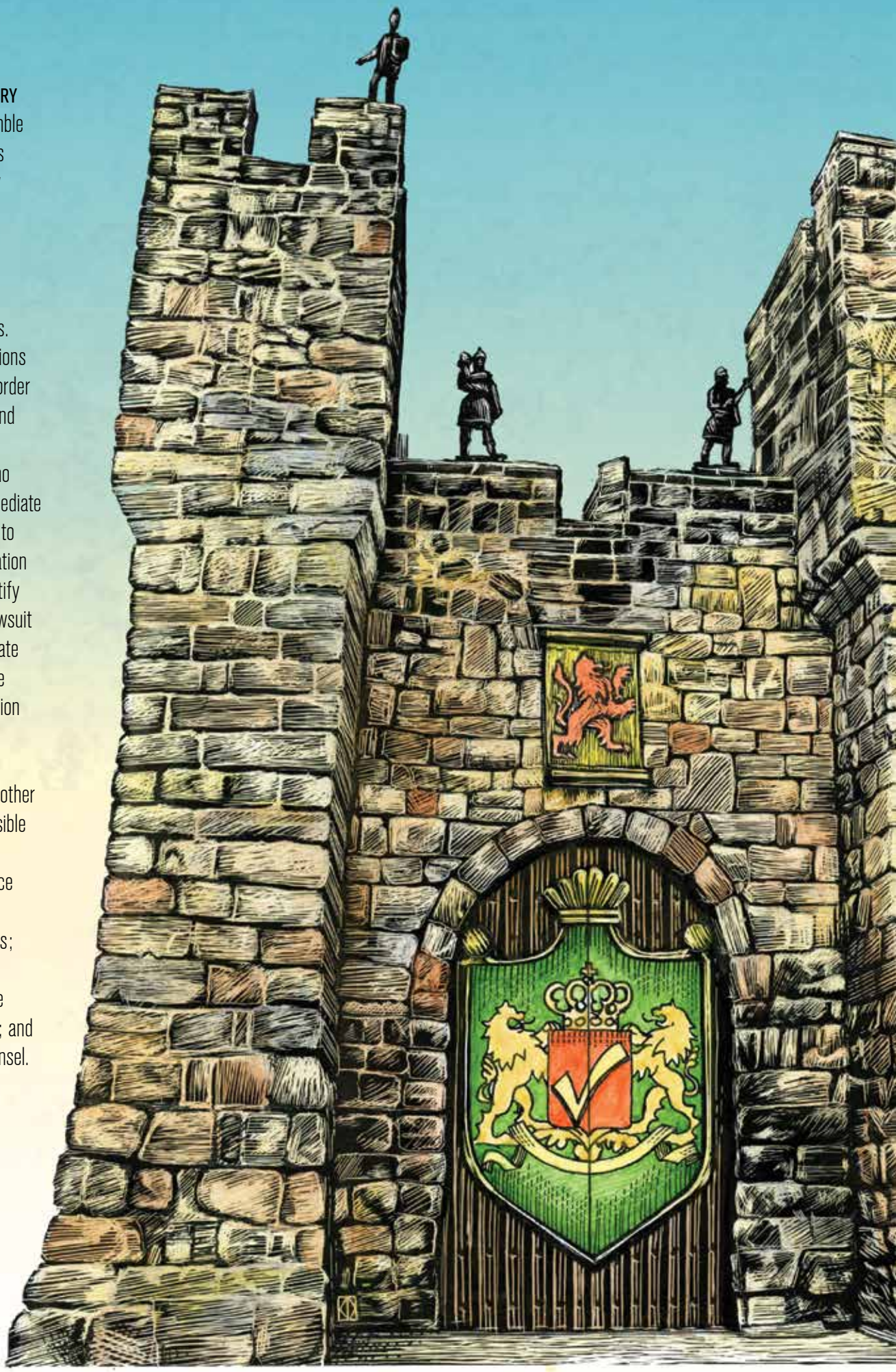
30-SECOND SUMMARY

In the initial scramble after a company is served with a new lawsuit, it is not uncommon for in-house counsel to miss simple tasks and responsibilities. Numerous professions use checklists in order to reduce errors and mistakes – legal departments are no different. The immediate steps in response to newly served litigation are as follows: notify stakeholders of lawsuit ramifications; initiate investigation of the claim; issue litigation hold to preserve documents and evidence; identify other potentially responsible parties; notify applicable insurance carriers; notify regulatory agencies; prepare for media relations; calculate response deadline; and retain outside counsel.



The In-house Checklist
OF STEPS FOR NEW LITIGATION

By Marc Bonora and Jordan Lipp

In the first few days after a company is served with a new lawsuit — or receives a threat of a new lawsuit — there are numerous steps that in-house counsel should take. These steps serve a dual purpose: They ensure compliance with the requirements placed on a civil litigant, and they put the company in the best position to defend itself against the claims. During the initial scramble of investigating claims, figuring out legal defenses and obtaining outside counsel, it is not uncommon for in-house counsel to miss simple tasks and responsibilities.

Numerous professions use checklists in order to reduce errors and mistakes, and many legal departments have created their own checklists of steps to take when served with a new lawsuit. In the stress that accompanies receiving a new lawsuit, a checklist of steps that requires your prompt attention can help reduce errors before unwanted consequences result. This article attempts to set forth the minimum steps — in checklist form — for you to address in order to ensure that your company is in the best position to deal with new litigation. The checklist appears immediately below, and an analysis of each step follows.

The in-house checklist of immediate steps in response to newly served litigation

- ❑ Notify internal stakeholders of lawsuit and ramifications.
- ❑ Initiate investigation of the claims.
- ❑ Issue litigation hold to preserve documents and evidence.
- ❑ Identify other potentially responsible parties.
- ❑ Notify applicable insurance carrier(s).
- ❑ Notify regulatory agencies, as appropriate.
- ❑ Prepare for media or customer relations issues.
- ❑ Calculate response deadline.
- ❑ Notify and retain outside counsel.
- ❑ Other

Discussion

Before discussing each step on the above checklist, there are a few issues worth noting.

Going through the checklist is not a long process. It should commence immediately, and much of it can be accomplished within a few days. The order of completion depends upon the type of case and the preferences and sophistication of the in-house counsel's office and the company as a whole. Many of the steps can and should be handled simultaneously or multi-tasked through delegation to other staff in your department or to outside counsel.

Next, this checklist sets forth the immediate items for the company to address. There are other critical items, of course, that will warrant careful examination in the following weeks. These items include an in-depth examination of the viability and appropriateness of counterclaims or third-party claims, the potential for jurisdictional or venue challenges, the examination and assertion of legal and factual defenses to the claims, the examination of the possibility of early settlement/resolution of the claims, and the actual drafting and filing (usually by outside counsel) of the responsive pleadings and appropriate motions. This checklist, however, does not include these items, as they usually do not require immediate attention.

Finally, while this article recommends general approaches to new litigation, you should always be mindful of the specific laws, rules and ethical dictates of your jurisdiction, as well as the requirements of the subject matter areas of the dispute or claim. With that in mind, here is a description of each step of the checklist.

Notify internal stakeholders of lawsuit and ramifications

Depending on your organization, the first step for you to take upon notification of a new lawsuit or claim is to alert the appropriate individuals at the company. Whether your internal client is publicly traded or privately held, keeping your business side informed of threats to the company — especially those in the public record — is likely one of your highest priorities and a top expectation that your company has of you. The CEO likely does not want to first hear of a significant new lawsuit from anyone but chief counsel. Even if you do not have all the facts surrounding the claim, or don't know its likely impact, assuming this is the type of case that warrants executive attention, an initial notification to the pertinent business side individuals is a sound move.

Quickly informing the appropriate personnel is particularly important if the company is discussing a merger or buyout, or is preparing to report to its board. Similarly, if a public company is about to make a public filing with the Securities and Exchange Commission, it may have to alter the filing to reflect the new lawsuit.[1] Also, depending on the lawsuit, it may be appropriate for the company to inform its auditors about the existence and nature of the lawsuit in short order.

Initiate investigation of the claims

Investigating the claims asserted involves both an internal investigation and, if warranted, an external investigation. Depending on the staffing and resources of your in-house counsel's office, the interviews and discussions with inside and outside individuals may be conducted by you, other attorneys in your department, internal paralegal staff or by outside counsel

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The issues that you face in the external investigation often have more potential landmines than those in the internal investigation.

and their staff. Issues that arise in the internal investigation and external investigation are discussed below.

For the internal investigation, you must ensure that key client executives, managers and employees are informed of the lawsuit and interviewed as warranted, while also effectively preserving their information and collecting documents from them. This process must start immediately so that:

1. these employees do not engage in conduct that undermines or contradicts the company's position and defenses in the lawsuit; and
2. key information is not lost.

Your discussion with key employees is a two-way street. Your goal is both to inform the employees of certain items, and to learn from them. Specifically, you should inform the employees of, at least, the following:

- Your communications are privileged, but the company — and not the employee — is the holder of the privilege;[2]
- The employee should retain and not destroy evidence;
- The employee should limit internal communications related to the subject matter of the lawsuit;
- For employees at the appropriate level and in appropriate positions, the basics of how to address external inquiries about the lawsuit, and instructions to others not to engage in any outside communication;[3]
- The general nature of the litigation in order to provide comfort to the employee who may not be familiar with the litigation process; and
- Conversely, if the employee is named individually as a defendant, or if your interview reveals that the interests of the employee and the company are not aligned, you may need to advise the employee to seek separate counsel.

While part of your role is to inform the employee of the various legal matters raised by the lawsuit, discussed above, the majority of the discussion will likely involve the employee informing you of the circumstances surrounding the dispute. Your initial discussion should be designed to elicit information, including:

- Which other employees have knowledge of the lawsuit so they can be interviewed in short order;
- The scope of a litigation hold;
- Whether there are other responsible parties;
- The potential scope and size of the lawsuit to assess its likely impact on your company; and
- The basics of the potential factual defenses to the lawsuit.

This should be accomplished quickly, with follow-up interviews over the following weeks to further ensure the retention of evidence, and develop any defenses, counterclaims and third-party claims. While your own communications with company employees are likely privileged, you should be mindful that interviews conducted by other departments not at the request of counsel may not provide the same protections.

In some cases, but not all, a prompt external investigation may be necessary. The key employee on your side of the litigation may have switched companies or retired since the events that led to the lawsuit. Or, the lawsuit may revolve around the conduct of another entity, whether a subcontractor or outsource manufacturer.

The issues that you face in the external investigation often have more potential landmines than those in the internal investigation. For example, although the common-interest doctrine may protect your (or your outside counsel's) communications with other companies and their employees, the odds are much greater that a court will find that such communications, as opposed to your communications with your employees, will not be privileged. Depending upon the circumstances, entering into an oral or written joint defense agreement in conjunction with the investigation may be prudent.[4] In-house counsel has to address the ethical rules when reaching out to individuals or companies that might have legal representation.[5]

If you are concerned that the adverse party may delete/destroy publicly available evidence before you have responded to the lawsuit, a quick investigation may be warranted. For example, if you are afraid the other side may quickly take down its pertinent webpages, it may be worthwhile to capture the other side's publicly available website and social media sites for future use in the litigation. In the personal injury realm, it is not unheard of for the plaintiff to permanently delete his social media accounts shortly after filing suit. While this likely constitutes spoliation, the data nevertheless becomes permanently deleted before discovery requests can be issued. Immediately capturing that information (being mindful of the ethical and legal considerations of social media searches) before it is deleted may be helpful.[6] Other unusual circumstances may require immediate actions. Although quite unusual, occasionally, a key witness may be dying or about to leave the country — which may require not only quick interviews, but perhaps even an early preservation deposition as well.[7]

Issue litigation hold to preserve documents and evidence

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prompt and effective litigation holds. Tales of sanctions and bad outcomes are well documented in recent case law and articles.[8] Thus, this step should be one of the very first that in-house counsel address when a new litigation trigger arises.

While some internal investigation is necessary to identify those persons and documents that must be placed on hold, investigation should not be used as a reason to delay initiating the hold. You can amend the hold as new witnesses and documents are identified. But immediate issuance of a hold to all the known entities — including your information technology (IT) department — is paramount. This issuance of the hold notice, even if incomplete, should ensure that document retention policies are suspended and that key employee's emails and files are preserved.

But in today's technological and legal landscape, issuance of the hold is not enough. Acknowledgement of the hold by its recipients should be tracked, a reminder hold should be reissued at regular intervals or at important junctures in the case, and in-house counsel must work with IT and other departments who may be migrating to the cloud or changing vendors, to ensure that items on hold are not lost with these updates and changes.

The tools through which you may issue a hold are incredibly varied, but to ensure defensibility of your process, you should employ a consistent, repeatable and demonstrable approach. The simplest approach is to manually create and send hold letters, and track the recipients so that, if challenged, you can produce evidence of receipt of the hold notice by the necessary personnel. There are also inexpensive web-based stand-alone notification systems, which automate much of the sending and tracking process, and may be more defensible in court than an ad-hoc internal approach. Sophisticated IT departments may also create their own systems that legal departments can use to notify and track. In addition, cloud and other IT vendors may have integrated litigation hold functions built into their platforms.

Regardless of what system you use, to avoid sanctions for spoliation and to ensure that your company is preserving the information it needs, you must ensure that your litigation holds are being followed. This may entail follow-up phone calls and conversations with employee witnesses on hold, and working in conjunction with IT and those responsible for document retention policies in your company. It is a joint effort, and all who are impacted must appreciate its importance.

Identify other potential responsible parties

Often times, there are other parties — whether a contractor, lessor or component part manufacturer — who are wholly or partially responsible for the damages or injuries alleged in the new lawsuit. Ready identification of these parties is important for multiple reasons, including helping to craft the defense strategy, the responsive pleading, and the potential cross-claims or third-party claims. As important is the need to determine whether other involved parties may have a contractual obligation to reduce or eliminate your company's defense costs and/or liability exposure.

You should check whether other responsible parties have indemnification agreements in place with your company that might make them responsible for the defense and indemnification of the lawsuit. (Conversely, it is also good to know whether your company owes an indemnification or defense obligation to another party in the lawsuit.) Not only may another party be liable under an indemnity clause, but another party may have secured insurance that provides coverage to your company for the newly served lawsuit. For example, your company may be named as an additional insured on another company's policy. Even if your company has not been named as an additional insured on another company's policy, the contract with the other company might create contractual liability obligations on the other company's insurance carrier.

Many companies keep logs of indemnification agreements and additional insured policies. In the absence of such logs, or to double-check the logs, a prudent initial step is to inquire with the relevant internal departments regarding which parties may be responsible and what contracts and insurance agreements exist.

Assuming you have learned that other companies (and/or their insurers) may be responsible and may have a contractual obligation to defend and/or indemnify your company, you should make sure to properly and promptly put those parties (and their insurance carriers) on notice of their responsibility. Quick notification may be required under the pertinent contract, and in any event, is important for determining defense decisions and strategies before the responsive pleadings are due.

Notify applicable insurance carrier(s)

Depending upon the nature of the lawsuit, one of the most critical steps once a company learns of a claim or lawsuit is to determine what insurance may be available for the defense and indemnity of the claim or lawsuit, and to put the applicable insurers on notice.[9]

A common mistake is for a company to fail to recognize all outstanding policies that might provide coverage. Often, several policies may cover a claim, and the prompt notification to all relevant insurers is important to protect the company and defend the case. While some claims may implicate obvious policies, it is not always clear which policies may afford coverage. A meeting with the risk manager and the insurance broker may help you sort through the potentially applicable

Sample litigation hold letters

If your company does not already have a standard litigation hold letter or process, or you are updating its litigation hold process, there are numerous treatises and practice guides that can assist. The following list provides some of the sample litigation hold letters available online.

Adam B. Landa & Philip H. Cohen, "eDiscovery for Corporate Counsel" Appendix 13C (2013), *http://bit.ly/1gM7Sdq*

Andrew B. Serwin, "Information Security and Privacy: A Guide to Federal and State Law and Compliance" § 40:12 (2013), *http://bit.ly/1gM8fVs*

Cynthia M. Krus, "Corporate Secretary's Answer Book" Appendix 26A (West 5th ed. Supp. 2014), *http://bit.ly/1g89QW4*

Daniel Oberdorfer & Mark A. Rothstein, "Employment, Agents and Independent Contractors" in 24A West's Legal Forms §9.38 (2013), *http://bit.ly/1lQOQKM*

Harold T. Daniel, Jr., "Litigation Management by Law Firms" in 5 Business and Commercial Litigation in Federal Courts § 62:32 (Robert Haig ed., 3d ed. 2013), *http://bit.ly/1htS5Wx*

Robert E. Crotty, "Litigation Management by Law Firms" in 4A Commercial Litigation in New York State Courts 4A § 62:45 (Robert Haig ed., 3d ed. 2013), *http://bit.ly/1ivmEq8*

Robert M. Abrahams, Gerald G. Paul, Wolfgang A. Dase & Barbara Gluck Reid, "Document Discovery" in 3 Commercial Litigation in New York State Courts § 25:85 (Robert Haig ed., 3d ed. 2013), *http://bit.ly/1juUX3U*

2 William E. Hartsfield, "Investigating Employee Conduct" § 10:29.50 (2013), *http://bit.ly/1mYhlq7*

policies. Unusual losses or losses in areas in which you are unfamiliar may warrant the retention of an outside insurance practitioner to provide advice on potential coverage.

You should be sure not to overlook insurance coverage available where your company is not the first named insured. The company may well be listed as an additional insured on another company's policy, or a contract with another company may provide a contractual basis for insurance. This issue should be examined as part of the previous section's task of identifying other responsible parties. When in doubt, it is better to put the carrier on notice on behalf of your own company, even if the primary insured notified the carrier as well.[10] Similarly, it is often prudent to place all excess and umbrella carriers on notice.

Once the company has determined the applicable insurance policies under which it may be covered, it should provide notice to the insurance carriers in short order. Notification is often warranted once you learn of a claim (or risk of claim), regardless of whether a lawsuit has been filed. Care should be taken to make sure the notification is to the proper entities, in the proper manner and at the proper address as listed in the policy. The timing requirements of such notification vary depending upon the policy language, the jurisdiction's law and the facts surrounding the notification. Nevertheless, it is not uncommon for an insurer to deny coverage based upon untimely notification.[11] Moreover, rapid notification is important if the carrier is assigning defense counsel. The sooner the carrier is aware of the claim, the sooner it can assign defense counsel.

Notify regulatory agencies, as appropriate

While regulatory notification is not required after receiving notice of a lawsuit in many cases, there are certain areas where immediate regulatory notification is critical. Obviously, it is important for your department to be familiar with the reporting requirements in your industry; have a regulatory affairs department able to address such reporting requirements; or be able promptly to obtain the advice of outside counsel on the reporting requirements once a lawsuit is served on your company. As regulatory reporting requirements are so vast and varied, this article provides only a few examples of some of the many reporting requirements in-house counsel may encounter that need immediate attention.

For example, if the lawsuit involves an environmental matter or condition, there may be immediate reporting requirements. If the company first becomes aware of an alleged release or spill from the lawsuit, or the company was previously aware and failed to make the proper notifications, there will likely be numerous reporting requirements. Many of these reporting requirements necessitate immediate (i.e., same day) action. Reporting requirements are mandated not only under US federal law (e.g., CERCLA, Clean Water Act), but also under the panoply of state-based and locality-specific regulations. Depending upon your company's

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WISDOM OF THE CROWD

What would you say are the key steps in-house counsel should systematically take when the company is served with a new lawsuit?

A few preliminary thoughts: issue a litigation hold directive or preservation memo (there are several names for this) — something to notify the appropriate business units that relevant electronic and physical documentation/items must be preserved; take note of the answer deadline so you don't miss it; consider hiring experienced outside counsel (you can get many referrals, probably, through ACC); and yes, don't panic!

ALLISON LYNN PHILLIPS, STAFF COUNSEL, HOBBY LOBBY STORES, INC.

You also want to timely tender the complaint to your company's insurance carrier(s). Simply send a copy of it to your broker and ask them to put your carriers on notice. Your insurance company, in turn, will contact you to gather more information and discuss the matter. They will also send you a coverage letter discussing your insurance, the alleged facts and their coverage position. If any of the allegations are covered under insurance, you may be entitled to a defense provided by your insurance. This is a topic by itself. This may take some time, so in the meantime, you should follow the advice of the others, issue a discovery hold, talk to the interested internal parties, and retain outside counsel.

JIM OFFICE, VICE PRESIDENT & GENERAL COUNSEL, VICTORY WHOLESALE GROUP

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size and industry, you may already have in place a spill response and emergency reporting plan. If so, your environmental health and safety (EHS) manager or risk manager can often oversee the reporting details. Depending upon the circumstances, retaining an environmental attorney with knowledge of the jurisdiction may be warranted.

For another example, companies that are regulated by the Food and Drug Administration (FDA) — from food producers to medical device manufacturers — may need to provide immediate reporting to the FDA. Among other situations, if a lawsuit raises a serious and unexpected adverse drug experience, and the incident has not been previously reported to the FDA, the company may be required to file a 15-day alert report with the FDA.[12] Similar requirements are in place for other entities regulated by the FDA.[13]

For a third example, a manufacturer, importer, distributor or retailer of consumer products has certain reporting requirements to the United States Consumer Product Safety Commission (CPSC). When a company first obtains information which reasonably supports the conclusion that its product fails to comply with applicable rules/regulations, contains a defect that could create a substantial product hazard, or creates an unreasonable risk of serious injury or death, it has a duty to report to the CPSC within 24 hours.[14] While often this is triggered by consumer complaints, warranty returns or insurance claims that occur long before any potential lawsuit, new litigation may trigger the regulatory notification requirement.

Prepare for media or customer relations issues

Most lawsuits receive no media coverage of any kind. Media often covers other lawsuits extensively. And, as a general matter, lawsuits are not confidential. If there is a substantial likelihood of media coverage of the litigation, the company and its counsel should immediately figure out its media relations strategy. Unlike the actual litigation, where a responsive pleading is usually not due for weeks, the media cycle demands immediate attention.

While the full details of responding to media inquiries and crafting statements to the press are beyond the scope of this article, there are a few brief items worth noting.[15]

Each company has a different method of responding to media inquiries. Some companies seek the guidance of an outside crisis communications/public relations firm. Other companies handle these tasks internally, while others look to outside counsel.

Regardless of a company's strategy in dealing with the media, quick, accurate and persuasive responses to media inquiries are important. If the lawsuit is the type to garner media attention (whether local, regional, national or international), the media strategy should be put in place, if possible, before the phone starts ringing. While use of a media relations department or the retention of a crisis communications firm can be very helpful, your legal department should stay involved with the press releases and statements to make sure no statements jeopardize future litigation positions. Throughout the process, in-house counsel should also be mindful of the ethical constraints placed upon attorneys in making press statements.[16]

While media attention is often fleeting, a potentially trickier situation involves addressing customer or supplier concerns as a result of the lawsuit. These inquiries may start immediately after the filing of a lawsuit, and they

often will not be addressed to your legal department. Meeting with the appropriate employees to ensure that the company has a consistent message to its customers, suppliers and other outside firms about the litigation may help prevent problems. Similar to press statements, these communications should be reviewed by counsel to make sure they do not jeopardize future litigation positions.

Calculate response deadline

Once a lawsuit is actually served on your company, you will typically only have 20 to 30 days for your company to file a responsive pleading, depending on the jurisdiction. For example, the response deadline in federal court is 21 days after service.[17] This is precious little time to fully investigate the claims being made, educate outside counsel (or internal litigation counsel) and have counsel file the response. Thus, it is of paramount importance that as part of your immediate response to new litigation you, or someone in your department, calculate and calendar the response date. If you receive service through a registered agent, the time allowed for the response may be stated in the notice of service issued by the agent. Verifying this statement is often warranted, and web-based services are available to calculate deadlines in virtually any jurisdiction. If the company is personally served or served through certified mail, in order to accurately calculate the response date, your department will likely have to communicate directly with the personnel who received service to ensure you know the actual date of service.

Whatever the deadline, you should immediately communicate this deadline to outside counsel who will litigate the case so that they can timely prepare the response or seek an extension. If your company misses the filing deadline, courts do not always waive the default.

In addition to the response deadline, depending upon the case, you may also want your department to calculate deadlines for removal of state cases to federal court.[18] Deadlines to respond to temporary restraining orders and requests for injunctive relief will have even shorter timeframes that require instant attention and involvement of outside litigation counsel.

Notify and retain outside counsel

Though some companies employ internal litigation counsel to litigate lawsuits brought against the company, most still retain outside counsel. As soon as a lawsuit is filed against your company — and maybe even as soon as litigation is threatened, depending upon the seriousness of the claims — you should retain outside counsel to begin strategizing and preparing the company's defenses and overall approach to the lawsuit. This step may be easy if you have regular outside counsel who handles the type of case at issue. For example, you may have established employment defense counsel who handles all of your employment litigation. But if the subject matter of the lawsuit is novel, or it is in a jurisdiction where you do not have regular counsel, you may need to quickly interview potential counsel. You may have a trusted outside counsel who knows your company but is unfamiliar with the type of claim or jurisdiction involved in the lawsuit. This counsel could be a resource to help you find the right representation for the case at hand, or serve as co-counsel in order to lend company knowledge to the new counsel you retain. You may also choose to use your regular counsel but hire local counsel who is familiar with the jurisdiction or subject matter.

In addition to the value in retaining outside counsel in short order to ensure early and seamless case strategizing and defenses, you also need to contact prospective outside counsel quickly to allow time for conflict-of-interest checks and to address any unusual issues presented by the local jurisdiction. You should be mindful, however, that if your potential loss is covered by an insurance policy, defense counsel will likely be chosen by the insurance carrier or indemnitor.

Other

Each legal department and company will have its own peculiarities that cannot be anticipated from the outside. If you decide to use the checklist provided in this article, you may want to remind yourself — when all other steps have been addressed — of the acronym MYCOR (Meet Your Company's Other Requirements) as a reminder to consider your internal client's special circumstances, preferences and requirements. The industry you are in may require that other necessary steps be met. Your company may have an intake sheet to fill out, a meeting to call or other preferred procedures to follow. Other companies, as a matter of practice, may immediately send out no-spoliation letters to the other side of the litigation.

Special circumstances within your company may also raise special issues. If the company is about to be sold, or is in the process of raising money, immediate notification of the acquirer or potential bondholder may be appropriate. In "bet the company" litigation, a public company may need to consider disclosing the litigation in a Form 8-K. No single checklist can provide for all contingencies or circumstances — and you should make sure that the checklist you use fits your company's needs.

Checklists can help you avoid missing important actions

In the rush to explore the company's defenses, counterclaims and settlement posture, you should not forget about the important and necessary tasks outlined in this checklist. To quote

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Litigation Preparation To-Do List (Oct. 2012). *www.acc.com/form/to-do-lit_oct12*

Administrative Duties Litigation Log (Oct. 2011). *www.acc.com/form/lit-log_oct11*

Presentation
Your Role in Managing Litigation (May 2012). *www.acc.com/managing-lit_may12*

Quick References
Managing Outside Counsel: Checklist of Conversations (Oct. 2011). *www.acc.com/quickref/moc-convo_oct11*

Lawsuit Checklist (Oct. 2011). *www.acc.com/quickref/lawsuit_oct11*

Litigation Matters Flowchart (Oct. 2011). *www.acc.com/quickref/lit-flowchart_oct11*

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Atul Gawande: "[g]ood checklists … are efficient, to the point, and easy to use even in the most difficult situations. … They do not try to spell out everything — a checklist cannot fly a plane. Instead, they provide reminders of only the most critical and important steps — the ones that even the highly skilled professional using them could miss."[19] Having this ready checklist handy will hopefully help you avoid missing important actions once a new lawsuit is served to your company. **ACC**

NOTES

1 See Item 103 of Regulation S-K, 17 C.F.R. § 229.103 (setting forth public company requirements on reporting of litigation). Even if no immediate reporting is appropriate, a public company should not forget its more long-term reporting requirements for certain lawsuits in its Form 10-K and Form 10-Q. Id.

2 You should be mindful that any instructions about keeping the matters regarding the lawsuit confidential may implicate the National Labor Relations Act. See *Banner Health Sys.,* 358 NLRB No. 93 (July 30, 2012) ("To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights.").

3 Beyond the National Labor Relations Act issues, addressed in the prior footnote, you should also be mindful of the ethical issues involving instructing an employee to refrain from voluntarily giving information to the other party. See Model Rules of Prof'l Conduct R. 3.4(f) (2013); Restatement (Third) Law Governing Lawyers § 116(4) & cmte. (2000).

4 See Christopher F. Dekker, et al., "Level the Playing Field and Protect Privilege with Common Interests Agreements," 28 Vol. 28 No. 6 *ACC Docket*, July/Aug. 2010, at 70.

5 See Model Rules of Prof'l Conduct R. 4.2 (2013).

6 See Adam Sand & Jodi A. Vickerman, "A Comprehensive Guide for Learning to "Like" Social Media," Vol. 31 No. 7 *ACC Docket*, Sept. 2013, at 46.

7 Federal Rule of Civil Procedure 30(a)(2) provides that a party can seek a deposition prior to the start of discovery without leave of court if it certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination after that time. Moreover, Federal Rule of Civil Procedure 27(a) even permits a deposition prior to the commencement of an action when it is needed to perpetuate the testimony.

8 E.g., *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212 (S.D.N.Y. 2003) (imposing sanctions for spoliation of electronic evidence). For a general discussion of litigation holds, see Dean Gonsowski, "Implementing an Effective and Defensible Legal Hold Workflow," Vol. 29 No. 7 *ACC Docket,* Sept. 2011, at 108; Elizabeth Ozmun, et al., "Evidence Preservation Warfare: eDiscovery Lessons Learned From *AMD v. Intel*," Vol. 28 No. 7 *ACC Docket*, 66 Sept. 2010, at 66.

9 For a general discussion of these issues, see John DeGroote & Wendy Toolin Breau, "Bet the Company Litigation From a Policyholder's Perspective," Vol. 27 No. 4 *ACC Docket*, May 2009, at 24.

10 44 Am. Jur. 2d *Insurance* § 1343.

11 See generally 44 Am. Jur. 2d *Insurance* §§ 1309-1342.

12 21 C.F.R. § 314.80.

13 For example, if a lawsuit raises a serious adverse event associated with a dietary supplement that was not previously reported, the company may be required to file a 15-day report to the FDA. 21 U.S.C. § 379aa–1.

14 16 C.F.R. § 1115.14(d)-(e). This is separate from the reporting requirements of lawsuit judgments/settlements that occur after the judgments/settlements. See 15 U.S.C. § 2084; 16 C.F.R. § 1116.1, et seq. See generally CPSC's Recall Handbook (March 2012).

15 For more in depth examination of responding to media requests, see James W. Patton, et al., "Responding to Media Inquiries in a Crisis," Vol. 21 No. 7 *ACCA Docket*, July/Aug. 2003, at 41.

16 See Model Rules of Prof'l Conduct R. 3.6 (2013).

17 Fed. Rule of Civ. Proc. 12(a)(1)(A)(i).

18 See generally 28 U.S.C. § 1446(b) for removal deadlines.

19 Atul Gawande, "The Checklist Manifesto: How to Get Things Right" 120 (2009).

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