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THOMAS A. MAUET
Director of Trial Advocacy
and Riepe Professor of Law
University of Arizona
Rogers College of Law

DAVID MARCUS
Professor of Law
UCLA School of Law

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To my father, Rudolf B. Mauet
(T.M.)

To my father, Howard Marcus
(D.M.)

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PREFACE

New lawyers quickly encounter an uncomfortable reality: A civil procedure course in law school only begins to prepare them for the twists and turns of civil litigation. For civil litigators, rules of procedure are not abstract subjects for academic study, but functional tools that regulate the pretrial stage of the litigation process. New litigators routinely worry that they might misunderstand or botch steps in pretrial litigation and thereby hurt their cases. This book aims to ensure that new lawyers avoid these mistakes and litigate successfully.

Whether a third-year law student in a clinical program or a litigator in the first years of practice, a new lawyer must approach every lawsuit systematically to make sure that he or she thinks through all important considerations and takes all timely steps during the investigation, pleading, discovery, and motion practice stages of the pre-trial process. Only by doing so can a lawyer adequately prepare for settlement or trial. This text approaches pretrial litigation in just this systematic way. It reviews the procedural rules and thought processes a litigator should utilize before and during each stage of a civil case. In addition, this text discusses and gives examples of how an understanding of the various stages of civil litigation translates into pleadings, discovery, and motions.

There is no one right way to litigate. Consequently, while this book presents standard approaches to pleadings, motions, and discovery, lawyers litigate effectively in a myriad of ways. The examples presented here offer only one approach and simply illustrate how a lawyer can successfully proceed step-by-step through the litigation process.

This text is of necessity an overview of the basic steps in the civil litigation process. Because any single-volume work must limit the space it can devote to any specific topic, compromises and hard choices were inevitable. In making them, we have followed a basic rule: Provide an overview that gives inexperienced litigators the basic information they need to handle routine civil cases. To determine what we believe new litigators *need* to know, we reflected on our beginning years as litigators, and we discussed the book's scope with a number of inexperienced lawyers. Sometimes their suggestions were surprising. For example, almost all recommended an overview of joinder, jurisdiction, and venue, since these are complex, technical areas. These new lawyers did not mean to suggest that some topics were more important than others; rather, they felt they were weak in some areas and stronger in others. In many ways their suggestions corresponded with our experiences and account in large measure for the text's coverage.

The text focuses on federal district court practice and the Federal Rules of Civil Procedure. Many states have adopted the Federal Rules, and most of the states that have not have modern code pleading rules that

resemble federal practice. Also, legal details do not matter for much of the book's contents. Solid planning, investigation, and drafting are essential skills regardless of the particular jurisdiction involved, and the text's emphasis is on those skills. Hence, we have designed the book to be a basic resource regardless of the jurisdiction where a case will be litigated.

This book is not intended as a reference manual for nuanced legal research. We cite lightly, certainly as compared to standard treatises, since our goals do not include a detailed, technical discussion of doctrine. We have provided basic citations for most topics, with an emphasis on treatises that litigators commonly use. A list of these commonly used treaties appears after this preface. Most legal topics discussed in this text begin with a footnote that provides citations to the relevant portions of these treatises.

This edition comes with an authorization to download *Materials in Pretrial Litigation*, which include six tort and contract case files that can be used in a course on pretrial litigation. These materials contain the plaintiff's and the defendant's initial case files. The Teacher's Manual includes the witness materials for these case files. Course instructors may obtain this manual from Aspen Publishing.

Thomas A. Mauet and David Marcus

What's New in the Tenth Edition

I was excited and humbled to join Tom Mauet as co-author of *Pretrial*'s ninth edition. My excitement continues for the tenth edition. Tom remains the country's leading figure in litigation pedagogy, a distinction that has been his since before he published the first edition of *Pretrial* in 1987. *Pretrial* teaches essential lawyering skills in an intellectually sophisticated, yet relentlessly grounded, way, and it inculcates professionalism and ethics at every turn. It is little surprise that *Pretrial* has won a coveted spot on many litigators' bookshelves. Generations of law students who have learned essential lawyering skills from previous editions.

Tom continues to provide ideas, suggest edits, offer advice, and contribute research, but he has turned primary responsibility for revisions over to me. As I did with the ninth edition, I have taken a "do no harm" approach to this one. Thousands of lawyers around the United States would agree that no one teaches how to litigate as well as Tom. I have left the book's organization, its overall themes, its flow, and its style mostly untouched. Tom is also a masterful strategist, so I have only lightly edited those sections that focus on litigation strategy.

Many of the changes for this edition involve important revisions to the Federal Rules of Civil Procedure. In 2015, a package of rule amendments designed to streamline and improve discovery became final. The previous edition could only allude to their likely promulgation, as it was published before the U.S. Supreme Court and Congress approved this set of amendments. This edition incorporates the many changes that these rule amendments make, including, importantly, the addition of a proportionality

requirement to the scope of discovery standard. This edition also reflects the continued evolution of personal jurisdiction and class action law in the U.S. Supreme Court, and it expands upon and updates the previous edition's discussion of the ever-changing world of e-discovery. Finally, this edition makes innumerable small but important changes—to the law governing the taxation of settlement proceeds, for instance, and the doctrine regulating pleading—that affect the ever-evolving world of civil litigation in the United States.

I welcome any suggestions for how we might improve *Pretrial* in the future. Comments from practitioners who have used *Pretrial* and instructors who teach pretrial courses are particularly welcome. Please do not hesitate to contact me by e-mail if you have any suggestions for future editions. You can find updated contact information for me at my UCLA School of Law faculty webpage.

David Marcus

Los Angeles, CA
November 2018

CITATIONS

For ease in citing, the text uses the following abbreviated citations:

Wright

Law of Federal Courts, Charles Alan Wright & Mary Kay Kane (8th ed. 2017)

Moore's Manual

Moore's Manual—Federal Practice and Procedure, James W. Moore, Allan D. Vestal & Philip B. Kurland (supplemented semi-annually)

Manual of Federal Practice

Manual of Federal Practice, Richard A. Givens (5th ed.), which is part of Trial Practice Series (supplemented annually)

Moore's Federal Practice

Moore's Federal Practice, James W. Moore, et al. (updated annually in print, with more frequent digital updates)

Wright & Miller

Federal Practice and Procedure: Civil, Charles Alan Wright, Arthur R. Miller, and E.H. Cooper (updated annually)

PRETRIAL

Part A

INVESTIGATING AND PLANNING THE LITIGATION

I
INTRODUCTION TO LITIGATION PLANNING

§*1.1. Introduction*

A partner in the firm that recently hired you has just called you into her office. She tells you that a prospective client who has a problem that might lead to litigation will be coming into the office soon. This problem, the partner says, appears to be just right for you to manage. With a smile, she hands you a note containing the prospective client's name and appointment time. Apprehensively you walk out of her office, thinking, "My God. What do I do now?"

What you do, when you do it, how you do it, and why you do it is what this book on civil pretrial litigation is all about. This first chapter offers an overview of the litigation process and discusses how to organize a coordinated litigation plan. The other chapters discuss each step in the plan in detail.

§*1.2. Organizing litigation planning*

Litigation planning addresses two basic questions. First, what overall litigation strategy will best serve the client's realistically attainable goals? Second, how does each part of the litigation plan contribute toward achieving those goals? Addressing these two questions early, and constantly keeping the answers to them in mind, will do much to develop and implement an intelligent, realistic, and cost-effective litigation plan.

An effective litigation plan obviously requires structure. This structure should trigger the sort of analysis you should undertake at key moments in the case, so that you will not miss the boat during any step in the litigation process. The basic steps in this plan are listed here, followed by a discussion of each step.

1. Establish the terms of the attorney-client relationship
2. Determine the client's needs and priorities

3. Determine the elements of potential claims, remedies, defenses, and counterclaims
4. Identify likely sources of proof
5. Determine what informal fact investigation is necessary
6. Determine what formal discovery is necessary
7. Identify solutions
8. Develop a litigation strategy
9. Make litigation cost and timetable estimates
10. Use a litigation file system

1. Establish the terms of the attorney-client relationship

The first step in any litigation plan is to establish the attorney-client relationship formally. You must do so in writing, unless the client is a regular client with whom you have an established business relationship. An attorney-client agreement is a contract between the attorney and client, and general contract principles apply.

The agreement should spell out who the client is, who will do the work for the client, what work will be done, how you will be compensated, and when the client will be billed for costs and legal work. All too often either lawyers do not reach clear understandings with clients, or the agreement does not cover all likely issues, causing serious problems later. Representing a client in litigation is hard enough without client relationship problems adding to the difficulties.

Before entering into an agreement, of course, you must first decide if you should take the case. In a simple case you can frequently make an intelligent decision after interviewing the potential client and reviewing available records. For example, in a personal injury case arising out of an automobile accident, you can probably determine whether the client's case has merit by interviewing the client and by reviewing available records, such as police reports and medical records. More complicated cases may require substantial factual and legal investigation. For example, in a medical malpractice or product liability case, the common practice is to send all the records about the patient or product to an appropriate expert for evaluation before deciding whether to take the case.

Establishing the attorney-client agreement is discussed in §4.3.

2. Determine the client's needs and priorities

People seek out lawyers when they have problems that need to be managed and solved. The lawyer, therefore, should first identify the client's problems and needs, viewing them broadly. The client's needs, seen from his perspective, may well conflict with possible solutions. But finding out what the client wants to have happen is the beginning step in dealing with the problems that brought him to a lawyer in the first place.

You should always keep in mind the client's immediate and long-term needs and interests. Clients often demand a lawsuit against every imagined

wrongdoer, when any lawsuit may be against the client's best interests. You should assess what can be gained from a lawsuit and then see how a lawsuit would affect the client in the long term. For example, consider the frequently encountered situation of a client who wishes to sue another party with whom the client has an ongoing business relationship. While the particular matter may have merit, a lawsuit may jeopardize that valuable relationship and adversely affect current deals with that party. A lawsuit may vindicate the client on one deal but not make sense for their overall relationship.

You will also need to assess the client's priorities. Clients rarely get everything they want, so they must develop a scale of priorities that will help you fashion the litigation strategy. For example, suppose your client wants to sue another party over a contract dispute. Does she want a quick, inexpensive resolution to preserve an ongoing relationship? Does she simply want the other party to live up to the agreement, or does she want money damages because she considers the relationship beyond repair? The client must evaluate these possibilities before you can sensibly decide how best to help her.

Determining the client's needs and priorities is discussed in §2.3.

3. Determine the elements of potential claims, remedies, defenses, and counterclaims

The initial client interview will often reveal the potential case's legal contours. At this early stage, think expansively and consider all legal theories that might apply to the case. For example, while a "contract case" will obviously involve contract claims, it might also involve UCC claims; state and federal statutory claims, such as securities and product safety statutes; and business torts. Your initial thinking should include all of them.

After you have identified the possible applicable legal theories, determine what the legal requirements are for each theory. The applicable jurisdiction's jury instructions are particularly helpful here. Most jurisdictions have approved pattern jury instructions for commonly asserted claims and defenses. These instructions will tell you what the required elements are for a particular claim or defense. If pattern instructions are unavailable, you should consult practice manuals that cover the particular field or research the cases and statutes to learn the elements for the applicable law.

Remedies require the same type of analysis. The availability of remedies relates to the choice of claims. For example, contract damages are available in contract disputes. If the dispute has fraud aspects, however, you may be able to bring a business tort claim and have broader damages rules apply. Statutory claims may permit the prevailing party to recover attorney's fees and costs. In litigation, particularly complex litigation, the nature of the remedies frequently influences whether the pleadings include a particular claim.

Consider potential counterclaims as well. Before bringing a lawsuit, always determine what the other side has against your client. This is particularly important in commercial litigation, where the parties have dealt

with each other many times over a period of time. A lawsuit may do more harm than good if it provokes a large, previously dormant counterclaim.

Evaluating potential claims, remedies, defenses, and counterclaims is discussed in §3.3.

After you have identified the possible applicable legal theories and the elements for each of them, you should set up some type of litigation chart, or diagram, to list the theories and their elements. For experienced litigators planning routine cases, this chart may be unnecessary. New litigators, however, should develop a chart system to analyze cases systematically from the beginning, by correlating the elements of claims, defenses and counterclaims with sources of proof, informal fact investigation, and formal discovery. A fully developed litigation chart will form the basis for your trial chart, should the case eventually go to trial.[1] For now, the chart guides your strategic litigation planning. Litigation charts are commonly organized like the one below.

Example:

You represent the plaintiff in an automobile negligence case.[2]

LITIGATION CHART

Elements of Claims, Defenses, and Counterclaims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Negligence			
(a) negligence			
(b) causation			
(c) damages			
(1) lost income			
(2) med. expenses			
(3) disability			
(4) pain and suffering			

1. See Thomas A. Mauet, Trial Techniques and Trials §11.4 (10th ed. 2016).

2. The elements of a negligence claim are duty, breach of duty, proximate cause, injury, and damages. Duty is a legal question, however, so the terminology used here better fits the trial proof.

The chart should be continued for each potential claim, defense, and counterclaim. Developing a litigation chart is discussed in §2.2.

4. Identify likely sources of proof

Most litigation involves events or transactions that have occurred in the past. The likely sources of proof will particularly include those witnesses who have some knowledge of and exhibits that contain information about past events or transactions.

The usual witness sources include your client, other observers of or participants in the events or transactions, the opposing parties, witnesses who have no direct knowledge of the events or transactions but may have useful circumstantial information, and experts. Exhibit sources include physical objects, photographs, police reports, business records, transaction documents, and any other paperwork or electronic material that has a bearing on the events or transactions involved. At this stage it is best to think expansively. Develop a long, thorough list early and refine it over time.

Finally, list the likely sources of proof of the elements of each possible legal theory on your developing litigation chart.

LITIGATION CHART

Elements of Claims, Defenses, and Counterclaims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Negligence			
(a) negligence	plaintiff police officers bystanders defendant		
(b) causation	plaintiff defendant treating doctors police officers police reports		
(c) damages			
(1) lost income	plaintiff employer employment records		

(2) med. expenses	med. bills treating doctors pharmacy bills		
(3) disability	plaintiff treating doctors employment records		
(4) pain and suffering	plaintiff treating doctors		

Identifying the likely sources of proof is discussed in §2.2.4.

5. Determine what informal fact investigation is necessary

Once you have identified the likely sources of proof, you then need to decide how to acquire information from those sources. Your choices are twofold: informal fact investigation and formal discovery.

Inexperienced litigators frequently use formal discovery as the principal fact-gathering method. This approach is often a serious mistake. A lawyer should always acquire as much information as possible *before* filing suit, when formal discovery methods usually are unavailable. As a defendant, you will most likely begin the investigation after the suit has begun, but you should still consider informal sources of proof. Rule 11 of the Federal Rules of Civil Procedure requires that a lawyer make "an inquiry reasonable under the circumstances" to determine if a pleading has a basis in fact before signing the pleading.

Informal fact investigations are principally conducted by interviewing witnesses; by obtaining documents, records, and other data from willing sources; and by getting expert reviews of the case. These investigations have advantages and disadvantages. On one hand, they are relatively quick and inexpensive and can be done without the presence of other parties. This efficiency is important because evidence can become lost unless identified and obtained quickly. On the other hand, while such investigations can yield important information, this information does not usually come in a form that makes it directly admissible at trial. For example, a written statement from a witness during an interview is not normally admissible. At best, the statement is useful at trial for impeachment.

When you have identified the witnesses and exhibits that are best reached through informal investigations, note on your litigation chart how you plan to get the necessary information from those sources.

LITIGATION CHART

Elements of Claims, Defenses, and Counterclaims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Negligence			
(a) negligence	plaintiff police officers bystanders defendant	interview interview interview	
(b) causation	plaintiff defendant treating doctors police officers police reports	 interview interview interview request letter	
(c) damages			
(1) lost income	plaintiff employer employment records	interview interview request letter	
(2) med. expenses	med. bills treating doctors pharmacy bills	pl. possession interview pl. possession	
(3) disability	plaintiff treating doctors employment records	interview interview request letter	
(4) pain and suffering	plaintiff treating doctors	interview interview	

Informal fact investigations are discussed in Chapter 2.

6. Determine what formal discovery is necessary

Formal discovery can ordinarily begin only after suit has been filed. For that reason, it is the last stage of the fact-gathering process. Formal discovery also has benefits and risks. On the upside, it is usually the only way to get information from the opposing party and other hostile or uncooperative witnesses. In addition, information obtained in discovery is often in a form that makes it admissible at trial. On the downside, formal discovery is time-consuming and expensive. In a case with a modest litigation budget, formal discovery may be substantially limited because of its cost.

Once you have decided which witnesses and exhibits require formal discovery to access, you have to decide which discovery method to use to obtain the necessary information. Each of the formal discovery methods—initial disclosures, interrogatories, document requests, depositions, physical and mental examinations, and requests to admit facts—is particularly suited for gathering certain types of information. Cost efficiency and effectiveness require that you carefully select and use the methods in the proper sequence.

Formal discovery serves two purposes: to obtain information you need to get but don't have, and to pin down your opponent and other witnesses on facts you already have. You will need to use formal discovery to obtain missing information from your opponent and uncooperative witnesses and other sources. You will want to pin down your opponent to learn where the key factual disputes in the case will be and to meet your burden of proof more easily if the case goes to trial. Although they overlap, each discovery method is particularly suited for obtaining certain kinds of information.

The Federal Rules of Civil Procedure recognize six discovery methods:

1. Initial disclosures—Rule 26
2. Interrogatories—Rule 33
3. Requests to produce documents, electronically stored information, and tangible things—Rule 34
4. Depositions—Rule 30
5. Physical and mental examinations—Rule 35
6. Requests to admit facts and genuineness of documents—Rule 36

Initial disclosures include four categories of information: the identity of persons likely to have discoverable information pertinent to a party's claim or defense; copies or descriptions of documents, data compilations, and tangible things the party may use to support a claim or defense; a computation of claimed damages; and insurance agreements. Initial disclosures are automatic and do not require a request or any action from the other side.

Interrogatories most effectively obtain basic factual data from other parties, such as the identity of proper parties, agents, employees, witnesses, and experts, and the identity, description, and location of documents, records, and tangible evidence. They may usefully seek other parties' positions on disputed facts. On the other hand, interrogatories are not usually effective instruments for getting detailed impressions and versions of events.

A request to produce documents, electronically stored information, and tangible things is the discovery method by which one obtains from another party copies of records, documents, data, and other tangible things for inspection, copying, and testing. Such a request also permits an entry on another person's land or property to inspect, photograph, and analyze things on it.

Depositions can be used for nonparty witnesses as well as parties. They are effective tools to obtain details, to tie down parties and witnesses to details, and to discover everything they know pertinent to the case. A deposition is the only discovery vehicle that permits you to assess how good a witness a person is likely to be at trial. It can usefully secure admissions.

Further, a deposition is the only method that preserves testimony if a witness becomes unavailable for trial.

A physical or mental examination of a party can be obtained by court order when the physical or mental condition of that party is in controversy, a situation most common in personal injury cases. While other discovery requests can obtain records of past examinations, this is the only means to force a party to be examined and tested for the case at hand. A physical or mental examination is therefore the best method to evaluate such damages elements as permanence, extent of injury, medical prognosis.

Finally, a request to admit facts forces a party to admit or deny facts or a document's genuineness. Requests to admit are used principally to pin down the other party to specific facts, and thereby to learn what facts the other party will concede or dispute at trial. An admitted fact is deemed conclusively admitted for the purpose of the pending trial. This method is effective if limited to simple factual data, such as the dates of someone's employment or the genuineness of signatures on a contract. It is not useful for opinions or evaluative information.

When you have identified the witnesses and exhibits you will target with formal discovery methods, note on your litigation chart what discovery methods you plan to use to obtain the missing information. You might also annotate your litigation chart by putting question marks next to topics that you are unsure of or by writing in numbers to reflect your planned discovery sequence.

LITIGATION CHART

Elements of Claims, Defenses, and Counterclaims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Negligence			
(a) negligence	plaintiff police officers bystanders defendant	interview interview interview	deposition? deposition & interrogatories
(b) causation	plaintiff defendant treating doctors police officers police reports	interview interview interview request letter	deposition deposition?
(c) damages			
(1) lost income	plaintiff employer employment records	interview interview request letter	 request to admit
(2) med. expenses	med. bills treating doctors pharmacy bills	pl. possession interview pl. possession	deposition? request to admit

(3) disability	plaintiff treating doctors employment records	interview interview request letter	deposition?
(4) pain and suffering	plaintiff treating doctors	interview interview	deposition?

Formal discovery is discussed in Chapter 6.

7. Identify solutions

Litigation is only one of many ways to deal with conflict. Before deciding to litigate, you should consider your client's problems in broad terms to determine what approach will best serve the client's immediate and long-term interests. Discuss various approaches with your client, who ultimately gets to decide what to do. There are several basic possibilities:

1. Do nothing
2. Seek an informal resolution
3. Seek formal dispute resolution
4. Litigate

Doing nothing is always an option. The case may simply be too high-risk. The amount realistically recoverable may not be enough to justify the cost of seeking it. In addition, the noneconomic costs should always be assessed. Your client may not have the resolve for a lengthy fight. He may not want to take his time and that of others away from other pressing concerns. He may have more important ongoing business, professional, or personal relationships with the adversary. Finally, negative publicity surrounding the disputed matter may make litigation prohibitive. If you decide that doing nothing is the best course, let the client know and get his agreement in writing so you can formally end the case and your representation.

If your client decides to push ahead, you should always consider an attempt to resolve the dispute informally. Your adversary may also wish to avoid a lengthy, expensive battle. He may admit liability and only dispute damages. Always consider informal solutions before battle lines are drawn. Often a concise, respectful, but firm letter to the adversary that explains why your client feels aggrieved can produce a quick and satisfying solution. The fact that your client has gone to the trouble of getting a lawyer to help can signal powerfully to the adversary that your client is serious about the problem. The adversary may prove particularly receptive to an informal resolution.

If informal solutions are impossible, think next about alternative dispute resolution, such as mediation, arbitration, and summary trials. These can be relatively quick and inexpensive. Commercial contracts frequently require them. Many consumer form contracts also include provisions that

require parties to arbitrate their disputes. By getting an impartial, experienced outside party involved, adversaries can frequently get advisory opinions or binding decisions on both liability and damages.

The last possibility is formal litigation. Keep in mind that litigation is expensive and time-consuming and that even the winning litigant is rarely made whole. The client must understand these realities. The worst thing that can happen is for a lawyer to yield quickly to a client's insistence to sue, only to have that client become disinterested, then uncooperative, as the realities of litigation set in. The only safe way to protect against this outcome is to develop a litigation strategy, litigation budget, and litigation timetable and then have your client approve them before starting the lawsuit.

Identifying solutions is discussed in §4.5.

8. Develop a litigation strategy

Up to now you have been thinking expansively, to ensure you are not missing the boat on anything that might influence the case. If you and the client have decided that litigation is the only solution, you will need to focus and begin making choices.

Assume that your client has valid claims, that attempts to resolve them informally have failed, and that the client agrees to pursue litigation. What do you do now?

Everything you do in litigation must have a purpose. A common mistake inexperienced litigators make is to conduct litigation mechanically so that it becomes an end unto itself, rather than becoming a means to an end. Always ask yourself two questions: What are my client's goals in this lawsuit? How does each decision I make help achieve those goals? Only if you constantly focus on the desired result will the individual steps in the process help achieve it. Perhaps the easiest way to think of litigation strategy is to consider its principal parts:

1. Where can I file the lawsuit?
2. What claims, defenses, or counterclaims should I plead?
3. How extensive should discovery be?
4. What motions should I plan to file or defend?
5. When should I explore settlement?

First, where can you bring the lawsuit? Can you bring the case in federal court, state court, or both? Some types of claims can only be brought in federal court, some can only be brought in state court, and still others can be brought in both federal and state courts. Where geographically should you file suit? There are advantages and disadvantages that you must consider when you have a choice. While this choice is mainly the plaintiff's, the defendant may have some say in the matter as well. He can remove the case from state to federal court, for example, or move to have the case transferred to a different forum. Sometimes the parties will have agreed in advance to litigate in a particular forum.

Second, how big a lawsuit do you want? You will make this decision at the pleading stage. A world of difference divides a simple contract case involving two parties and a complex commercial case involving multiple parties. You have to keep in mind the consequences of your pleadings. Multiple claims frequently require multiple parties, which in turn usually generate extensive pleadings, discovery, and motions. Just because the claims are there does not necessarily require that you assert them. Also, litigation must be cost conscious. Inexperienced litigators sometimes allege every conceivable claim. Expensive, time-consuming litigation can result, which may not be in the client's best interests. As you think about the pleadings, review your litigation chart, see which claims and remedies are the most meritorious, and structure a lawsuit that will serve the client's objectives and that is feasible in light of the client's economic resources.

These prefiling considerations boil down to several basic questions:

1. What parties must or can I join?
2. Will my preferred court have subject matter jurisdiction over the claims?
3. Will my preferred court have personal jurisdiction over the parties?
4. Where will proper venue lie?

Asking and answering these questions is critical because they determine what actions can properly be brought in a particular court. The questions are interrelated. For example, limits on the subject matter jurisdiction of the court you choose can affect the claims and parties you can join. The choice of parties necessarily relates to whether you can get personal jurisdiction over them. These decisions in turn influence the determination of where venue is proper.

Second, once you have decided on the pleadings, you need to select the discovery that is appropriate for your case and your purposes. What do you need to know that you don't already know or can't find out through informal fact investigation? What witnesses do you need to pin down with depositions? What are your cost constraints? In what order, and when, should you engage in formal discovery? How extensive should each discovery method be? Again, many inexperienced litigators mechanically begin a standard discovery sequence—initial disclosures, interrogatories, document production, depositions, physical examination, and requests to admit—without a clear idea of what information is needed and how best to get it. Without a consistent overall litigation strategy, the case then bogs down as discovery assumes a life of its own.

Third, what motions should you plan to file or defend? Your motions strategy must be part of, and coordinated with, your overall litigation plan. For instance, if you plan on moving for summary judgment on some counts or some issues, your discovery must be focused on getting the facts that will support your motion. Now is the time to plan on making those dispositive motions and to make sure that you have thought through your litigation plan, principally parts addressing the pleadings and discovery, so you can support those motions.

Finally, when should you explore settlement? Since the vast majority of civil cases that survive dispositive motions settle before trial, you need to consider what your position on settlement should be at the points when settlement is likely to come up. This task includes assessing the value of the case at various times, as well as the financial and emotional benefits of settlement. The likelihood of a settlement, particularly an early one, will also affect your handling of the litigation and the relationship with your adversary.

Devising a litigation strategy is discussed in §4.5.

9. Make litigation cost and timetable estimates

A litigation cost estimate is something every litigator should make in every case. Most clients, except perhaps those whose cases are on a contingency fee basis, will ask how much litigation will cost. You should give your client an estimate of likely costs *before* starting the litigation and get the client's approval. You should stress that you are making an estimate, not a guarantee, and that you do not have complete control over costs.

Creating a litigation budget forces you to develop a realistic litigation plan and determine which tasks are required at the case's outset. Over time, you will be able to estimate more accurately how much time and resources various parts of the process will likely require in a particular type of case. Many law firms use task-based litigation software that makes this calculation systematically, and many sophisticated clients will expect such an analysis when they send out requests for proposals to law firms interested in handling a substantial matter. The amount of detail these clients will expect in the litigation budget depends on the complexity of the lawsuit.

The cost estimate should be broken down by basic litigation categories. For example, in a simple personal injury case your estimate may be as follows:

Litigation Cost Estimate

Fact and legal investigation	30 hrs.
Pleadings	15 hrs.
Discovery	60 hrs.
Motions	40 hrs.
Pretrial memorandum and settlement	40 hrs.
Trial preparation and trial	70 hrs.

The total estimated time before trial amounts to 185 hours; trial preparation and trial will add another 70 hours. As defense counsel, if you are billing at $100 per hour, the likely cost if the case settles after the pretrial conference is $18,500; a trial will add another $7,000. Expenses, such as for experts, depositions, and travel costs, might add a few thousand dollars.

The client may not like the estimated litigation costs. But you should discuss what they are and whether your client wants you to limit costs (for example, by restricting formal discovery or limiting the number of

experts) before plowing ahead. Explain the assumptions on which you base your cost estimate, and emphasize that it is only an estimate based on facts presently known.

You should prepare a cost estimate even if you are a plaintiff's lawyer and usually handle personal injury cases on a contingency fee basis. Doing so will help you determine if taking the case makes economic sense to you.

The last step in the litigation plan is to create a realistic timetable for the litigation. As plaintiff, you have substantial flexibility. Unless you face a statute of limitations problem or a short notice of claim period, or unless you have another particular reason to file suit quickly, you can take the time to think through your litigation plan before filing the complaint. Once the complaint is filed, procedural rules and judges' practices largely control the litigation timeline. Judges will usually hold a scheduling conference after the pleadings are filed to establish a timetable for discovery, motions, and the final pretrial conference. For example, a judge may order that all discovery be concluded within 6 months, that any dispositive motions be filed within 30 days of the discovery cut-off date, and that a final pretrial conference will occur 60 days after the discovery cut-off date. Even where the judge does not establish a timetable, every jurisdiction has an informal set of expectations in routine cases that you should usually follow.

When you have structured a realistic timetable for your litigation plan, it is best to plot it out on a calendar to ensure that you don't omit any steps or lose track of when particular steps should be taken.

Litigation Timetable

1/1 (today)	Client interview
by 2/1	Interview bystander witnesses Get pl.'s medical records Get pl.'s employment records Get police reports Interview police officers
by 3/1	File complaint
by 4/1	Interrogatories to def. Documents request to def. Deposition notice to def.
by 6/1	Depose def.
by 7/1	Depose other witnesses? Depose physicians?
by 8/1	Requests to admit to def.
by 10/1	Prepare pretrial memorandum
11/1	Pretrial conference
12/1	Anticipated initial trial date

Every client will ask: "How long is my case going to take?" You should give the client your best estimate, revising it later if necessary, while emphasizing that it is an estimate and that you cannot completely control the litigation's trajectory.

Devising a litigation timetable is discussed in §4.5.

10. Use a litigation file system

The last step is to develop and use a system for organizing your litigation files. There is no magic way to do this. All law firms have systems for the types of cases they routinely handle. Those systems include both litigation software systems that organize all electronic data in a case as well as manual file systems that organize all hard copies. The important point is that your system must be logical and clearly indexed to reflect the kinds of materials your cases will generate. The system should be in place when litigation starts. A good file system grows in importance as more and more lawyers and paralegals work on a case.

Litigation files are usually divided into several categories. The files should have tabbed dividers for each category, and categories may be further divided. For example, discovery is frequently divided into initial disclosures, interrogatories, documents requests, depositions, mental and physical examinations, experts, and requests to admit facts.

The following file organization and categories are commonly used in routine civil cases:

1. Court documents
   a. pleadings
   b. discovery
   c. motions
   d. orders
   e. subpoenas
   f. pretrial memoranda
2. Attorney's records
   a. chronological litigation history
   b. case summary
   c. client agreement, time sheets, bills, costs, billings
   d. correspondence with client and lawyers
   e. legal research
   f. miscellaneous notes and memos
3. Evidence
   a. bills, invoices, statements, receipts
   b. correspondence between parties and with nonparties
   c. business records and public records
   d. photographs, diagrams, maps, charts
   e. physical evidence (needs to be safeguarded in secure location)

Certain paperwork, such as pleadings, orders, and correspondence, should be organized in chronological order with the most recent on top.

Original evidence, such as bills and correspondence, should be put in clear plastic sheet protectors so that the originals will not be marked during the litigation process. You should also create digital copies of this evidence, when possible, and add it to a digital case management file.

§*1.3. Conclusion*

This overview chapter has discussed the basic sequential steps in litigation planning. The critical concept is that every step of that plan is connected to every other. Each step you take influences what happens later, and the various steps you take will make sense only if they are part of an overall plan. When you are immersed in the technical details of any particular step in the process, it is easy to lose sight of that overall plan. Consequently, before doing anything, always ask yourself two questions. Why am I doing this? How does this step fit into my overall litigation plan? If you never lose sight of the big picture and keep your long-term objectives in mind, you will have a much better chance to conclude your litigation with satisfactory results.

II
INFORMAL FACT INVESTIGATION

§*2.1. Introduction*

Preparation and planning for litigation are the critical initial components of the litigation process. Too many lawyers rush to court and file a complaint to get the process started without a thorough investigation of the facts and the law or a thoughtful litigation strategy. Small wonder, then, that the results frequently disappoint.

Litigation outcomes usually depend on facts, not law. Hence, litigators spend much of their time identifying and acquiring admissible evidence that supports their contentions and evidence that refutes the other side's contentions. The evidence at trial will include witness testimony and exhibits. For this reason, the fact investigation principally involves finding and acquiring "people and paper," which means following the people trail and the paper trail. The party that discharges this task more successfully will more likely convince the fact finder that its version of the facts reflects what really happened.

§*2.2. Structuring fact investigations*

There are two ways to get the facts: through informal investigation or through formal discovery. Inexperienced litigators commonly err when they use informal investigation, such as an initial client interview, only to decide whether to take the case, and then rely on formal discovery methods to gather all other facts. This mistake is serious. First, the party that has a better grasp of the favorable and unfavorable facts as early as possible is in a stronger position to evaluate the case accurately. Second, information obtained early on, particularly from witnesses, is more likely to be accurate and complete. Third, information sought before the action formally begins may come more easily, since a lawsuit often makes people cautious

or uncooperative. Fourth, information obtained before suit has been filed is less expensive to acquire. Formal discovery is the most expensive way to get information. Informal investigation before filing suit is usually more effective and less expensive; formal discovery methods can then obtain missing information, pin down witnesses, and procure specific information and records from the opposing party. Fifth, Rule 11 of the Federal Rules of Civil Procedure requires that a lawyer conduct a reasonable inquiry into the facts to ensure that a pleading is well grounded. Finally, you can get information informally without the opposing parties participating, or even being aware that you are conducting an investigation. For all these reasons, you should pursue informal channels for investigation as much as possible.

1. When do I start?

The best time to start is immediately, particularly in cases based primarily on eyewitness testimony. For example, a personal injury case should be investigated as soon after the accident as possible. Witnesses forget or have second thoughts about being interviewed; witnesses move away and disappear; and physical evidence can be lost, altered, or destroyed.

But an immediate investigation is not always required. A prompt fact investigation may not be essential in contract and commercial cases, for instance, where the evidence will primarily consist of documents, correspondence, and other business records, and where the danger that records will be lost or disappear mysteriously is low. Contract and commercial cases may have complex legal questions that you must research and answer before you can start an intelligently structured fact investigation. Moreover, delay sometimes helps. If you start an investigation of a prospective defendant who expects to be sued, you may spur the defendant into beginning its own investigation. Unless the defendant needs to investigate an affirmative defense or counterclaim, a sound approach may be simply to wait for the other side to do something.

2. What facts do I need to get?

Your job as a litigator is to obtain enough admissible evidence to prove your claims and defend against the other side's claims. Therefore, you need to identify what you must prove or disprove, as determined by the substantive law underlying the claims, remedies, defenses, and counterclaims in the case. But how do you research this law if you do not yet know what the pleadings will allege? What do you research first, the facts or the law?

This question has no easy answer, as the facts and law are intertwined. The investigation of one affects the investigation of the other. You will usually go back and forth periodically as you develop your theory of the case.

Example:

> You have what appears to be a routine personal injury case. From your initial interview of the client it appears to be a simple negligence case against the other driver. You do preliminary research on the negligence claim to see if the damages are sufficient to warrant litigation. You then continue your fact investigation and discover that the defendant is uninsured. To find another possible source of recovery, you wonder if there may be a claim against the municipality for not maintaining intersection markings and safe road conditions. Of course, you need to research the law here. If a legal theory supports such a claim, you then need to go back to see if the facts support this theory. Back and forth you go between getting the facts and researching the law until you have identified those legal theories that have factual support. This process is ongoing and is how you will develop your "theory of the case," or what really happened from your side's point of view.

3. How do I structure my fact investigation?

The easiest way to give structure to your investigation is to use a system that organizes the law and facts based on what you will need to prove if your case goes to trial. In short, this is a good time to start a "litigation chart."[1] A litigation chart is simply a diagram that sets out what you need to prove or disprove in a case and how you will do it. The chart is a graphic way of identifying four major components of the litigation plan:

1. Elements of claims, remedies, defenses, and counterclaims
2. Sources of proof
3. Informal fact investigation
4. Formal discovery

Start with the elements of each potential claim and remedy in the case. Most jurisdictions have pattern jury instructions for commonly tried claims, such as negligence, products liability, and contract claims. The elements instructions will itemize what must be proved for each claim, remedy, or defense. If pattern jury instructions don't exist, more basic research will be necessary. If the claim is based on a statute, read the statute and look at the case annotations that deal with elements and jury instructions. If the claim is based on common law, consult treatises covering the claim and research recent case law in the applicable jurisdiction. Regardless of where the applicable law is, you must find it and determine what the specific elements are. When you have done this, you will have completed the first step on your litigation chart.

1. The litigation chart will become a trial chart if the case is ultimately tried. See Thomas A. Mauet, Trial Techniques and Trials §11.4 (10th ed. 2016); Michael R. Fontham, Trial Technique and Evidence §§1–8 (4th ed. 2013).

Example:

> You represent the plaintiff in a potential contract case. Your client says she obtained goods from a seller and paid for them, but the goods were defective. From your initial client interview, and from reviewing the documents and records she provided, you decide to bring a contract claim against the defendant. Your jurisdiction's pattern jury instructions for contract claims list the elements you must prove to establish liability and damages.

LITIGATION CHART

Elements of Claims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Contract			
(a) contract executed			
(b) pl.'s performance			
(c) def.'s breach			
(d) pl.'s damages			

You should use this approach for every other possible claim. For example, since the contract is for the sale of goods, a claim based on UCC warranties may be appropriate. If so, you should put the elements of this claim on your litigation chart. Most lawyers also use the chart for potential defenses and counterclaims.

The litigation chart has two principal benefits. First, it helps you identify what you have to prove or disprove so that you can focus your fact investigation on getting admissible evidence for each required element. Second, a litigation chart helps you pinpoint the strengths and weaknesses of your case as well as your opponent's case. In most trials, the side that wins is the one that convinces the fact finder to resolve disputed issues in its favor. The litigation chart will help you identify the disputed matters on which you will need to develop additional admissible evidence to strengthen your version and rebut the other party's version.

Notice that the grid structure of your chart is just a simple spreadsheet. Commercially available case management software exists that allows you to create and use customized fields. In addition to the four fields in the litigation chart, you can add fields for questions, favorable/unfavorable facts, lawyer assigned, and so on. You can create links to exhibits and witness testimony. You can export facts to create chronologies. Extending the fields using a case management program allows you to use the database for evidence analysis, discovery planning, and trial preparation.