

Litigating In New York: The Choice Between State and Federal Court

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I am often asked by clients who have decided to file a legal action whether they should file in state or federal court. The question invariably brings to mind an old law school professor who once lectured us: "When you graduate you will take the subway to City Hall and there you will see two grand buildings fronted by massive columns. On top of one of them you will read the words *The True Administration of Justice is the Firmest Pillar of Good Government*. That's the state court. Don't go there. Go to the next building which says *United States Courthouse*." In the two-plus decades of practice—in both buildings—I have certainly had experiences which would validate the professor's cynicism. But I have also had many that disproved it. Which means, of course, that as a general proposition his counsel was unsound. The two courts are indeed different, both in their procedures and practices, but these differences do not automatically favor one or the other. Rather, the decision where to file depends on the kind of case you have and what you anticipate to be the best, most effective strategy to get to your ultimate goal. Your goal may be to prevail at trial (although most litigations never get that far). But it may also be to obtain summary judgment, perhaps a preliminary injunction, or it may be to create conditions favorable to a settlement. The point is, there is no one-size-fits-all litigation strategy and you should choose the court that will best serve yours. Here are some of the things that lawyers and their clients should consider when deciding whether to file an action in New York state or federal court. (Please note that this is limited to New York only; other states have their own practices and procedures).

1. Length of Litigation

As a general rule litigations take longer to get through the state court system than the federal one. There is no hard and fast rule and there are exceptions of course. But on the whole, litigants can expect a much more protracted process in state court. This is due in part to backlog, certain inefficiencies in the motion practice procedures, as well as to limited judicial oversight of the discovery process. Bluntly, lawyers who want to delay the litigation are afforded greater leeway in state court than in federal court. With additional time come additional costs – to both sides. So if

your client's resources are limited this would argue in favor of a federal action. But if your client is the one with the deeper pocket the longer process may not necessarily be a bad thing. If your goal is to get the other side to the settlement table the prospect of a costly and lengthy litigation may be just the encouragement your opponent needs.

2. Committing to a Jury Trial

Federal court procedures require parties to choose at the very outset of the litigation whether they want the case to be ultimately decided by a jury or a judge. In state court this decision need not be made until shortly before trial. The implications are important. Let's say you filed a federal action and did not ask for a jury. In the course of the next year, before trial, you have formed a distinct impression from the judge's rulings and comments that she doesn't think much of your case. She may not even think much of you. At that point, you would understandably prefer a jury, not the judge, to make the final decision. Too late. You are committed to a non-jury trial. On the whole, most lawyers would prefer to make a judge v. jury decision once they have a better feel for the evidence in the case, the quality of the witnesses, and the judge. This option is not available in federal court.

3. Stay of Discovery While Motion to Dismiss is Pending

A defendant's response to a complaint is often a motion to dismiss it. His argument is that plaintiff has no claim as a matter of law even if everything he claims is factually true. In state court such a motion as a rule (with some exceptions) automatically stays all proceedings until it is decided. In federal court there is no such automatic stay in most cases; the action generally proceeds to discovery (depositions, document production, etc.) while the court is pondering its decision. This may not seem as all that important a difference but it can be. Motions to dismiss may take months, sometimes upwards of a year to decide. What happens in the interim? If you are in state court, nothing. The case simply grinds to a halt for an indefinite duration. In the meantime evidence may become stale, witnesses may move or become otherwise unavailable. And if keeping the defendant's feet to the fire is part of your strategy, you're out of luck. The defendant can relax, at least for a while. On the coin's flip side, in federal court you may spend hundreds of thousands of your client's dollars on discovery while the motion is pending, only to have the judge rule against you and dismiss your claims. If your case is weak it sometimes pays to know this sooner rather than later, before you've invested the money.

4. Appeals

Perhaps the most critical difference between state and federal practice is in the area of appeals. In federal practice appeals are generally available only after a final judgment, *i.e.*, after the case is basically over at the trial court level. At that point, the parties may bring up for review all of the lower court's orders made in the course of the litigation. The same process is available in state court. However, in state court a party may also appeal *non-final* orders as soon as they are issued, without waiting for the final judgment. The practical implications are huge. A complex state court action may involve three or four appeals before the final judgment is issued – everything from denial or granting of injunctive relief, rulings on motions to dismiss, summary judgment motions,

motions to exclude evidence, *etc.* On the one hand, this can extend the litigation process greatly, as well as increase the costs. On the other, this allows for (more or less) prompt corrections of judicial errors without having to wait for the entire litigation to be completed. Suppose it is important for your client to obtain an immediate preliminary injunction in order to prevent the defendant from doing something irreparably harmful. The judge denies your request. If you are in state court you can appeal the denial immediately. If in federal, you need first to complete the entire litigation and appeal only then. By that time the injunction may be a moot point. (Federal rules do allow parties to ask for permission to appeal non-final orders, but these are rarely granted).

5. Discovery and Evidence

As a rule, discovery is more circumscribed in federal courts than in state courts. For example, federal rules impose limits on the number of written interrogatories and also limit the number of hours a witness can be questioned at a deposition. They also impose specific disclosure requirements at the outset of the case. State rules generally do not have these restrictions, and it often depends on the judge how much freedom a lawyer will have to conduct discovery as he wishes to. Also, federal courts have a comprehensive code of evidence, entitled the Federal Rules of Evidence. By contrast, state courts do not. In fact, New York is one of a handful of states in which the rules of evidence are not codified by statute but are derived from various court decisions and treatises, with a limited number sprinkled throughout the Civil Procedure Law and Rules. In theory, this should not make much of a difference. A rule is a rule, after all, whatever the source. In practice, however, the difference is not trivial. Most New York lawyers would likely agree that when it comes to receiving documentary and testimonial evidence, federal judges are more, for lack of better word, predictable than state court judges. Lawyers who want greater flexibility in having their evidence admitted are likely to prefer the state court.

***** These are some of the key differences between state and federal practice in New York. This is by no means an exhaustive list. There are a number of other differences, including smaller but nevertheless important ones, that should also be considered before making the decision where to file.

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