Prosecuting or defending a lawsuit requires a significant investment of time and resources, both yours and your client’s. Regardless of whether you represent the plaintiff or the defendant, careful planning, organization, investigation, and strategizing are crucial to obtaining a favorable outcome for your client, whether that means a jury verdict or a settlement that addresses important business concerns. This process of planning and evaluating at the outset of litigation is typically referred to as a “pre-suit investigation.” This chapter explores the practical and legal significance of a pre-suit investigation in a business torts case, discusses the components of a comprehensive investigation, and addresses the importance of documenting your methodology.

I. THE IMPORTANCE OF PRE-SUIT INVESTIGATIONS IN BUSINESS TORTS CASES

Conducting a thorough pre-suit investigation is important for many reasons, some pragmatic, some tactical, and some required by law. As a matter of basic practice, plaintiffs must conduct an investigation sufficient to support the allegations of their complaint. Indeed, Federal Rule of Civil Procedure 11 requires that the individual signing the complaint ensure that “(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will
likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”1 Rule 11 likewise requires defendants to certify that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”2 Neither plaintiffs nor defendants can reliably make the required representations of accuracy and nonfrivolousness without conducting some form of factual or legal investigation.

The penalties for failure to comply with Rule 11 are severe. A court may impose sanctions on you and your client, either on a party’s motion or sua sponte, including, but not limited to, dismissal, payment of the opposing party’s attorneys’ fees, or a monetary fine. Imposition of sanctions can also expose counsel to a potential malpractice claim. Thus, you should conduct an in-depth investigation before signing any pleadings.3

Even if a rule or statute in the jurisdiction in which you practice does not expressly require a pre-suit investigation, conducting an investigation before bringing or defending a lawsuit has several practical and tactical advantages. Pre-suit investigations enable attorneys to represent their clients better in a variety of ways, including (1) identifying a proactive litigation strategy, (2) managing the client’s expectations, (3) preparing for early motion practice or discovery, and (4) seeking or opposing a prejudgment remedy or injunction.

A. Mapping a Litigation Strategy
First and foremost, conducting a pre-suit investigation is an invaluable tool in mapping out a clear litigation strategy at the outset of a matter. Operating under the time constraints and pressure inherent to the profession, too many attorneys dive into litigation without identifying a specific end goal or strategizing as to how to get there. Failure to do so thrusts counsel into a precarious reactionary role, merely responding to the opposing

2. Id.
3. While this book focuses on business torts, certain types of cases may be subject to additional, specific pre-suit investigation requirements, such as federal patent cases or medical malpractice actions in many jurisdictions.
party’s actions rather than proactively taking steps to best position his or her client for the desired outcome. This leads to errors and frustrations and frequently costs the client additional money. Conducting a pre-suit investigation—really thinking about the facts and the law that will be in play—allows you to identify your client’s goals and develop a step-by-step strategy to achieve those goals. For instance, many business torts cases are not intended to ever reach a jury but rather are filed to leverage settlement. Other cases involve clear legal issues that should be disposed of through early motion practice. Lastly, some cases will ultimately need to be decided by a judge or jury. Identifying which of these very different outcomes best suits your client will allow you to plan your litigation strategy accordingly. It will also enable you to assess your chances of success, anticipate and analyze any likely defenses or counterclaims, and properly advise your client.

While a pre-suit investigation frequently yields dividends for counsel, its importance to the client should not be underestimated. In the business torts context, whether to initiate litigation is a significant business decision that is typically arrived at in the face of a specific dispute and with an eye toward a desired business outcome. The more you know about the facts and law, the better able you will be to advise your client as to the available options at the outset. This includes creating a budget for various scenarios, articulating the viability of each available approach, and clearly communicating the chances of success of each option. Perhaps the cost of litigation outweighs the financial gain of even the best-case scenario? Maybe the parties are close enough together that a mediation or negotiation will help them bridge the gap? Simply put, investing the time up front to learn the key facts and familiarize yourself with the operative law will allow you to better advise your client.

B. Managing Client Expectations
Additionally, the investigation will help you manage your client’s expectations. For instance, while a tortious interference claim levied against your client in an unfamiliar jurisdiction may seem hollow at first blush, further factual investigation or research into the nuances of the law could reveal that the claim has merit and that there is the potential that your client may be found liable. Knowing enough to advise your client of this fact as early
as possible, before committing to a vigorous defense or making assurances of victory, will prevent your client from growing frustrated or unhappy with your representation.

C. Preparing for Early Motion Practice
Conducting a pre-suit investigation is particularly important in business torts cases where early motion practice, early discovery, prejudgment remedies, and temporary injunctions are a common practice. The knowledge, both factual and legal, gained through a comprehensive investigation can aid in expeditiously drafting or defending a motion to dismiss for lack of jurisdiction or an Iqbal/Twombly challenge without requesting numerous extensions, which can alienate the judge, provoke the ire of opposing counsel, or cause the client to doubt your experience. Similarly, if you have previously investigated the facts available to you, such as by interviewing the witnesses under your control, and researched the elements necessary to prove your case, you will be better positioned to timely issue targeted discovery requests that are less likely to draw broad objections. Another benefit of a pre-suit investigation in discovery is that it can allow you to assess the scope of e-discovery, both offensively and defensively. As will be discussed in greater detail later in this chapter, e-discovery is becoming increasingly important in overall litigation strategy and litigation budgeting. The sooner you can get a handle on the amount of data that may be subject to discovery, the better you’ll be able to prepare.

D. Remedies
Early mastery of the facts and law is of paramount importance in business torts matters involving prejudgment remedies and temporary injunctions. Plaintiffs frequently file the papers for a prejudgment remedy or temporary injunction simultaneously with the complaint. When asking the court to impose what many have deemed “extraordinary” remedies with due process considerations, without any real sense of the scope of the dispute, specificity

lends credibility to your allegations. Moreover, if you are the party seeking a prejudgment remedy or temporary injunction, timeliness is paramount. Any delay in filing required to marshal the facts or law will be weighed against your claim of imminent harm. Lastly, hearings on such matters are typically scheduled expeditiously. Whether you are arguing for or against these remedies, you will need to have solid command of the facts and the law to craft your argument and effectively counter the other side’s claims.

In summary, no matter how big or small a matter, whether plaintiff or defendant, some form of pre-suit investigation into the facts and law at issue will benefit both counsel and the client in all business torts matters.

II. THE COMPONENTS OF A PRE-SUIT INVESTIGATION

A pre-suit investigation can take many forms and should be tailored to the needs of a specific case. There are, however, certain components that should almost always be undertaken before filing or undertaking to defend a business torts case. Generally, these tasks break down into two broad categories: factual and legal considerations. Factual considerations refer to an investigation of the facts that are likely to be at issue in the matter, while legal considerations involve research and analysis into the applicable law. Typically, the factual components of a pre-suit investigation include:

1. identification of key facts,
2. identification of key documents,
3. identification of potential witnesses, and
4. research into the opponent or key players.

The legal factors that need to be identified include:

1. the substantive legal issues implicated by the cause of action you are asserting,
2. the procedural issues that could bear on the action,
3. the need for expert witnesses,
4. the legal strategy, and
5. an analysis of any expected defenses and counterclaims.
Some matters require a more intense factual investigation before deciding how to proceed, such as a complex business deal where the actions taken by the parties will be key to determining liability. In other cases, where the facts are largely undisputed, a more rigorous legal investigation will be required to determine the ramifications of the undisputed facts. Still other matters will require a thorough factual and legal analysis before continuing. The components of each facet of a typical pre-suit investigation will be discussed herein.

**A. Factual Considerations**

While it seems an obvious point, a detailed preliminary investigation of the facts is often given short shrift in the rush to the courthouse or under pressure to respond to potentially damaging allegations. However, the success of a case hinges on the development of the facts as much as any other pre-suit task. Any seasoned trial lawyer will tell you that mastery of the facts is often just as important as mastery of the law. And early mastery allows counsel to begin to craft the “story” that will ultimately be told to the judge, jury, or mediator. Thus, it is important not to wait until discovery begins to dig in to the facts but instead to tackle them head on during pre-suit preparation.

1. **Identification of Key Facts—Getting Started**

The factual portion of a pre-suit investigation deals with the “who, what, why, when, where, and how” of a matter. For instance, in a fraud case, the allegedly fraudulent statements will take center stage. Accordingly, plaintiff’s counsel should be prepared from day one to identify with specificity the allegedly fraudulent statements, who made the statements, when they were made, where or in what context they were made, the subordinate facts that make those statements untrue or misleading, and any facts indicating reliance on those statements. Conversely, a defendant responding to such allegations needs to have an equally thorough understanding of these same facts to deny or admit their truth. Assuming that the allegedly fraudulent statements were in fact made, the context of those statements as well as the subordinate facts related to their veracity could greatly impact the manner in which the allegation is answered.
Counsel can glean this information from many sources. In a business torts case, the most common sources will be people, physical documents, and electronic data. Your preliminary meeting with your client should provide a road map for accessing these sources as early as possible. The internet and other publicly available sources are also starting points.

(a) Preliminary Client Meeting
At the outset of any new matter, regardless of your familiarity with the client, you should schedule a preliminary meeting or phone call to provide the client the opportunity to tell you about the dispute and to allow you to probe any areas that will require further factual development. In that initial meeting, ask your client to tell you the story. Why have they called you? What is the problem that requires your assistance? Why do they believe litigation is the appropriate next step? As they tell their story, listen carefully and take notes to follow up. Who made the allegedly fraudulent statements? To whom were those statements made? Did anyone else have knowledge of the statements or related facts? Are there any writings or documents that support or undermine their version of events?

Upon leaving that initial meeting, you should have a list of the individuals within your control who may have knowledge related to the story told by your client, a list of known documents that may come into play, and a list of any other potential data sources, such as servers or electronic databases. This list serves as the roadmap for your factual investigation. Following the preliminary meeting, you should be able to identify (1) all potential witnesses and key players, (2) key documents, both helpful and harmful, and (3) any other potential sources of data.

The importance of this initial conversation should not be underestimated. Faced with litigation or difficult business decisions, clients can be distracted, short-tempered, anxious, or any combination thereof. This can impact the manner in which they tell their story. As counsel, your job is to aid them in giving you the information that you will need to properly advise them. Do not allow the client to tell you what is relevant and what is not. Ask all questions that you deem necessary to understand the facts of the dispute. This extends to understanding the client’s business, which is critical in business torts cases. Ask the client...
to clarify where applicable and if you don’t understand how a relevant aspect of their operation works, ask the questions that you need to reach the required level of cognizance.

During the initial meeting, you should also assess whether—or more accurately, when—to issue a litigation hold. Although not explicitly articulated in the Federal Rules of Civil Procedure, parties have an unmistakable duty to preserve any information that may be relevant to a matter. This duty arises “once a party reasonably anticipates litigation.” There is not a bright line test for when a party should reasonably anticipate litigation and the courts have found that the duty arises at varying times. Notably, this duty can arise prior to the commencement of a lawsuit if the parties are aware of the existence of a dispute. Once you or your client reasonably anticipate, litigation, a litigation hold notice should be issued promptly to avoid any claims of spoliation. The litigation hold notice should be specific as to the types of materials that must be preserved and should clearly indicate that any documents, paper and electronic, covered by the hold must not be destroyed. The litigation hold notice should be provided to anyone who may have relevant documents in their possession, starting with those individuals identified by the client in your preliminary meeting. Do not forget to issue litigation holds to additional individuals as you learn of them through your investigation.

(b) The Internet and Other Sources of Facts
In addition to the facts conveyed by the client, you should also conduct your own preliminary investigation to corroborate the client’s account, learn information about the client that may not have been conveyed, and identify any facts about the opposing party that may be useful. In some instances, the hiring of a private investigator is warranted. In most cases,

however, attorneys and paralegals can unearth sufficient information from
the internet and public records.

A basic internet search can yield a wealth of information and should be
conducted as a starting point in any investigation. Simply “Googling” the
names of clients, adversaries, and key witnesses may reveal information
about subsidiaries, parent companies, other potentially relevant business
dealings, or any number of newsworthy topics. Targeted searches may also
help complete the picture. For instance, docket searches should be con‑
ducted to learn what other matters the opposing side and its principals are
litigating or have litigated. Reference to the secretary of state’s website may
reveal corporate relationships or filing deficiencies. Other government agen‑
cies’ websites may contain regulatory filings (such as the SEC) or licensing
information. Social media searches of both businesses and individuals can
be a treasure trove of useful information. Even a corporation’s own website
should be reviewed. This can be particularly helpful in disputes where venue
or personal jurisdiction is at issue, potentially listing offices and locations
in which an entity does business.

While internet research is easy, accessible, and cost efficient, it does
have its pitfalls. Accurate, reliable information is intermingled with vast
amounts of less‑than‑accurate information. Sites with user‑generated
content such as Wikipedia may be useful but be mindful of the source of
the content, namely other internet users who may be far from experts on
any given topic. The same is true of blogs or any other websites featur‑
ing user‑generated content, which often contain pure opinion at best and
sheer speculation at worst. To the extent such information will be relied
upon for any purpose, verify it.

Also, the internet is a fluid, ever‑evolving source of information, and the
content of any web site can change between the time of an online search
and the time the suit is filed. It is important to print anything relevant (and
to include the date of printing) to ensure that you have a valid copy of the
information. Additionally, if your case hinges on something online—such
as a defamatory blog post—periodically check back to ensure that the con‑
tent has not changed or been altered in any way.

Finally, while conducting Facebook or Twitter searches of publicly avail‑
able information is acceptable in most circumstances, the creation of fake
identities, misleading friend requests, or the changing of credentials to gain access to networks that you wouldn’t normally have access to are not.8

2. Development of Facts—Identifying Witnesses and Key Players
After marshaling the available preliminary information, the next step is to develop that information further by conducting witness interviews and gathering documents and data.

(a) Witness Interviews
Witness interviews form the backbone of a factual pre-suit investigation. While many witnesses will ultimately be deposed, do not wait until deposition preparation to sit down with the witnesses in your client’s control and explore their knowledge. Early interviews are vital for several reasons.

First, in a business torts case, your client will frequently be an organization and your initial contact will often be with someone in a supervisory role, such as a manager, director, or officer. Often, these individuals will not have first-hand knowledge of the genesis of the problem but will have received reports from subordinates as the matter escalated to them. Much like the child’s game of telephone, facts have a way of morphing and evolving as they are conveyed from one human being to another. Accordingly, it is important to speak directly with the actors involved before committing to a version of events in a pleading. In other words, go straight to the source and insist on early access to the individuals who will likely be key players in the litigation. You will find that the perception at the top of a company can differ dramatically from the version of events offered by the people on the ground floor.

Speaking with the actors is also important in a business torts case where industry custom or practice is at issue, such as in an unfair trade practices case. The managers of an organization are required to have vast oversight for all aspects of the business. As a result, they are understandably less familiar

with the nitty-gritty, day-to-day operations. Where these details may be important—such as in establishing a custom or practice—you must speak directly with the people who know how business is conducted in actuality, as opposed to in theory. Frequently, practices may deviate from the written policies of an organization and it will be important to know this early.

Second, speaking with witnesses or actors while events are fresh in their minds is preferable. The passage of time, later events, suggestions from others, or simple memory loss can impact a witness’s ability to recollect specific facts accurately. Interviewing people as quickly as possible presents the best chance of accurate recall.

Third, as a practical matter, employees with knowledge may no longer be with the company a year down the road when discovery heats up. It is best to understand the depths of their knowledge while they are still clearly under your control.

Lastly, witness interviews are essential in identifying relevant documents and data. In most cases, a witness interview should include questions related to what types of documents are available to support their story, what documents they are aware of that might be harmful or helpful, and their knowledge of any other data or data systems that may be relevant. Importantly, any witnesses who indicate that they have potentially relevant documents in their possession but have not yet received a litigation hold notice should be sent the litigation hold notice immediately following the interview.

Due to their import, conducting witness interviews should be approached methodically. First, make a list of individuals known to have relevant information. This should contain people identified by your client contact in the preliminary meeting. If your client is a business and you suspect that e-discovery will be a necessity, as it almost always is these days, be sure to include information technology personnel.

In addition to names, the list should contain job titles, affiliations, contact information, and whether the individual is under your control. This will help identify friendly witnesses, hostile witnesses, and third-party witnesses who are likely neutral. Witnesses under your control—i.e., employed by your client—should be easy to schedule for interviews. Third parties may initially be reluctant to become involved but may come around if they understand
that they will likely be compelled to testify by subpoena at some point in the future and that this result may be avoided if they speak with you now. It is unlikely that you will have the opportunity to interview any persons affiliated with the opposing side. Indeed, if the opposing side is represented by counsel, you would need to contact him to discuss the possibility. In most situations, counsel will not allow such pre-suit conversations.

Once you have identified witnesses to speak to, develop an interview template or list of questions. You will probably not ask each witness the same questions but there will be considerable overlap. To prepare your questions, consider the types of information needed to prove your claims or defenses. Also, gather relevant background information about each witness as well as facts sufficient to understand their role within the organization. Additionally, in the age of electronic discovery, it is also wise to explore the types of documents, both paper and electronic, that each witness has in their possession or uses as part of their job. When speaking with IT personnel, be sure to ask about the systems used, the locations available to store data, backup tapes, any mobile devices issued by the company, and any data retention policies. If the organization has a data map, collect it as early as possible. If the organization does not, work with the client to create one. You will need to know the location of any relevant data prior to a Rule 26(f) conference or its state court equivalent.

Many people will be nervous when speaking to “the lawyers.” To the greatest extent possible, explain to them who you represent and why you are there. This will help them understand what information might be important for you to know, especially in the early stages where you may still not know what precise questions to ask. Bear in mind, however, that the attorney-client privilege may not extend to all of your conversations, particularly with third parties. Research the reach of the privilege in your jurisdiction before having conversations that you would not want to be discoverable.

10. Edna Selan Epstein’s treatise, The Attorney-Client Privilege and the Work Product Doctrine (5th ed. 2007), contains helpful discussions regarding the application of the attorney-client privilege and the work product doctrine in a variety of contexts.
After you have conducted your interview, organize your notes in a memo to the file while the interview is still fresh in your mind. Make a note of any areas of follow up, such as names of other individuals who may have knowledge of the facts. In many business torts cases, it is a good practice to create a witness file for each witness. Initially, this file should include your notes from the interview, your memo, and any documents the witness may have provided at the interview.

(b) Identification of Key Documents
In addition to witness interviews, your pre-trial investigation should also focus on identifying relevant documents or other materials. This obviously includes physical, hard copy materials but also encompasses electronically stored information, commonly referred to as “ESI.”

While the universe of available relevant materials will vary with the facts of each case, most business torts cases will involve emails, correspondence, contracts, and memoranda. Many others will involve spreadsheets, financial information, technical data, customer information, proprietary databases, and other forensic data, such as computer logs and other electronic access records.

This is an area that cannot be overlooked in the early stages of a matter. E-discovery is costly and time consuming. Many cases hinge on a party’s ability to merely survive e-discovery. If e-discovery is going to be a significant part of your case—and it almost always is these days—you need to understand the scope early on so you can advise your client accordingly.

B. Legal Considerations
In addition to a factual investigation, the pre-suit phase of a business torts case should also include a preliminary legal analysis. This aspect of the pre-suit process typically includes identification of the substantive legal issues at play, consideration of any procedural issues that may be important, consideration of the need for expert witnesses, analysis of overall legal strategy, and identification of any challenges or pitfalls.
1. Identification of Substantive Legal Issues

Although it may seem an obvious point, early identification of the key substantive legal issues involved is crucial to success. Indeed, the threshold question to consider is whether the law provides relief for the client’s predicament. Particularly in the business torts arena, not every dispute can be remedied through the legal system. When the legal process cannot provide satisfactory relief, it is imperative to advise the client before expending time and energy. Accordingly, it is wise to conduct some preliminary legal research following the initial client meeting.

Where the legal process can be of assistance, further research into the substantive legal doctrines at play is necessary. For plaintiffs, this will include research into all available causes of action and analysis of which ones will withstand a challenge for failure to state a claim. In many instances, the causes of action will be familiar: fraud, misrepresentation, tortious interference with business relations, unfair trade practices, defamation, etc. Depending on the facts of each case, there may also be less obvious causes of action that may provide relief, such as computer crimes or invasion of privacy. Less common causes of action are frequently articulated in state statutes. Also, consider what remedies are available for your client. Is there a cause of action that will allow for recovery of attorneys’ fees or punitive damages? Defendants should conduct a similar exercise with an eye toward defenses and possible counterclaims. Although not as extensive, a prepared plaintiff will have undertaken the same exercise in anticipation of the defense. There may be instances in which the cause of action your client wants to bring may provoke a better, stronger counterclaim.

A good practice is to create a memorandum that identifies each cause of action, the elements of each cause of action, and the authority for those elements. This memorandum should also include available defenses, the elements of those defenses, and the authority for those defenses. This memorandum will be helpful in ingraining the important points of law that will govern your entire litigation strategy and will likely be frequent points of conversation with the court and opposing counsel.

At this stage, you will likely happen across more nuanced legal issues related to the manner in which courts interpret certain elements or the
proof required to establish an element. Some of these nuances will require immediate exploration, such as considerations related to insufficient pleading or motions to dismiss. Others, such as burden of proof or evidentiary issues, should be noted in the memorandum, but in-depth research likely will be tabled for a later point.

2. Identification of Procedural Issues

Equally important in the early stages of a matter are procedural issues, such as service, personal jurisdiction, venue, and choice of law. These fundamental concepts inform crucial strategy decisions, such as when and where to bring suit or what law to apply. If the parties to an action are both from the same jurisdiction, this will likely be an uncomplicated inquiry. In today’s global economy, however, organizations are frequently incorporated or formed in one jurisdiction but have a principal place of business in another and have inserted themselves in the stream of commerce in yet another location. This common situation requires a careful analysis of the applicable long arm statute, minimum contacts, and other personal jurisdiction considerations, such as where a company is incorporated, headquartered, has warehouses, or advertises.11 Your factual investigation will play a large role in this analysis.

Venue must also be considered. In federal court, venue for a corporate defendant is proper in any judicial district where it is subject to personal jurisdiction, or in a district in which “a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.”12 A plaintiff’s choice of venue is given substantial deference and can only be overcome “when the private and public interest factors clearly point towards trial in the alternative forum.”13

The final important procedural issue to consider is the applicable law. While a court may have jurisdiction over the parties, the law of another jurisdiction may apply either as a result of the location of the events giving rise to the injury or by contract. Make sure to consider this issue prior to diving into your substantive analysis since which law applies could impact

not only the available causes of action but the availability of prejudgment remedies, statutes of limitations, punitive damages, attorneys’ fees, or statutory interest rates.

3. Identification of Likely Expert Witnesses

Many business torts cases will require expert witness testimony to establish liability or damages. Plaintiffs endeavoring to prove forms of negligence, such as breach of fiduciary duty, are likely to need an expert to establish a duty of care. In some jurisdictions, failure to present expert testimony as to the duty of care will result in a directed verdict in favor of the defendant. In other instances, expert testimony may not be required, but may be helpful to the fact finder, such as matters involving a complicated damages analysis or highly technical subject matter.

In addition to testifying experts, consider whether the case merits or requires the use of a consulting, non-testifying expert. Consulting experts are individuals with subject matter expertise who can assist counsel in understanding the nuances of a business or industry. Critically, under the Federal Rules of Evidence, communications between counsel and consulting experts are not discoverable. In many instances, a client can fill this role. However, while cost effective, a client’s expertise may be embedded with biased information. Where a completely objective view is essential, hiring a consulting expert may be beneficial.

While many parties will eventually hire an expert, early consultation and retention of experts is key. Where the subject matter is complex, experts can help provide a thorough understanding of the facts at issue, allowing counsel to draft the complaint in a manner likely to withstand a challenge. Experts are also helpful in obtaining preliminary relief, such as preliminary injunctions or prejudgment remedies. Additionally, experts can also assist in focusing early discovery requests, which can result in a more efficient process or even yield information that may support settlement. As a practical matter, early identification of experts avoids the last-minute rush to complete the expert’s report and allows your client the best opportunity to obtain the preeminent experts in a given field.

Accordingly, your pre-suit investigation should include the subject matters on which you anticipate needing expert assistance, analysis of whether

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you will need testifying or consulting experts (or both), as well as the names of potential witnesses.

4. Early Identification of Litigation Strategy
The last step in your pre-suit investigation should be to marshal the facts learned and the legal research performed to develop your overall litigation strategy. This is where you put it all together. Based on everything you have learned about the facts and the law, ask yourself the following questions:

• What is the desired outcome?
• What steps do you need to take to obtain that result?
• What are the strengths of your case?
• What are the weaknesses?
• What steps can you take to address either?

The answers to these questions will guide you in formulating your strategy and provide direction as you progress in the action.

III. DOCUMENTING YOUR EFFORTS
Many attorneys undertake several components of a pre-suit investigation without giving it much thought. We run a few Google searches, we check the elements of tortious interference, but we don’t always keep a record of these efforts. Keeping detailed records of your efforts will allow you to develop a case module that centralizes and synthesizes your investigation in a single document. It will also serve as proof that you have not brought a baseless claim should such a challenge be made.

To create this document, keep your notes from each interview and put them in a file for each witness. If your notes are difficult to read, consider using them to draft a memo to the file while the conversation is fresh in your mind. Keep printouts of any internet research you performed, such as land records, dockets, or regulatory filings. Similarly, draft memos for all research performed and print out copies of key cases or statutes that you will need to refer to frequently. This will prevent you from having to duplicate your efforts in the future. Secure any documents gathered in a safe place where you will be able to locate them quickly for production.
The case module that you create based on your investigation and your analysis is attorney work product that is protected by the work product doctrine. Care must be taken to preserve that protection. Accordingly, if you share the case module with your client, instruct them not to share it with any third parties. If the client is an organization, it should not be disseminated beyond the top executives or a control group, where applicable.

14. See Fed. R. Civ. P. 26(b)(3) (providing that “[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” absent a showing of substantial need and undue hardship).