
CONTENTS

<i>Preface</i>	<i>xxv</i>
<i>Citations</i>	<i>xxix</i>

PART A INVESTIGATING AND PLANNING THE LITIGATION **1**

I. INTRODUCTION TO LITIGATION PLANNING

§1.1.	Introduction	3
§1.2.	Organizing litigation planning	3
	1. Establish the terms of the attorney-client relationship	4
	2. Determine the client's needs and priorities	4
	3. Determine the elements of potential claims, remedies, defenses, and counterclaims	5
	4. Identify likely sources of proof	7
	5. Determine what informal fact investigation is necessary	8
	6. Determine what formal discovery is necessary	9
	7. Identify solutions	12
	8. Develop a litigation strategy	13
	9. Make litigation cost and timetable estimates	15
	10. Use a litigation file system	17
§1.3.	Conclusion	18

II. INFORMAL FACT INVESTIGATION

§2.1.	Introduction	19
§2.2.	Structuring fact investigations	19
	1. When do I start?	20
	2. What facts do I need to get?	20
	3. How do I structure my fact investigation?	21
	4. What are the likely sources of proof?	23
	5. What is my litigation budget?	26
	6. What sources should I investigate?	27
§2.3.	Client interviews	28
	1. Client attitudes and disclosure	28
	2. Interview environment	29
	3. Initial client interview	31
	a. Statute of limitations	32

xii Contents

	b. Liability	33
	c. Damages	33
	d. Client background	33
	e. Parties	34
	f. Defenses, counterclaims, and third-party claims	35
	g. Witnesses	35
	h. Records	35
	i. Physical evidence	35
	j. Other lawyers	35
	k. Client goals	36
	l. Conflicts	36
	m. Next steps	36
	4. Follow-up client interviews	37
§2.4.	Exhibits acquisition	37
	1. Scene	37
	2. Physical evidence	38
	3. Records	39
	4. Internet research	40
	a. People	41
	b. Corporations	42
	c. Products, medical devices, and drugs	42
	d. Experts	42
	e. Jurors	43
§2.5.	Witness interviews	43
	1. Whom to interview and when	43
	2. Who should do the interviewing?	45
	3. Locating witnesses	46
	4. Purposes of the interview	46
	5. Arranging the interview	47
	6. Structuring the interview	48
	7. Recording the interview	49
	8. Interviewing techniques	50
	9. Evaluating witnesses	51
§2.6.	Expert reviews	52
§2.7.	The “small” case	53

III. LEGAL INVESTIGATION

§3.1.	Introduction	57
§3.2.	Choice of law	57
	1. When will state law apply in federal court?	58
	2. Which state’s substantive law applies?	60
§3.3.	Legal theories for claims, remedies, and defenses	61
§3.4.	Joinder of parties and claims	63
	1. Real party in interest	64
	2. Capacity to sue	64
	3. Required joinder of parties	65
	4. Permissive joinder of parties	66

	5. Special joinder rules	66
	6. Joinder of claims	67
§3.5.	Subject matter jurisdiction in district courts	67
	1. “Case or controversy” and standing	68
	2. Federal question jurisdiction	68
	a. “Arising under”	69
	b. Specific grants of jurisdiction	69
	c. The United States as a party	70
	3. Diversity jurisdiction	71
	a. “Citizenship” requirement	71
	b. Complete diversity requirement	72
	c. Jurisdictional amount requirement	73
	4. Supplemental jurisdiction	74
	5. Removal jurisdiction	76
§3.6.	Personal jurisdiction	77
	1. Due process requirements	78
	2. Service-of-process requirements	80
§3.7.	Venue	80
	1. Determining venue	81
	2. Change of venue	82

IV. CASE EVALUATION AND STRATEGY

§4.1.	Introduction	85
§4.2.	Taking the case	85
	1. Conflicts check	85
	2. Feasibility analysis	87
§4.3.	Establishing the terms of the attorney-client agreement	89
	1. Work covered	90
	2. Who will do the work?	90
	3. Lawyer’s fee	91
	4. Retainers	92
	5. Costs	92
	6. Liens	93
	7. Billings	94
	8. Authorization to file suit and withdraw	94
	9. Next steps	97
§4.4.	Declining representation	98
§4.5.	Planning the litigation	100
	1. Reevaluate the client’s objectives, priorities, and cost constraints	101
	2. Define the client’s litigation objectives	101
	3. Develop a “theory of the case”	101
	4. Plan the pleadings and jury demand	102
	5. Plan the discovery	104
	6. Plan the dispositive motions	105
	7. Plan the settlement approach	105
	8. Develop a litigation timetable	105

§4.6.	Example of litigation planning: Novelty Products, Inc. v. Gift Ideas, Inc.	106
	1. Reevaluate the client’s objectives, priorities, and cost constraints	108
	2. Define the client’s litigation objectives	108
	3. Develop a “theory of the case”	110
	4. Plan the pleadings	110
	5. Plan the discovery	111
	6. Plan the dispositive motions	112
	7. Plan the settlement approach	112
	8. Develop a litigation timetable	113
§4.7.	Prefiling requirements	113
	1. Statutory notice requirements	113
	2. Contract requirements	113
	3. Mediation, arbitration, and expert review requirements	114
	4. Administrative procedure requirements	114
	5. Appointment of legal guardian	114
	6. Lis pendens	115
	7. Attachment	115
	8. Temporary restraining orders	115
	9. Discovery before suit	115
	10. Demand letters	116
	11. Preservation letters and litigation holds	117
	12. Physical examinations	118

**PART B
CONDUCTING THE LITIGATION 119**

V. PLEADINGS

§5.1.	Introduction	121
§5.2.	General pleading requirements	122
	1. General requirements for claims	122
	2. Alternative and inconsistent pleadings	124
	3. Format requirements	124
	a. Caption	124
	b. File number	124
	c. Parties to action	125
	d. Designation	126
	e. Signing pleadings	127
	f. Disclosure statement	127
	4. Rule 11	127
	5. Service and filing	131
	a. Service of original complaint and summons on defendant	131
	b. Service of all other pleadings on existing parties	131
	c. Filing and proof of service	131

§5.3.	Complaints	132
	1. Subject matter jurisdiction	132
	a. Federal question jurisdiction	133
	b. Diversity jurisdiction	133
	2. Statement of claims	134
	a. Use plain English	135
	b. Make it factual	135
	c. Plead “special matters” with particularity	136
	d. Use separate paragraphs	137
	e. Use separate counts	138
	f. Use exhibits	139
	3. Prayer for relief	140
	4. Jury demand	141
	5. Signature	142
	6. Common problems	142
	7. Filing and service of summons	143
	a. Issuing the summons	143
	b. Summons content	144
	c. Persons who may serve the summons	145
	d. Methods of service	145
	i. Individuals	145
	ii. Minors and incompetents	146
	iii. Corporations, partnerships, and associations	146
	iv. United States and its agencies, officers, and employees; foreign, state, and local governments	147
	e. Territorial limits of service	147
	i. Statewide service	147
	ii. The 100-mile “bulge” rule	147
	iii. State long-arm statutes	148
	iv. Federal statute	148
	f. Timeliness of service	148
	g. Proof of service	149
	h. Informal service	149
§5.4.	Rule 12 responses	150
	1. Motion to strike	150
	2. Motion for a more definite statement	151
	3. Motion to dismiss under Rule 12(b)	152
	a. The one motion requirement	152
	b. Rule 12(b) defenses	152
	c. Waiver	152
	d. Practice approach	153
§5.5.	Answers	155
	1. Timing	155
	2. General requirements	156
	3. Responses	157
	4. Rule 12(b) defenses	159
	5. Affirmative defenses	160
	6. Practice approach	161

§5.6.	Counterclaims	163
	1. Compulsory counterclaims	163
	2. Permissive counterclaims	164
	3. The United States as plaintiff	165
	4. Statutes of limitations	165
	5. Waiver and amended pleadings	165
	6. Practice approach	166
	7. Plaintiff's responses	167
§5.7.	Answer to counterclaims and replies	167
§5.8.	Cross-claims	168
	1. Discretionary pleading	168
	2. Subject matter	169
	3. When made	169
	4. Jurisdiction, venue, and joinder	169
	5. Cross-claims against the United States	170
	6. Practice approach	170
	7. Responses to cross-claims	170
§5.9.	Third-party practice	171
	1. Discretionary pleading	171
	2. Subject matter	171
	3. Jurisdiction and venue	172
	4. Statutes of limitations	172
	5. Practice approach	173
	6. Third-party defendant responses	174
	7. Original plaintiff responses	175
§5.10.	Interpleader	175
	1. Rule 22 interpleader	176
	2. 28 U.S.C. §1335 interpleader	176
	3. Practice approach	176
§5.11.	Intervention	178
	1. Intervention of right	178
	2. Permissive intervention	179
	3. Timing	180
	4. Jurisdiction	180
	5. Practice approach	180
§5.12.	Class actions	182
	1. Requirements for class certification	182
	2. Jurisdiction	184
	3. Procedure	185
	4. Class action and arbitration	186
§5.13.	Amendments of pleadings and supplemental pleadings	186
	1. Amendments as a matter of course	187
	2. Amendments by leave of court	187
	3. Statutes of limitations and "relation back"	188
	a. Changing facts and theories	188
	b. Changing parties	189
	4. Supplemental pleadings	189
	5. Practice approach	189

VI. DISCOVERY

§6.1.	Introduction	191
§6.2.	Scope of discovery	192
	1. Relevance	192
	2. Insurance agreements	194
	3. Statements	194
	4. Experts	194
	5. Privileges	196
	6. Trial preparation materials	197
§6.3.	Discovery strategy	198
	1. What facts do I need to establish a winning case on my claims (or to defeat the opponent’s claims)?	198
	2. What facts have I already obtained through informal fact investigation?	198
	3. What “missing” facts do I still need to obtain through formal discovery?	198
	4. What discovery methods are most effective for obtaining the “missing” facts?	199
	5. What facts and witnesses that I already know of through informal investigation do I need to “pin down” by using formal discovery?	200
	6. What restrictions does my litigation budget place on my discovery plan?	201
	7. In what order should I execute my discovery plan?	203
	8. How can I conduct discovery informally?	205
	9. How can I limit discovery against my party?	206
§6.4.	Discovery planning meeting and pretrial scheduling conference	208
	1. Law	208
	2. Practice approach	209
	a. Timing	209
	b. Written report of proposed discovery plan	210
	c. Scheduling conference	212
§6.5.	Required disclosures	213
	1. Initial disclosures	213
	2. Expert disclosures	215
	3. Pretrial disclosures	216
	4. Practice approach to initial disclosures	216
	a. Timing	216
	b. Drafting the initial disclosures	217
	i. Heading	217
	ii. Content	217
	iii. Signing and serving	219
	c. Effect of initial disclosures	220
	5. Practice approach to expert disclosures	220
	a. Timing	220
	b. Topics	220

	c.	Drafting the expert disclosure	221
	i.	Heading	221
	ii.	Content	221
	iii.	Expert report	222
	d.	Effect of expert disclosure	223
	6.	Practice approach to pretrial disclosures	224
§6.6.		Interrogatories	224
	1.	Law	224
	2.	Practice approach	226
	a.	Timing	226
	b.	Topics	227
	i.	Identity of parties, agents, and employees	227
	ii.	Identity of witnesses	227
	iii.	Identity of documents and tangible things	227
	iv.	Identity of testifying experts, opinions, bases, and background	227
	v.	Details and sequences of events and transactions	228
	vi.	Technical and statistical data	228
	vii.	Damages information and insurance coverage	228
	viii.	Identity of persons who prepared answers and of sources used	229
	ix.	Positions on issues, opinions of fact, and contentions	229
	c.	Drafting the interrogatories	230
	i.	Headings	230
	ii.	Definitions and instructions	231
	iii.	Interrogatory style	232
	iv.	Signing and serving	237
	d.	Responses to interrogatories	237
	i.	Researching and preparing answers	237
	ii.	Objections	238
	iii.	Answers	240
	iv.	Signing, serving, and filing	244
§6.7.		Requests to produce and subpoenas	245
	1.	Law	245
	2.	Practice approach	247
	a.	Timing	247
	b.	Organization	248
	c.	Drafting requests to produce	249
	i.	Heading	249
	ii.	Definitions	249
	iii.	Drafting requests	250
	iv.	Signing and serving	252
	d.	Common problems	252
	e.	Responses to requests to produce	253
	i.	Researching and preparing responses	254
	ii.	Objections	255

	<ul style="list-style-type: none"> <li style="margin-left: 40px;">iii. Answers 257 <li style="margin-left: 40px;">iv. Signing and serving 258 3. Document subpoenas to nonparties 259 	
§6.8.	Electronically stored information 259	
	1. Law 259	
	2. Practice 262	
	<ul style="list-style-type: none"> a. Initiate a “litigation hold” with your party and the opposing parties and learn about your party’s ESI and key IT personnel 262 b. “Meet and confer” under Rule 26(f) with opposing counsel about ESI discovery issues, including whether to enter into a “clawback” agreement to govern privileged and trial-preparation material 266 c. Attend the Rule 16 conference to discuss the parties’ discovery plan with the court, and argue for your approach in disputed areas 268 d. Make sure your initial disclosures under Rule 26(a) include required ESI disclosures 269 e. Consider using ESI to answer Rule 33 interrogatories 269 f. As the requesting party for your Rule 34 requests to produce and Rule 45 subpoenas, determine the form or forms in which you want the requested ESI to be produced. Consider early interrogatories and depositions of opposing parties’ IT personnel to learn details of their ESI systems 269 g. As the producing party, determine if you will object to a request or subpoena for ESI on the grounds that (a) the requested ESI is “not reasonably accessible,” or (b) the requested form of production is improper. If (b), suggest another form 272 h. As the requesting party, if the court rules that the requested ESI is not reasonably accessible, be prepared to show that good cause exists to require that the ESI still be produced 273 i. As the producing party, if the court orders discovery of ESI that is not reasonably accessible, be prepared to show that cost-shifting is warranted because the request creates an undue burden or cost 273 j. As the requesting party, if the responding party has altered or destroyed ESI after the time that party knew or should have known of its obligation to preserve ESI, determine if Rule 37 sanctions for spoliation are appropriate 275 	

	k. As the responding party, if no prior agreement exists, screen your ESI for privileged and confidential information	276
	l. The producing and requesting parties must work out the mechanics for producing the discoverable ESI	276
§6.9.	Depositions	277
	1. Law	278
	a. Timing	278
	b. Number and length of depositions	278
	c. Notice	278
	d. Location	280
	e. Persons present	280
	f. Recording	280
	g. Signing and correcting	281
	h. Objections	281
	i. Conferring with counsel during the deposition	282
	2. Practice approach	282
	a. Should I take a deposition?	282
	b. Whose deposition should I take?	283
	c. When should I take depositions?	285
	d. What order of depositions should I use?	286
	e. What must I do to schedule a deposition?	287
	f. How should I prepare for taking a deposition?	290
	g. How should I prepare to take the deposition of a testifying expert?	295
	h. How should I prepare for a Rule 30(b)(6) deposition?	297
	i. How should I prepare for a videotaped deposition?	300
	j. How do I start the deposition?	302
	k. What questioning styles should I use?	305
	i. Getting information	306
	ii. Eliciting detail and pinning down specific facts	307
	iii. Preserving testimony	309
	iv. In what order should I cover my topics?	309
	v. Common problems	310
	l. How should I handle objections?	311
	m. How should I prepare and represent a deponent?	313
	n. After the deposition	316
§6.10.	Physical and mental examinations	318
	1. Law	318
	2. Practice approach	319
§6.11.	Requests for admissions	321
	1. Law	322
	2. Practice approach	323
	a. Timing	323
	b. What to request	324

c. Drafting the requests	325
d. Choosing a response	328
e. Requestor’s responses	329
§6.12. Supplementing discovery	330
§6.13. Discovery motions	330
1. Protective orders	331
2. Compelling discovery	335
3. Sanctions for abuse	337
§6.14. Discovery review	340

VII. MOTIONS

§7.1. Introduction	343
§7.2. General requirements for motions	343
1. Form	343
2. Notice, service, and filing	344
3. Content of the motion	346
4. Responses to motions	347
5. Hearing and argument	349
6. Order	350
§7.3. Extensions of time and continuances	351
§7.4. Substitution of parties	352
§7.5. Temporary restraining orders and preliminary injunctions	353
1. Temporary restraining orders	353
a. Law	353
b. Practice approach	354
i. Complaint and summons	355
ii. Application for TRO and preliminary injunction	355
iii. Attorney’s certificate regarding notice	356
iv. Witness affidavits	357
v. Security for costs	358
vi. Hearing, order, and service	358
2. Preliminary injunctions	360
a. Law	360
b. Practice approach	360
§7.6. Removal	362
1. Law	362
2. Practice approach	362
a. Can I remove?	362
b. Should I remove?	362
c. Can I get codefendants to remove?	363
d. Can I remove all claims?	363
e. What are the procedural requirements for removal?	363
i. Timing	364
ii. Notice of removal	364
iii. Notice to adverse parties	365
iv. File notice of removal in state court	366

	v. Further proceedings	366
	vi. Motion to remand	366
§7.7.	Judgment on the pleadings	367
§7.8.	Summary judgment	368
	1. When made	368
	2. Standards and matters considered	369
	3. Hearing, order, and appealability	370
	4. Practice approach	371
	a. Should I move for summary judgment?	371
	b. When should I bring a summary judgment motion?	372
	c. How should I organize a summary judgment motion?	373
	d. How do I prepare the memorandum of law?	373
	e. How do I prepare the statement of facts?	373
	f. How do I prepare exhibits?	375
	g. How do I prepare witness affidavits?	376
	h. How does the summary judgment motion look when done?	377
	i. Common problems	379
	5. Opponent’s responses	379
	6. Hearing on the motion	381
§7.9.	Dismissals and defaults	381
	1. Voluntary dismissals	382
	2. Involuntary dismissals	384
	3. Defaults	384
§7.10.	Consolidation and separate trials	386
	1. Consolidations	386
	2. Separate trials	387
§7.11.	Interlocutory appeal	387

VIII. PRETRIAL CONFERENCES AND SETTLEMENTS

§8.1.	Introduction	389
§8.2.	Pretrial conferences	389
	1. Procedure	389
	2. Pretrial disclosures and memorandum	390
	a. Jurisdictional statement	391
	b. Issues of law	391
	c. Uncontested and contested facts	391
	d. Witness lists	392
	e. Exhibit lists	392
	f. Damages proof	392
	g. Jury instructions	393
	h. Voir dire questions	393
	i. Trial briefs	393
	3. Pretrial order	397
§8.3.	Settlements	400
	1. Case evaluation	401
	a. List elements of proof	401
	b. List sources of proof	401

c. Relate proof to elements	401
d. Review credibility of the proof	401
e. Evaluate your case’s jury appeal	402
f. Review jury verdict reporters	402
g. Review the trial expenses	402
h. Consider preparing a settlement brochure	403
i. Determine the settlement value	404
j. Evaluate the tax consequences of settlement	407
k. Marshal your facts	408
2. Negotiating a settlement with opposing counsel	409
3. Negotiating at a settlement conference	411
4. Client authorization	413
5. Settlement agreements	415
a. Releases, covenants not to sue, and loan receipts	416
b. Drafting the agreement	417
c. Structured settlements	421
d. High-low agreements	423
e. Terminating the suit	424
f. Offers of judgment	426
g. Evidence rules	429
h. Insurer good faith requirements	429
i. Enforcing settlements	430
j. Settlement statement	430
k. Liens on settlements	431
l. Close the client’s file	432

APPENDIX 433

LITIGATION FILE: JONES v. SMITH
