days after receiving notice of the court's action (*FRCP 12(a)(4)(A)*).

Motion for a More Definite Statement

If the complaint is vague, unclear or lacking in detail so that the defendant cannot reasonably prepare a response, the defendant may move for a more definite statement before filing a responsive pleading. In its motion, the defendant must identify the perceived defects and specify the additional detail the complaint requires. If the court grants a motion for a more definite statement, the plaintiff must obey the order within 14 days after notice of the order unless the court sets a different deadline. (*FRCP 12(e)*.) After being served with the more definite statement (usually in the form of an amended complaint), the moving party has 14 days in which to file a responsive pleading (*FRCP 12(a)(4)(B)*).

MECHANICS OF RESPONDING

In the federal judicial system, pleadings (after the summons and complaint), motions and other court documents (except for discovery requests and other documents that are not typically filed with the court) are usually served and filed through the district courts' Case Management/Electronic Case Filing (CM/ECF) system. Each district court has detailed rules governing electronic filing, such as the types of documents that may be e-filed and size limits on e-filed documents. Counsel must ensure that he has a CM/ECF login and password and become familiar with the court's CM/ECF rules before filing any pleading, motion or other document.

ATTORNEY ADMISSIONS

Before making a motion or formally appearing before a court, counsel must first be admitted to practice in that court. The attorney admissions process in the federal system is fairly straightforward. Generally, an attorney admitted to practice law in at least one US jurisdiction may gain admission to any federal district court by filling out the requisite paperwork and paying an admission fee. Alternatively, an attorney may choose to become admitted pro hac vice through a motion submitted by a member of the Bar of the court where the action is pending. Most courts require non-member attorneys appearing pro hac vice to associate with local counsel.

For more on attorney admissions, see *Practice Note, Commencing a Federal Lawsuit: Initial Considerations: Bar Admission and Local Counsel (http://us.practicallaw.com/3-504-0061#a335252)*.

REMOVAL

An action originally filed in state court may be removed to the federal district court for the district where the state-court action is pending if the federal court possesses "original jurisdiction" over the action (*28 U.S.C. § 1441(a)*). The party seeking removal to federal court must demonstrate that the federal district court has jurisdiction. The two main jurisdictional bases for removing a case to federal court are:

- Federal question jurisdiction, which applies to actions arising out of the US Constitution, its laws or treaties (*28 U.S.C. § 1331*).
- Diversity jurisdiction, which applies when:
  - no plaintiff is a citizen of the same state as any defendant; and
  - the amount in controversy is at least $75,000 (including attorneys' fees and punitive damages but excluding interest and costs).

(*28 U.S.C. § 1332(a)*.)

Federal court jurisdiction also includes certain class actions under the Class Action Fairness Act of 2005 (CAFA) (*28 U.S.C. § 1332(d)*).

To remove a case to federal court, the defendant in the state-court action must file the following documents in the federal district court to which the case is being removed:

- Notice of removal containing a short and plain statement of the grounds for removal.
- Copy of all process, pleadings and orders served on the defendant in the state-court action.

(*28 U.S.C. § 1446(a)*.)

The notice of removal, together with the state-court process, pleadings and orders, must be filed in federal court within the shorter of:

- 30 days after the defendant receives (through service or otherwise) the initial state-court pleading.
- 30 days after receiving the state-court summons, if the initial state-court pleading is filed in court but is not required to be served on the defendant.

(*28 U.S.C. § 1446(b)(1)*.)

If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after the defendant's receipt, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable (*28 U.S.C. § 1446(b)(3)*). However, a case removed based on diversity jurisdiction must be removed within one year from the date on which the action was commenced, unless the district court finds that the plaintiff acted in bad faith to prevent the defendant from removing the action (*28 U.S.C. § 1446(c)(1)*). The date of commencement is defined by the law of the state in which the complaint was originally filed (see *Varga v. United Airlines, No. 09-cv-02278, 2009 WL 2246208, at *3 (N.D. Cal. July 24, 2009)*).

To properly remove a case to federal court, the defendant also must:

- Promptly provide all adverse parties with written notice that a notice of removal has been filed (*28 U.S.C. § 1446(d)*).
- File a copy of the notice of removal with the clerk of the state court in which the action was originally filed. This filing divests the state court of jurisdiction over the action unless and until it is remanded by the federal court (*28 U.S.C. § 1446(d)*).

For more information on removing a case from state to federal court, see *Practice Note, Removal: How to Remove a Case to Federal Court (http://us.practicallaw.com/1-506-8452)*.

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PREPARING TO DEFEND THE LAWSUIT

Defense counsel must perform several critical and time-sensitive tasks as soon as counsel receives notice of a lawsuit. These tasks include becoming familiar with all of the parties and their attorneys, setting out near- and long-term tasks and devising a strategy for the most time- and cost-efficient way to collect all of the necessary evidence from all parties. The issues that typically arise during these preparations, as well as ways to best manage them, are discussed in this section.

REVIEW THE COMPLAINT

To prepare and defend a lawsuit, counsel must first become familiar with the parties and the allegations. Defense counsel should review the complaint and immediately identify and investigate the:

- Parties.
- Counsel.
- Legal claims.
- Relief sought.

Parties

When investigating the other parties involved in a dispute, defense counsel should look into several aspects of the parties' backgrounds, financial situation and litigation experience. In conducting this inquiry, counsel should:

- Determine whether the plaintiff is an individual, small company or large corporation.
- Investigate whether the plaintiff has a history of litigating disputes.
- Ask colleagues about the plaintiff's reputation generally and whether it has ever litigated the same kind of action(s).
- Find out whether the outcome of any previous litigation included settlement or an adjudicated result that may trigger collateral estoppel, *res judicata* or similar issues.
- Determine whether there are other defendants and whether they are individuals, corporations or other types of entities.
- Find out what liability the plaintiff alleges the other defendants have.
- Verify the financial status of each additional defendant and research whether they could likely satisfy a judgment, as well as the location of their assets.
- Consider whether one of the defendants should take a lead role in the litigation.
- Look into whether insurance and counsel for insurance companies may be prominently involved in the defense and resolution of the litigation.
- Research related actions, if any. Some courts have local rules that require a notice of related case, motion to consider whether the cases should be deemed related or other filings where a party knows or has reason to believe that the case is related to another case pending before the same court.

Counsel

Defense counsel must learn as much as possible about opposing counsel. To do this, counsel should:

- Determine whether the plaintiff's counsel is an individual or a law firm.
- Ask colleagues about plaintiff's counsel's reputation and find out if he usually sticks to the merits of the case or runs up defense costs by litigating extraneous details.
- Identify the strengths and weaknesses of all parties' counsel.
- If multiple plaintiffs are represented by separate counsel, determine if:
  - there are any actual or apparent conflicts of interest among the plaintiffs; and
  - one of them may take the lead in the litigation.

Legal Claims

Counsel must identify all causes of action and become familiar with their elements, including the applicable statutes of limitations and any pre-suit notice requirements (see *Standard Document, Pre-Suit Notice Letter (http://us.practicallaw.com/4-503-1235)*).

Relief Sought

Counsel must identify the damages or other relief sought by the plaintiff by determining if the plaintiff is seeking:

- Compensatory damages.
- Statutory penalties.
- Punitive damages.
- Injunctive relief.
- Other types of relief.

IDENTIFY IMMEDIATE TASKS AND DEADLINES

After becoming familiar with the basic nature of the lawsuit, counsel should identify the probable next litigation steps and calculate the deadlines by which they must be accomplished. For example, defense counsel must immediately identify and keep track of the due dates for responsive pleadings, pre-answer motions and initial discovery conferences. If necessary, defense counsel should promptly contact plaintiff's counsel to obtain an extension of these deadlines.

START GATHERING THE FACTS

As soon as practicable after receiving the complaint, the defendant and its counsel should begin to gather all available facts relating to the plaintiff's allegations. Counsel must research the facts by examining the relevant documents and interviewing witnesses, keeping in mind that factual exploration should be done in conjunction with discovery obligations, the duty to preserve evidence and litigation holds (see *Comply with Discovery Obligations Early in Litigation*).

Documents

The defendant should gather key internal documents as early and quickly as possible. In-depth review of all potentially relevant and/or responsive documents takes place later. The key documents counsel must collect immediately are the paper and electronic documents of, and correspondence between, the key players in the dispute. The types of additional key documents counsel must collect depend on the nature of the particular dispute.

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Counsel may also have to issue subpoenas to obtain some of the necessary documents from non-parties likely to have key materials, although this step may have to wait until the discovery phase formally begins (see *Practice Note, Subpoenas: Using Subpoenas to Obtain Evidence (http://us.practicallaw.com/0-503-1893)*).

Witnesses

To develop the facts and better evaluate the parties' relative strengths, counsel should interview key fact witnesses at the beginning of the litigation. When interviewing corporate employees, the company lawyer must keep in mind that the interviews may be protected by the attorney-client privilege and that there may be ethical issues concerning the scope of the lawyer's representation.

In determining whether communications between corporate counsel and company employees are privileged, federal courts usually consider whether the:

- Information disclosed by the employee was necessary to supply a basis for legal advice to the corporate client.
- Communication involved the employee's corporate duties.
- Employee knew that he was being questioned to enable the corporation to obtain legal advice.
- Communication was intended to be confidential.

(See *Upjohn Co. v. United States, 449 U.S. 383 (1981)* and *Practice Note, Attorney-Client Privilege: Identifying the Attorney and the Client (http://us.practicallaw.com/9-502-8339)*.)

When an attorney representing a company or other organization works with the company's individual employees, the employees may be unclear about the attorney's duties and representation. Counsel should explain clearly to officers and employees that he represents the company, not individuals, when he knows or should know that the company's interests may be adverse to any of the individuals (*Model Rule of Professional Conduct 1.13(f)*). If counsel wishes to represent both the company and one of its officers or employees, a conflict waiver may be required (*Model Rule of Professional Conduct 1.7*). If it becomes clear that the individual or officer of the company should obtain his own attorney (for example, to avoid a criminal indictment), counsel should recommend this to him.

CALCULATE ANTICIPATED LITIGATION COSTS

The costs of litigation are constantly rising and becoming more difficult to calculate. This is due in part to the growing amount of electronically stored information (ESI) litigants must collect and review during the discovery phase. However, there are several criteria counsel may examine to develop an accurate estimate of a litigation's probable costs. These are discussed in detail below.

Liability Exposure

To effectively consider the defendant's options, counsel should try to determine his client's potential liability or exposure as soon as possible. He should estimate both a possible maximum damages amount and a more conservative amount.

Discovery Costs

The costs associated with identifying, preserving, collecting and reviewing ESI and hard-copy documents may consume the majority of any litigation budget. To adequately assess the amount of discoverable information that may be collected from the client and opposing counsel, counsel should first identify the various sources of that information and create a list of the key players from whom the information must be collected. In calculating prospective discovery costs, counsel must account for the time and expense of re-assigning a client's employees and officers to the tasks of locating and reviewing potentially relevant documents for production to opposing counsel.

Attorneys' Fees

In some cases, prolonged litigation costs may serve as an incentive to a quick settlement, particularly where anticipated attorneys' fees are large compared to exposure (see *Practice Note, Settlement Tactics in US Litigation (http://us.practicallaw.com/4-502-7417)*). Therefore, at a dispute's outset counsel also should determine whether the plaintiff has a basis for recovering attorneys' fees from the defendant and the likelihood that the plaintiff would be able to recover those fees. For example, if the lawsuit is based on a breach of contract, counsel should check the contract's terms for a provision governing the recovery of attorneys' fees. In addition, certain statutes, such as state consumer protection statutes, may allow a prevailing plaintiff to recover attorneys' fees.

Insurance

Defense counsel should review all of the client's insurance policies for applicable litigation coverage (see *Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (http://us.practicallaw.com/8-502-7415)*).

Reputation

For some clients, and in certain types of actions, the effect of negative press may be an additional factor in the overall anticipated cost of the litigation. Counsel should weigh reputational and other non-monetary concerns when determining whether settlement is an option (see *Article, Managing litigation PR (http://us.practicallaw.com/0-101-7801)*).

Additional Considerations

Counsel also should assess the potential disruptive impact the litigation may have on the client's business. Further, counsel should consider whether the litigation may have any other collateral consequences (for example, potential suspensions or debarments), the impact the litigation could have on any other pending proceedings (civil, administrative, criminal or otherwise) and the potential that the litigation itself (or the way it is defended) may encourage other lawsuits.

DECIDE BETWEEN FEDERAL AND STATE COURT

In the initial stages of litigation, it is vitally important to decide which court should hear the case. If the complaint is originally filed against the defendant in state court, the defendant must decide whether to remove the case to federal court.

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Perceived Advantages of Federal Court

Large corporate defendants often prefer federal court because it is viewed as not having the home court advantage that local plaintiffs are perceived to have in the state court jurisdiction in which they reside.

Depending on the plaintiff's and counsel's sophistication, litigating in federal court may create additional time and expense for the plaintiff because counsel may lack familiarity with federal court rules and procedure. Likewise, the defendant's counsel, both in-house and retained, may not have any experience with the state court in which the action was brought, nor with the judge before whom the case is pending.

The litigation may progress more quickly in federal court, although this depends on both the state and federal jurisdictions in question. In addition, cross-state discovery may be easier in federal court. Moreover, federal judges are known for being more likely than state court judges to dismiss an action, particularly on procedural grounds.

Perceived Advantages of State Court

The perceived slow pace of many state courts may be attractive for litigants not seeking a speedy resolution. Further, in cases where it may be advantageous to seek to overturn or modify state law, a state court may be more likely to consider the possibility than a federal court. Moreover, some states, including New York, allow litigants to take interlocutory appeals. The ability to take an interlocutory appeal may be important when deciding whether to remain in state court. For example, if the defendant loses its motion to dismiss in state court, it may be able to obtain a favorable appellate ruling before having to go to trial. In contrast, appeals in federal courts are generally limited to appeals from the final judgment (*28 U.S.C. § 1291*).

COMPLY WITH DISCOVERY OBLIGATIONS EARLY IN LITIGATION

The parties must comply with all of their document preservation and discovery obligations as soon as they anticipate becoming involved in litigation. Throughout this discovery process counsel must maintain a well-informed understanding of:

- The types of documents found.
- How and where they are maintained.
- The best way to provide them to opposing counsel.

PRESERVATION OF DOCUMENTS

An individual or entity must preserve discoverable evidence when litigation is pending or becomes reasonably foreseeable.

Duty

The duty to preserve evidence extends beyond paper documents and ESI from common sources, such as e-mail and word processing programs. Courts may require litigants to preserve "outlier ESI" under certain circumstances, including information stored on:

- Websites.
- Social media sites, including Facebook, LinkedIn and Twitter.
- Cell phones and personal digital assistants.
- Text messages, Tweets and instant messages.
- Voicemail messages.
- External hard drives, including "memory sticks" and universal serial bus (USB) drives.

Procedure

To ensure that documents and other evidence are preserved, counsel should issue a timely written litigation hold notice as soon as it is aware of impending or existing litigation (see *Standard Document, Litigation Hold Notice (http://us.practicallaw.com/0-501-1545)*). To implement a litigation hold meaningfully and effectively counsel must quickly ascertain:

- The identities of the key players involved in the lawsuit.
- The timeframe relevant to the potential litigation.
- All possible data types and sources.
- All existing document retention policies and procedures that may need to be altered in light of the preservation obligations.

(See *Practice Note, Implementing a Litigation Hold (http://us.practicallaw.com/8-502-9481)*.)

In developing an effective litigation hold, counsel should communicate with the client's information technology personnel to obtain information on possible data sources as well as current document retention policies (including retention of back-up tapes) and any auto-delete functions. Counsel also should interview the key players in the lawsuit to understand what types of documents they maintain and how they individually store information.

Counsel must distribute the litigation hold notice to all relevant individuals and communicate the preservation obligations clearly to the information technology personnel. In addition, counsel must periodically review and update (if necessary) the scope of the litigation hold notice.

In modern litigation, harvesting documents is a complicated process, often (but not always) left to outside e-discovery consultants. Whoever handles the harvesting of documents collects potentially discoverable and responsive information from computer hard drives, file servers, CDs, back-up tapes, handheld devices and other storage units. The ESI is usually loaded (along with paper documents, which may be scanned and converted to an electronic format) to a centralized data storage system, on which searches may be conducted based on keyword, custodian, date or other function.

Spoliation

After the preservation duty is triggered, a party risks spoliation sanctions if it fails to:

- Issue a timely written litigation hold.
- Identify all key players and ensure that their electronic and paper records are preserved.
- Stop the automatic deletion of relevant ESI under current document retention or records management policies.
- Preserve back-up tapes if they are necessary as the sole source of certain relevant information.

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- Preserve the contents of all relevant ESI under the party's custody or control, even if maintained by a third party (see *Article, Protecting Foreign Corporations from US Discovery: The "Custody or Control" Analysis (http://us.practicallaw.com/6-502-5304)*).

Sanctions

Depending on the jurisdiction, a court may sanction a party that destroys evidence unintentionally (for example, with negligence). Circuit courts are split on the level of culpability required for the application of certain types of sanctions.

Sanctions may take one or more of the following forms:

- Court-ordered additional discovery at the offending party's expense (for example, a forensic search of a computer from which it was suspected, but not shown, that relevant e-mails were deleted).
- Monetary sanctions against the party and/or its counsel.
- A court order prohibiting the spoliating party from using related or derivative evidence.
- A court order allowing the jury to infer that the destroyed evidence would have been helpful to the other side.
- A court order striking a claim (or defense) where an issue has become incapable of fair resolution because of the evidence's destruction.
- Dismissal of the action or a default judgment against the offending party.

(See *Practice Note, Practical Tips for Handling E-Discovery (http://us.practicallaw.com/8-500-3688)*.)

In some cases, courts have sanctioned outside counsel and their clients for preservation lapses despite no showing of bad faith (*GFI Acquisition, LLC v. Am. Federated Title Corp. (In re A&M Fla. Props. II, LLC), No. 09-01162, 2010 WL 1418861, at *6-7 (Bankr. S.D.N.Y. Apr. 7, 2010)*). However, where a client fails to comply with discovery obligations, outside counsel may avoid sanctions through "significant efforts to comply with ... discovery obligations" (see *Qualcomm Inc. v. Broadcom Corp., No. 05-cv-1958, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010)*). Therefore, counsel must ensure that clients fulfill their preservation obligations.

INITIAL DISCLOSURES

Parties must disclose the following without waiting for a request from the opposing party (unless it is intended to be used solely for impeachment):

- Name and contact information for any individual likely to have discoverable information, including the subjects of that information, that the disclosing party may use to support its claims or defenses (*FRCP 26(a)(1)(A)(i)*).
- A copy or description by category and location of all documents and ESI that the disclosing party has in its "possession, custody or control" and that it may use to support its claims or defenses (*FRCP 26(a)(1)(A)(ii)*).
- Any insurance agreement through which an insurer may be liable to satisfy any portion of a possible judgment or indemnify the disclosing party for payment of any possible judgment (*FRCP 26(a)(1)(A)(iv)*).
- A computation of each category of damages claimed, if any (*FRCP 26(a)(1)(A)(iii)*).

In addition, the disclosing party must make available for inspection and copying any documents or other material on which the computation of damages is based (unless privileged or otherwise protected). In complex cases, a party may need to retain an expert witness to properly compute its damages.

Timing

Unless the court changes the schedule, initial disclosures must be made within 14 days after the parties' initial meet and confer required under FRCP 26(f) (*FRCP 26(a)(1)(C)*). A party that is first served or otherwise joined after the initial meet and confer must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order (*FRCP 26(a)(1)(D)*).

Consequences for Failure to Disclose

Where a party certifies that disclosure was properly made but actually was not, the court must impose sanctions, unless either applies:

- The party was "substantially justified" in failing to comply with disclosure requirements.
- The failure to disclose was harmless.

(*FRCP 37(c)(1)*.)

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