

MAYER • BROWN

Managing the Early Stages of Commercial Litigation: **Critical First Steps**



Table of Contents

Introduction	1
Initial Communications Within Company	3
Preliminary Considerations	3
Issue a Litigation Hold	3
Identify Key Witnesses	5
Identify Key Documents and Issues	6
Notifications That Might Be Required	8
Determine if the Board or a Board Committee Needs to be Notified of the Litigation	8
Notify Any Insurers	8
Include Litigation in a Periodic SEC Filing and/or File a Form 8-K	10
Notify Other Regulators	11
Determine Whether the Lawsuit Triggers any Contractual Obligations to Notify Third Parties	11
Consider Whether to Notify Third Parties Who May Possess Important Evidence That They Should Preserve That Evidence	12
Determine Whether a Litigation Loss Reserve is Required and, if so, the Size of the Reserve	13
Retaining Counsel	16
Determine Whether any Individuals Require Separate Counsel	16
Determine Whether an Internal Investigation is Required	18
Preliminary Litigation Considerations	22
Part A: General Issues	22
Determine Applicable Privilege Rules (e.g., <i>Upjohn</i> vs. Control Group)	22

Perform an Early Case Evaluation, Including Budget and Settlement Evaluation	24
Determine Whether the Case Will Require a Public Relations/Media Strategy	27
Part B: Legal Process Issues	30
Determine Whether to Challenge the Plaintiff's Choice of Forum	30
Consider Whether There are Grounds for a Motion to Dismiss	36
Determine Whether to Waive/Accept Service of Process	38
Check Contracts to See Whether Disputes Must be Arbitrated	39
Part C: Other Issues	43
Determine Whether There Are Any Data Privacy Issues	43
Determine Whether Any Key Witnesses Are Former Employees and Identify Related Issues	45
Determine Whether it Makes Sense to Enter Into a Joint Defense Agreement with Any Co-Defendants	47
Determine Whether Expert Witnesses Are Likely to be Necessary and, if so, Begin Looking for Them Promptly	49
Considerations Specific to the Collection of Electronic Evidence	51
Determine the Identity of Key Custodians for Both Preservation and Collection Purposes	51
Consider Whether any Routine Electronic Data Operations Need to be Suspended or Altered	52
Identify the Sources of Electronically Stored Information—Such as Databases—Outside the Control of Individual Business Custodians and Take Steps to Ensure That Such Sources Are Properly Preserved	54
Determine the Existence and Location of any Non-Standard Electronically Stored Information and Archived Material	56
Ballpark the Size of Production and Determine Whether to Hire an Outside Vendor and, if a Vendor is Necessary, Select an Appropriate One	57

Determine if an Electronically Stored Information Issue Relates to Third-Party Agents, Including the Need to Preserve and Collect Data in the Custody of Such Agents	59
Determine if an Electronically Stored Information Issue Relates to Data Maintained Outside of the United States and Consider Local Rules Regarding Collection and Review of Such Data	59
Consider Identifying a Project Lead for Electronically Stored Information Issues and Preparing a Written Plan Documenting the Preservation, Collection, Review and Production of Electronically Stored Information	61
Conclusion	64
Appendix 1: Sample Litigation Hold	65
Appendix 2: Sample Litigation Budget	71
Appendix 3: Sample Public Relations Firm Retainer Letter	75
Endnotes	79