NATIONAL COORDINATING COUNSEL

Lee Hollis
Lightfoot Franklin & White

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Industrywide Litigation Committee

DISARMING WEAPONS OF MASS DESTRUCTION

Defending Multi-Jurisdictional Litigation

Carmelite M. Bertaut and William P. Barnette [FNa1]

In the past several years, numerous companies, and indeed entire industries, have increasingly been confronted with mass tort lawsuits in multiple jurisdictions at the same time. At a minimum, the threat posed by such multi-jurisdictional litigation is serious, and in a worst-case scenario can threaten the company's or industry's very existence. Any company facing such a scenario will likely expend significant resources before the threat subsides. The goal, however, of all companies remains the same: resolve the litigation as favorably and quickly as possible, at minimal cost.

A company in "crisis litigation" essentially follows the same process as any other defendant. Because the scope of multi-party, multi-jurisdictional litigation can be so vast, however, those caught up in it can easily lose sight of the big picture. In particular, the first complex litigation that a company faces may be a painful learning experience. What follows are some considerations that a company sued in several jurisdictions, and joined with other defendants, should take into account in pursuing its defense.

Timing is Critical

Any company confronted by multiple suits should avoid at all costs a reactionary approach. Thus, as quickly as possible, a company should focus on setting up the litigation team and infrastructure on which it will rely. A defendant with its key players in place early on both maximizes the time available to determine a winning strategy and positions itself to take the offensive in implementing this strategy. Organization is especially crucial in the early critical days when public perceptions are being formed and many plaintiffs' lawyers are considering whether to jump on the litigation bandwagon.

Appearances are very important. Companies that appear disorganized are likely to find themselves defendants in an even greater number of courts. On the other hand, a defense that hits the ground running can dictate to a large degree the timing of the litigation, influence the ranking of primary jurisdictions, and narrow the issues to those that the companies should win.

Timing, then, is critically important in setting the defense agenda. The need for quick action also can have practical application in a particular case. For example, plaintiffs frequently will have propounded a request for a protective order with their complaint. In some instances, the court may already have issued draconian non-destruct

orders that impair the company's ordinary business operations. In those instances, defense counsel will have to work hard and fast to obtain relief from inequitable provisions while ensuring that the company complies with the rest. The time limitations are apparent. In short, time is precious.

The In-House Role

One of the most important decisions any defendant makes is selecting the outside lawyers who will handle the defense. The significance of outside counsel selection runs proportionately to the stakes of the litigation: as the stakes increase so does the importance of picking the right lawyers, and then assigning them to the right jobs. That is, when the scope of litigation explodes, a defendant not only must select the right person, often in multiple jurisdictions, but must also match the person and task so as to use his or her talents to the fullest while avoiding duplication. Responsibility for choosing appropriate outside counsel typically belongs to the company's lead in-house attorney, who also must marshal the necessary internal resources to defend the litigation.

Decision makers within the company must first identify who is best situated in-house to take on the supervising counsel's role. Litigation responsibility in corporate law departments is frequently divided along geographical lines and/or by type of case. When major litigation involving several jurisdictions commences, however, the company should look beyond artificial divisions and assign its best qualified and most knowledgeable attorney to supervise.

Deciding which in-house lawyer best fits that description will largely turn on the precise role that he or she will take. How active will in-house counsel be in the litigation? While prudent in-house counsel will review drafts of pleadings and attend significant hearings, it will likely not be feasible to play a more hands-on role, such as by taking depositions or arguing motions. Rather, the in-house supervising attorney should focus on the big picture--setting the overall strategy for the litigation.

Managing multi-jurisdictional litigation can quickly grow beyond the means of the most conscientious in-house lawyer. Typically, many lawyers, both in-house and outside, will be involved in the lawsuits. Thus, for efficiency and effectiveness, a team approach is essential. A successful team effort is contingent on the ability to timely decide and effect decisions; if any one person takes on too much responsibility, that person becomes not a keystone but a stumbling block. In other words, the supervising attorney must delegate responsibilities. Complex litigation can quickly engulf any one person who feels the need to pass on all decisions, regardless of how small. By focusing instead on his or her supervisory role, in-house counsel can keep the big picture in mind, while not unnecessarily impeding the defense.

This, however, does not mean that the in-house role is "hands off." The more knowledgeable in-house counsel is about the facts and law at issue, the better served the company is in formulating strategy. Day-to-day communication with outside counsel will ensure that the in-house attorney--and thereby the client--will stay grounded and realistic about the company's prospects. Such basic appreciation is essential to the company's decision to "fight or flee" the litigation.

Another factor that will affect the role of the supervising attorney is whether the outside lawyers have represented the company previously, and provided quality representation. Do the outside lawyers already understand the company's business, and perhaps the legal issues that are implicated? The broader the network of tested and experienced outside counsel that are available to the company, the more comfortable the company can feel about its prospects in the litigation.

The supervising counsel has several functions to perform on behalf of the company. The company rightfully expects, first and foremost, that its in-house lawyer will protect the company's larger business interests, coordinate litigation support within the company, and develop overall strategy for the litigation.

• Business interests. Every in-house lawyer is required to know his or her employer's long-range interests. Indeed, the promotion and protection of the company's business interests is the core role of the in-house lawyer. Although no lawyer is ever relieved of the necessity to understand the business interests of his or her client, in-house counsel are imbued with this information and are therefore optimally situated to both defend and advance those interests during litigation.

• Liaison between the company and outside counsel. All defense begins with an understanding of the facts of the lawsuit. The in-house lawyer should identify those persons within the company who can provide background information and answers to the various questions about the facts. This information will then be shared with outside counsel. Developing key facts and amassing critical evidence requires early identification of needed company resources, ranging from technical assistance (e.g., with design elements) to marketing representatives to information services (to guard against spoliation issues). Once these resources are identified, the in-house attorney can either work directly with company personnel or, where appropriate, direct outside counsel to deal directly with employees.

• Joint defense. A necessary function for in-house counsel in multi-party litigation is communicating with representatives of co-defendants, which may lead to a formal agreement to defend jointly. Such communications should occur within the respective corporate legal departments, rather than among business people, so as to preserve their privileged nature.

• Internal communication. Although not unique to high-stakes litigation, a company's key decision makers always have a legitimate need to know precisely what is going on with the litigation. A representative of the legal department is the proper filter through which to answer the business people's questions and address their concerns. The ultimate path that the litigation takes will be determined by these decision makers, who must be kept fully informed. Armed with an appreciation of the defense's strengths and weaknesses, these key players, along with the legal department, can develop the ultimate strategy.

Involvement of Company Personnel

Beyond the legal department, major litigation against a company often requires the identification of individuals within the company who are critical to the defense. The specific departments of the company that are important turn on the type of case. In a products liability lawsuit, research and development, and quality control departments will be at the heart of the controversy. Conversely, in a trade practices matter, marketing and financial people are likely to be regularly involved. Identifying one or more persons within each critical department to serve as liaison with the legal department can assist in marshaling the necessary evidence. Such an approach will streamline access to the information while avoiding repetitive interruptions. Keep in mind that the litigation may implicate the decisions of more than current employees or even their predecessors; in a design claim, for example, generations of workers' decisions may be impugned. Thus, employees with considerable history with the company are most helpful.

The person in each department providing information to the lawyers should be generally knowledgeable of company history on the relevant subject. He or she should not, however, be a key witness to the events at issue, if possible. Each department's liaison will learn of matters that have arisen in the litigation from communication with counsel. Employees likely to be called to testify should generally be excluded from this informational loop, so as to avoid exposing the witness to information protected by the attorney work product privilege.

Thought should also be given to identifying a company media spokesperson. That person may or may not be an in-house attorney or public relations person; indeed, the spokesperson may vary, depending on the nature of the comments. Sometimes a company will want comments from its attorney, especially where there are purely legal issues that need to be addressed, for example, whether class certification is appropriate or whether the plaintiffs lack standing to sue. Day-to-day management of such issues should be left to the public relations department so as to avoid burdening business people or the lawyers with peripheral interruptions.

Role of National or Regional Coordinating Counsel

In multi-jurisdictional litigation, the company client needs to appoint outside counsel who can manage the litigation nationally or in their region on a daily basis. Such lawyer(s), often called "coordinating counsel," will provide continuity that would be lost if the company were represented exclusively by local counsel in each of the relevant jurisdictions.

Coordinating counsel can be either national, i.e., one outside law firm that works with the various local counsel, or more than one outside firm. In the event more than one coordinating firm is used, assignments are generally based

on either geography, or on the sort of legal issues that are involved. Assigning lawyers by region is one means whereby a company can keep its travel costs in check. Moreover, such an approach gives the company access to those regional contacts that its lawyers have developed, as well as providing the benefit of having attorneys who are already familiar with the law in the relevant jurisdiction. When the litigation is tightly clustered in certain states or regions, regional assignments make sense.

When geographical assignments don't make sense, the division can be by subject matter. For example, one firm might be asked to handle one discrete issue or a set of related issues such as all written discovery or class certification issues. The possibilities are limitless, but care should be given to not carving the litigation into so many pieces that counsel are duplicating efforts.

Regardless of how many lawyers are employed, one core function of national or regional counsel is to ensure consistency in the legal positions that the company takes. This is absolutely critical. Nowhere is this more crucial than in discovery responses: if the company objects to production in one venue on privilege grounds, for example, that objection must be universal. Consistency also affects credibility on substantive issues: if the company asserts in one case that a particular claim is preempted by federal law, then it is important that the same defense is asserted everywhere else. While the failure to argue such a defense is not likely to result in waiver elsewhere, it can make the argument less persuasive.

Coordinating counsel are also helpful in identifying the jurisdictions that may be the most favorable in which to pursue key positions. To make these decisions, the national coordinator has to appreciate the innumerable differences in the substantive and procedural law of the various jurisdictions and among the courts. In this regard, the lawyer becomes the client's eyes on the ground.

Finally, coordinating counsel are pivotal in defining and maintaining perspective as to company witnesses and documents as the litigation progresses. Because coordinating counsel have to be on top of daily developments, they are ideally suited to provide the periodic status reports that enable other outside counsel and the in-house attorney to appreciate the larger picture.

Role of Local Counsel

The aim in looking for local lawyers should be to find a competent attorney with intimate knowledge of the local jurisdiction--judges, jury venire, and any biases that may have an impact on decision makers and the forum in general. This knowledge must encompass the particular jurisdiction's substantive and procedural law. Local lawyers are also useful in identifying local experts. Keep in mind that the size of the jurisdiction may limit the choice of local counsel; this is especially true for the later named defendants. If it appears the company will face a suit in such a jurisdiction, thought should be given to hiring local counsel in anticipation of need.

In addition to coordinating and local counsel, companies should also consider whether there is need for specialized criminal or regulatory counsel. Has the litigation spawned requests for grand juries or invitations to appear before Congressional committees? Obviously, if there is a need for such representation, the sooner it is in place the better.

Understanding the Client's Long-Range Interests

When a company is in high-stakes, complex litigation, it is easy to lose sight of its long-range interests. At the top of the list is the strong desire to end the litigation as soon as possible. Such termination may be achieved through settlement or one or more trials. Because litigation is expensive both in dollars and in sapping a company's energy, a settlement is sometimes--but not always--the most desirable resolution.

The client must recognize that a basketful of claims--even trivial claims-- can swamp a viable company. Three words prove this point: "negative value claims." Many companies have heard the argument that individual claims are so insignificant that no one will pursue them. Keep in mind, however, that plaintiffs' lawyers are collecting dozens of these small claims, and are planning arguments for class certification.

Even if the individual claims are themselves minimal, how wide is the plaintiffs' swing? Or what precisely is the

cost of giving plaintiffs what they want? Consider: minimal payout in one jurisdiction can equal multiple payouts elsewhere. On the other hand, admission that a virtually obsolete design is problematic may cause little disruption, but a settlement that costs a company a star design or an industry a critical product can be fatal.

Can the industry even bring the claims together for a comprehensive and meaningful settlement, or are there too many mavericks among the companies affected? This is one area where consolidation and/or transfer to multi-district panels can be valuable. By bringing the players together in one proceeding, settlement of as many claims as possible can be contemplated.

Finally, consideration needs to be given to the question: what is a win, anyway? The answer requires understanding the negatives of the company's position, which invariably requires appreciation of any "bad" documents and problematic testimony.

Joint Defense Agreements

The goal of both the company defendant and its lawyers is to coordinate the litigation to achieve efficiency. This can be accomplished both internally via joint defense agreements and externally via transfer and consolidation of cases and/or discrete issue coordination.

When faced with litigation on a huge scale, it is wise to consider joining with co-defendants in an effort to share strategy as well as reduce costs. Such a joint defense agreement allows co-defendants to efficiently plot and develop a common defense.

One element of a joint defense agreement can be a cost-sharing provision, either on per capita, market share, or most potential exposure basis. The goal is to apportion the work among the various defendants in a manner that matches the most capable resource with the need. Is there a national law firm in the JDA that is justifiably well known for the depth of its in-house nursing paralegals, or its ability to develop experts? Perhaps another firm is well suited to draft briefs. Often, the litigation will have progressed to where a particular jurisdiction will have disproportionate significance. Is there one or more counsel or firms in the joint defense that are better situated to take the lead in that jurisdiction?

One of the possible weaknesses of the joint defense approach is that consensus among the various defendants may take longer to achieve. In addition, due to the need for consensus, the joint approach can be more cumbersome. It is also likely to result in a conservative defense. When a group of bright attorneys are asked their opinions as to any suggested action, one can expect many different viewpoints--some of which may be based on reservations due to perceived risk. Either from the sheer number of the levels through which decisions have to be vetted or because lawyers can think themselves out of "risky" ideas, the defense of any litigation via committee is likely to produce a conservative, careful representation. Such a result is not necessarily bad and, indeed, if a company or industry is under a potentially fatal attack, it may well be the prudent approach. But understand, innovative or radical approaches--thinking outside the box--may be impossible when the lawyers are part of a joint defense.

Notwithstanding any agreements, each defendant should exercise its own independent judgment. Just because the co-defendants disagree does not mean that any one defendant should not pursue the scorned strategy. Of course, the more independent thinking that goes on, the more difficult a true joint defense becomes.

It is also important to acknowledge conflicts of interest within co-defendant groups. Is this an industry where trust and cooperation can even develop? There are some industries where competition is so intense that a full-fledged joint defense is simply not doable. If the principals are going to spend a sizable chunk of time worrying about the goodwill of their colleagues, then a joint defense may not be in the cards.

In spite of these possible problems, however, dismissing the joint defense approach is shortsighted. With the advent of the Internet and well-financed plaintiff consortiums, corporations are increasingly confronting better coordinated and financed attacks. For instance, plaintiffs' lawyers and publishing houses are distributing copies of current rulings and pleadings that can easily spur more litigation. Because of the sophistication of their opponents, defendants in industrywide litigation would be better served to put their past differences behind them and attempt to

define at least some common agreed-on approaches. Perhaps agreement can be reached on a (relatively) neutral point such as which jurisdictions are more likely to be favorable and thus pursued. Starting with small agreements can build trust for more sensitive deals.

In any situation, whether previously hostile or not, the parties should agree on the scope of any joint defense or cost-sharing agreement. The variations are infinite. While written joint defense agreements are not required in all jurisdictions, reducing the agreement to writing does have some attractiveness in that the parties' obligations can be clearly set out. And while no one likes to think that a colleague--a trusted colleague at that--might later want out of the agreement, withdrawals from joint defenses have occurred.

Requiring all signatories to advise one another in the event any documents subject to the JDA are subpoenaed, and requiring a good faith opposition to the production of such materials on behalf of the others, can help protect the remaining members of a coalition should a member withdraw. Another matter that can be addressed in the agreement is the scope of the joint defense, e.g., that counsel for any one party to the agreement is not deemed to be counsel for any other party. Such a provision can avoid any argument that counsel who participated in the joint defense is barred from representing his or her same client in later litigation against another participant.

Multi-District Litigation Consolidation

In deciding where to pursue the litigation, companies are likely to be confronted with both federal and state court venues. Short of removing the state cases--successfully--to federal court, there is currently no statutory mechanism to ensure the coordination of federal and state matters. There have been, however, situations where state and federal judges have voluntarily met with one another to determine whether agreements about timing in their respective jurisdictions can be worked out. These meetings can also promote consistency in the terms of case management orders.

Lawsuits filed in federal court can be considered for transfer to the panel for multi-district litigation. The statutory basis for such a request is set out in 28 U.S.C. § 1407. To be transferred to an MDL judge, cases must involve one or more common questions of fact. The general rules for transfer are set out in Rules of Procedure of the Judicial Panel on Multi-District Litigation. Note that as later lawsuits are filed, they also can be sent to the MDL judge by virtue of "tag-along" designations. Resort to an MDL court offers an opportunity to a defendant to capture the numerous cases under one umbrella for the purposes of the scope and timing of discovery.

In the past, defendants have frequently been reluctant to sign on to an MDL request for fear that consolidation would grease the skids and actually encourage more lawsuits. If all discovery and pre-trial matters are consolidated, the concern was that later plaintiffs would ride the coattails of their more aggressive colleagues. While there is some justification for these concerns, companies faced with hundreds of individual filings may appreciate the safe harbor of an MDL process to establish unified pre-trial procedures and deadlines. Beyond simplification of deadlines, an MDL consolidation can also limit multiple depositions of the same company witnesses--thereby avoiding the risk of inconsistent responses, as well as unnecessary disruption to business operations.

Even when MDL consolidation is not possible, companies should work diligently to achieve consolidation of discovery so that company witnesses and written discovery responses do not have to be repeated into perpetuity. This can be done voluntarily with plaintiffs' counsel or achieved through orders of the various courts. In this regard, counsel should review the current edition of the Manual for Complex Litigation, Third (1995). If the lawsuits are based in one state, the counsel should determine whether the particular state has any comparable complex litigation guide or procedural code. These manuals are a good source for the nuts and bolts of a case management order.

Recognize that, just as with jurisdictions, not all plaintiffs' counsel are equal. Especially in the early days of litigation, consider the reputation of opposing counsel when striking deals regarding case management terms, deadlines, etc. The credibility of opposing counsel who negotiate deals can ensure precedential value or negate it.

Creating a Logistical Framework

Throughout the course of the litigation, fees for legal services and software costs will be substantial. While a

company must understand the expenses of litigation, it expects its outside lawyers to keep costs down. Nonetheless, the old adage that one should not be penny-wise and pound-foolish is especially significant in multi-party, multi-jurisdiction litigation. The focus early on should be to create teams and systems that can carry the load in a cost-effective manner without redundancies.

The costs of professional services are usually the most significant. The principals at each level of representation should agree on a budget, which should be honored to the fullest extent possible. The issuance of written outside counsel guidelines can define a company's expectations. If a company has done a good job at hiring experienced counsel and given serious thought to the best use of each level of representation, costs for legal fees will be appropriate, albeit considerable. As with so many other issues, communication with in-house counsel regarding budget issues is critically important. Thought should also be given to discussing possible cost-sharing measures within any JDA.

In addition to legal fees, document management will also be expensive. One can expect a huge collection of materials will have to be amassed. A company's internal documents, its co-defendants' production, plaintiffs' documents, case management orders, pleadings, and other court documents will soon grow to an unmanageable size. The earlier in the litigation that imaging documents is undertaken, the quicker common access will be achieved.

The most prudent course is to scan every piece of paper to an image file. Be aware that a sizable number of the documents, while technically relevant, have very little significance. By imaging all documents, a party ensures comprehensive preservation. Imaging the documents also ensures that complete documents are preserved. Early in the process, counsel should decide which significant documents will merit additional conversion to OCR (optical character recognition) format to afford full-text searching capability.

A discussion of the various software programs available for the imaging task is outside the scope of this article. Before committing to any program, however, counsel should consult with information systems professionals both in-house and in outside firms to make sure that the system will afford the necessary flexibility and features. Too cumbersome or too limited a system will render it underused or, even worse, irrelevant.

Companies should also consider whether to create a document depository so that later litigants may be compelled to search the depository before requiring the company to produce any documents. Of course, mandatory use of a depository or the company's prior production can be written into any case management orders. But even in the absence of such a requirement, the company's lawyer could direct a litigant to a depository in lieu of further production.

The cost savings associated with a depository are obvious: produce once and then never again, shifting the burden of searching for a particular document onto the plaintiff. The downside is perhaps less obvious: any plaintiff now has at his or her fingertips a wealth of information with which to pursue the defendant. Some veterans of industry wars fear that the ease with which plaintiffs can obtain needed information can breed even more lawsuits. To some extent, the belief that "the discovery is all there" may well entice others to join the fray. Those concerns, however, may be outweighed by the benefits of a single production.

Depending on the number of counsel involved, defendants should consider the development of a secure Intranet that will allow multiple sites, including the other parties to the JDA, to access drafts, e-mail systems, and internal document collections. Again, the costs of creating and maintaining the system can be considerable. But if the system is routinely used, in lieu of faxes, expedited mail deliveries, and personnel costs to obtain and route copies, the overall expense will be reasonable.

Conclusion

With the key players and framework in place, good decisions about strategy can be made promptly. Counsel and their clients will then be able to chart a course to successful resolution of the litigation at a reasonable cost.

[FNa1]. Carmelite M. Bertaut is a partner with Chaffe, McCall, Phillips, Toler & Sarpy, LLP, in its New Orleans office. She focuses her practice on the defense of products liability and commercial claims. William P. Barnette is

(Publication page references are not available for this document.)

Product Litigation Counsel with Brown & Williamson Tobacco Corporation in Louisville, Kentucky. Previously, he practiced with King & Spalding in Atlanta.

The views expressed herein are the authors' alone.

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Feature Article

*357 PRACTICAL CONSIDERATIONS FOR NATIONAL COORDINATING COUNSEL IN COMPLEX LITIGATION

The Role of National Coordinating Counsel in Complex Litigation Is Multifaceted, with an Approach to Keep Everyone of the Same Page from the Beginning to End

Christopher N. Weiss [FNa1]

CORPORATIONS increasingly face lawsuits by groups of claimants, rather than cases pursued by individuals. Group claims are typically filed either as class actions or in clusters of individual filings or multi-plaintiff single cases in which a large number of claimants are represented jointly by a single set of lawyers. Group claims filed in one jurisdiction often prompt similar group claims filed by different law firms in different states.

Some plaintiffs' counsel prefer a particular federal forum; others like their local state court. To defeat an attempt to remove cases from a perceived favorable state court venue to federal court, state cases regularly include a locally based vendor or other resident-defendant, thereby defeating federal diversity of citizenship jurisdiction. It is not unusual for a corporation to be required to mount a defense to multiple cases pending simultaneously in both federal and state venues.

Numerous factors account for this increase in multijurisdictional lawsuits, perhaps most important being the Internet's facilitation of access to information and its creation of a fast, inexpensive and global portal for communication with prospective and actual claimants. In the United States, more lawyers than ever are practicing in these fields, with a not so surprising corresponding increase in litigation. Legal publishers closely track dozens of types of specific litigation--for instance, Mealey's and Andrews publications on securities, toxic torts and pharmaceuticals--enabling counsel access to case developments, theories and experts.

THE STAKES

Group litigation increases the potential recovery for claimants' attorneys, although not necessarily for the individual claimant. For lawyers working on a contingent fee basis, the potential fee is frequently increased as a function of the size of the client group, with seven-figure fee awards not uncommon. And with large fee awards cached as working capital, the plaintiffs' bar is better funded to take on the substantial legal and financial challenges of complex claims against a variety of targeted industries and products. Legal claims include the traditional realms of products liability [FN1] ***358** and shareholder litigation, but they now press corporate defendants on employment and compensation practices, including allegations of discrimination, wage and hour violations, employee benefits and stock option plans.

Dozens to thousands of claimants are presented in multijurisdictional and class action litigation, with each plaintiff or putative class member seeking monetary and/or non-monetary remedies. Because of the number of claimants, such filings attract more attention by the media and investors. Corporate reputations are impacted to a far greater degree by group litigation, a consideration that goes beyond the reserves that must be set asidfe for such claims.

With the stakes so high, at the inception of multijurisdictional or class action litigation, corporate counsel is well advised to involve several professionals for the company's initial response, including national coordinating counsel, the corporate risk manager responsible for insurance notification and coordination, and the company's public relations director and/or an outside public relations firm to respond to media, investor and other inquiries.

THE ROLE OF NATIONAL COORDINATING COUNSEL

One of a defendant company's first steps in responding to multijurisdictional litigation is designating its national coordinating counsel. [FN2] That role can be filled by in-house corporate counsel or a private law firm.

National coordinating counsel serves as the

principal point of contact on litigation matters with general counsel and the officers and directors of the company. The lawyer or lawyers selected should have the experience not only in managing class action or mass tort dockets, or both, but they also must have litigation technologies and staffing support to manage huge volumes of paper documents and electronic data. [FN3]

National coordinating counsel performs a number of essential functions.

A. Global and Unifying Litigation Strategy

With corporate counsel, national coordinating counsel formulates, implements and supervises an over-all litigation strategy for the multiple case filings. Although each case will not be handled identically, it is essential for the defendant to maintain consistent positions on its central factual and legal themes. [FN4] Procedural strategies also require a coordinated approach that seeks to manage the status of the different cases toward defined objectives-- for example, a negotiated settlement of all claims, a successful trial in one or more cases, or both.

The prospect of collateral estoppel is a key reason national coordinating counsel and corporate counsel must monitor and adjust the global litigation strategy consistently for all cases.

Litigation strategy also must be harmonized with the values and business objectives of the company.

B. Identification and Supervision of Local Counsel

National coordinating counsel plays a key role in the identification, recommendation and engagement of local counsel in the venues in which cases have been filed. [FN5] Charged with managing the global case strategy, coordinating counsel is best situated to supervise local counsel's work on the specific cases. Similar issues will arise across the cases, allowing national coordinating counsel to communicate how such issues should be addressed.

C. Procedural Strategies

Several docket management options are available to a defendant facing multijuris-***359** dictional litigation, including: (1) consolidation of actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure; (2) using the multidistrict litigation proceeding (MDL) available under 28 U.S.C. § 1407; using class actions under Federal Rule 23; and (4) motions for stay.

Federal judges and national coordinating counsel often take guidance from the Federal Judicial Center's *Manual for Complex Litigation* (4th ed. 2004) as a resource for formulating case management orders.

Consolidation. Consolidation allows multiple independent cases to be joined for purposes of pretrial, trial or both. During the late 1980s in King County, Washington, the crush of several hundred separate asbestos personal injury cases prompted the state trial court to formulate what it termed accelerated case review rules, which consolidated groups of cases, usually dozens of individual filings, for pretrial discovery, settlement and trial purposes. Similar consolidations have taken place in major metropolitan state courts across the country and at the federal level in a variety of mass tort contexts.

Multidistrict Litigation. Section 1407 authorizes federal courts through the Judicial Panel on Multidistrict Litigation to transfer federal cases to a single district for consolidation and coordination of pretrial proceedings. Follow-on orders allow for the transfer of new case filings to the MDL court. On completion of the defined pretrial phase, the MDL court issues remand orders transferring individual cases back to their originating districts.

A defendant must assess closely whether it favors or opposes MDL status for multiple federal cases. For example, MDL consolidation increases the likelihood of certification of a national class action in appropriate cases. On the other hand, if federal lawsuits have reached a substantial number and cover a large geographic area, MDL consolidation may provide a cost-effective approach, a strategic approach, or both, to ensure uniform treatment of the various cases. [FN6]

Mixed Federal and State Dockets. Multijurisdictional cases frequently are pending in both state and federal courts simultaneously. Mass tort cases, based on state common law theories, often involve a federal MDL proceeding with concurrently pending state cases. For instance, the director of the Federal Judicial Center, Judge Barbara Rothstein, has retained jurisdiction of the phenylpropanolamine (PPA) MDL in Seattle. In 2003, she arranged for joint Daubert hearings for federal and state PPA cases. She hosted state court judges in person and by closed-circuit television at the Seattle federal

courthouse, and they jointly presided over the scientific hearings.

Federal courts also can coordinate with state courts to issue common protective orders, scheduling orders, joint pretrial conferences, coordinated document depositories, joint-captioned depositions and other pretrial arrangements designed to minimize the potential for unnecessary duplication and delay. [FN7]

In addition to formulating the framework on which cases will proceed, national coordinating counsel also provides guidance on a variety of procedural strategies for liability and damage discovery and trial. For example, Lone Pine orders have proved effective in mass tort cases in which questions are presented as to the existence and scope of injuries sustained among a large group of allegedly affected claimants. [FN8] Bifurcation orders, including reverse bifurcation in which damages are ***360** tried first, also are potentially helpful methods by which to resolve group case filings efficiently.

D. Class Action Litigation

Class actions are governed under Rule 23 of the Federal Rules of Civil Procedure and under each state's own civil rules. [FN9]

Some people link the increased cost of insurance premiums and calls for legislative reform to the surge in class action filings. Congress struggled in 2004 with two bills that would have conferred exclusive federal jurisdiction over most class actions. Whether that legislation will be enacted or face the same extended discussion to which federal tort reform has been subjected remains an open question. [FN10]

In some state court courts, motions for class certification may be noted on a regular motions calendar, which is usually far too short a time to allow for effective discovery and briefing of the issue. Early, advance arrangement with plaintiffs' counsel on an agreed briefing schedule is advisable. Absent coming to an agreement, defense counsel might consider a motion for a scheduling conference.

Discretionary appeals are authorized under Federal Rule 23(f) from orders granting or denying motions for class action certification. By contrast, some states have no provision for such appeals.

When multiple class actions are pending simultaneously in federal court, national coordinating counsel must assess the strategic implications of the creation of an MDL panel to which all federal cases would be transferred and coordinated.

When filed, class actions identify a putative class or classes that would be represented by the named plaintiff or plaintiffs, who would serve as the class representative. Much of the work in class action cases focuses on whether it is proper to certify a class under the Rule 23(b) criteria. Certification is sometimes sought only on particular issues pursuant to Rule 23(c)4).

The scope and timing of class certification discovery is a subject of disagreement between counsel for plaintiffs and defendants. The disagreements can be resolved by case scheduling orders entered either by stipulation or following motion practice.

Settlements of class actions are exceedingly challenging. The U.S. Supreme Court issued two decisions in the 1990s that impose increased procedural safeguards ostensibly protecting class member interests. [FN11] These safeguards, however, make approval and enforcement of class action settlements more difficult. [FN12] Federal Rule 23(a) states that any class action settlement requires formal notice to all class members and court approval, including approval of the provisions for compensation of the plaintiffs' counsel. Dismissal orders require notice and court approval. Rule 23(e).

Ethical considerations seem to arise more frequently in class action litigation than in other litigation contexts. Conflicts of interest are presented regarding the interests of the class representative and absent class members, as well as the professional responsibility obligations incumbent on the representational duties of class counsel. [FN13]

***361 E. Internal Fact Investigation and Development**

National coordinating counsel investigates the facts and develops the key defense witnesses and documentary evidence. They typically prepare the core chronologies, organizational charts, witness lists and other fact-based work product that serve as the foundation for the management of the various pending cases. Utilizing such automated litigation support tools as CaseMap, Concordance, Summation, and Binder, national coordinating counsel is able to develop work product in electronic databases that can be made available to corporate counsel and to local counsel.

F. Management of Discovery

Discovery is expensive and time consuming. National coordinating counsel's role is to develop a strategy that is cost-effective and minimizes disruption of the corporate defendant's ongoing business activities. [FN14]

National coordinating counsel must assess whether there is proprietary or confidential information at risk in the case, a situation that would make protective orders appropriate. National coordinating counsel coordinates efforts to obtain consistent protective orders across cases, and most important, must ensure that protective documents are collected back at the conclusion of litigation.

Responding to discovery requests propounded to the corporate defendant is managed by national coordinating counsel. Of obvious importance, responses to written discovery must be handled in a consistent manner across jurisdictions. National counsel should serve as the coordinating entity to work with the company in developing full responses and appropriate objections. Local counsel ensure that the responses conform with the requirements of the particular venue.

Answering interrogatories and document requests can disrupt business activities and intrude on the individuals whose electronic and paper files must be reviewed. Repeat searches for documents are expensive and understandably can annoy the company employees who must again open their files. National coordinating counsel therefore should craft a strategy that seeks to obtain as much of the potentially relevant data as possible at one time. National coordinating counsel can then maintain the data--electronic and paper documents--at its offices.

National coordinating counsel should devise and implement strategies (1) for assessing the company's record retention schedules and whether the litigation should affect those policies and (2) for conducting electronic discovery of such media as e-mail and documents maintained only in electronic form.

National coordinating counsel should develop common sets of interrogatories, document requests, and requests for admission to the plaintiffs in each case. If personal injuries are asserted, a consistent strategy should be implemented for independent medical examinations of each claimant or a representative sample of the claimants.

If the case is proceeding as a class action, one must determine the degree to which the local rules and the assigned judge, or both, will allow or limit discovery of absent class members. The manner in which the class action complaint is framed and the positions plaintiffs take in subsequent case filings, or both, may permit such discovery to take place. National coordinating counsel should take the lead in determining whether discovery of absent class members is strategically beneficial or detrimental to the global case strategy.

Depositions are of central concern for national coordinating counsel. The schedule of depositions for lay witnesses across cases has important procedural consequences in the way each case develops. The identification of witnesses and the order of examination of witnesses also are matters national coordinating counsel and local counsel should decide.

***362 G. Development of Company's Witnesses**

National coordinating counsel plays an important role in identifying which current and former employees are the appropriate witnesses to convey the company's position in deposition and at trial. The process involves the direct interaction by national coordinating counsel with those potential witnesses, including thorough preparation of them in advance of testimony to ensure they are familiar with the documents and facts on which they likely will be questioned.

The passage of time can prey on the frailty of human memory. National coordinating counsel must take the time to examine the historical documents and to interview persons with knowledge. That process often involves a review of documents with a prospective witness in advance of a deposition appearance.

Presentation of a corporate witness pursuant to Federal Rule 30(b)(6) is a special challenge in discovery. Because the witness will be answering questions directed to the company on designated topics, national coordinating counsel is in the best position to prepare and participate in what often are key case deposition examinations.

H. Experts and Scientific/Technical Evidence

As with all complex litigation, experts play a pivotal role in an effective defense. National coordinating counsel identifies and retains both consulting experts (protected from disclosure under

the work product rule) and testifying experts (discoverable). Working in conjunction with experts, national coordinating counsel must develop “fluency” in the subject matter in dispute-- whether it is computer code, the pharmacology of prescription medications or market share in a relevant market.

National coordinating counsel often takes complete responsibility for experts in multijurisdictional litigation, to the exclusion of local counsel. It is imperative that national coordinating counsel and local counsel be consistent in the development of experts, preparation of reports, defense of their opinions in deposition and testimony at trial.

National coordinating counsel also must take the primary role in meeting the challenges of plaintiffs' experts--for understanding the opinions that must be met, for taking those experts' depositions, and for cross-examining the plaintiffs' experts at trial, if the experts can make it there. *Daubert* and in some remaining states, *Frye*, define the standards for admissibility each side must be able to meet in order to present their expert opinions in summary judgment motion practice and at trial. [FN15] *Daubert*'s “gate-keeping” obligation on a federal trial court, which requires a disciplined inquiry into both relevance and reliability, applies not only to “scientific” testimony but also to all expert testimony. [FN16]

National coordinating counsel must monitor the defense experts vigorously to ensure they have the credentials and the integrity in the development and substance of their opinions to meet *Daubert*'s mandate. On the other hand, coordinating counsel is responsible for challenging plaintiffs' experts. A successful Daubert challenge often results in summary judgment dismissal of claims and/or a favorable settlement.

I. Knowledge Management

Strategic advantages and cost efficiencies in multijurisdictional litigation result from the effective use of automated litigation technology and support. Litigation technology improves the depth and quality of case analysis and increases the speed with which information can be accessed and analyzed. The technology compresses critical documents, depositions, images and other data into a portable package--namely, a laptop computer--making it possible for lawyers to carry, analyze and present millions of pages of case material ***363** anywhere their work demands their presence.

Clients recognize the importance of incorporating technology in their own business practices, and they seek legal counsel who do the same. Clients also require counsel capable of managing electronic media--e-mail and other electronic business documents--which increasingly are the objects of extensive and expensive discovery demands. In short, clients need counsel that has the technology infrastructure and experience to manage e-discovery.

Unparalleled volumes of information must be managed in multijurisdictional litigation. The information is in paper form and in electronic databases, including such materials as (and clearly without limitation):

- Paper documents;
- E-mail;
- Electronic documents and data;
- Medical and employment records;
- Industry-specific information;
- Medical, epidemiological and other scientific information;
- Government documents;
- Pleadings;
- Depositions;
- Document repositories;
- Correspondence;
- Brief banks;
- Legal research; and
- Reference libraries.

As the volume of information requiring management has increased into the realm of terabytes, national coordinating counsel, using hardware and litigation software, must be able to implement automated legal services that allow for the sharing of case resources over broad geographic areas, thereby facilitating the dissemination of case information, the division of case responsibilities and the management of case and client knowledge.

National coordinating counsel's role includes creating and managing a variety of case databases, as well as defining the methods by which the databases can be accessed by the client and local counsel. Extranets have emerged as a primary way in which this communication can be enabled and supported. [FN17]

At its center, litigation identifies and evaluates facts developed from documentary evidence and testimony. The large volume of information and the need to organize and analyze it make the discovery process an obvious target area for automation. Imaged document and transcript management databases are proved systems for use in discovery analysis.

The most significant new component of today's discovery regime is computerized documentation. The use of efficient automated collection and processing methods for electronic discovery, such as e-mail, is crucial not only to succeed in litigation but also to ensure that clients and opponents are compliant with their discovery obligations.

1. Fact Management Tools

The organization and evaluation of important case knowledge, or “fact management,” represent another important area for application of automated processes.

CaseMap and Summation offer automated tools that go well beyond basic discovery management. Building casts of characters, chronologies and lists of issues, as well as developing the key questions involved in cases, always have been good litigation procedures. Automated software applications eliminate the disparate and often manual methods employed to prepare these types of case analysis profiles. Efforts now are focused in one location, within a database where all the critical resources (*e.g.*, discovery evidence) already exist. With the case analysis information available to all members of the legal team, information does not need to be discovered and rediscovered independently, and thus team collaboration is greatly enhanced.

***364 2. Core Documents Databases**

Database systems should be used for managing the core collection of paper and electronic documents in litigation. The two leading litigation database handlers are Concordance and Summation. They have obvious application with respect to larger document populations, but they are equally effective for medium and some small collections. With proper levels of coding based on the individual needs of a case, these systems can boost legal team efficiency in the organization and retrieval of documentary evidence.

Properly organized paper and electronic document databases provide legal teams with the means to retrieve, analyze and report information instantaneously. This information can be used to identify issues in the case, develop discovery requests and responses, prepare witnesses for depositions and interviews, and support motion practice. These databases can be used to analyze opponents' document production or prepare for client production by electronically managing reviews for responsiveness, privilege and confidential status. They also can be used to create both physical and electronic document productions, including sequential Bates labeling and confidential/privilege status branding.

To control the costs associated with the scanning, coding and optical character recognition processes required for the creation of these databases, outside vendors specializing in these areas are often the best solution.

3. Transcript Management Databases

All deposition transcripts should be managed in a database system. Summation contains an electronic deposition handler. RealLegal Binder (previously eBinder) is also a very effective transcript management software package.

The ability to search dynamically and instantaneously retrieve testimony across transcript collections allows for more accurate identification of case facts than can be accomplished through a manual system. The minimal costs involved in setting up transcript management databases are among the litigation technology expenses most quickly mitigated by productivity enhancements.

4. Electronic Discovery Methods

Computer-based documents and communications have become a primary source of discovery. Clients create and maintain the overwhelming majority of their documents electronically. And the ease with which electronic documents are created has increased significantly the volume of information available in discovery. These facts are even more apparent when one considers

electronic correspondence. The volume of e-mail generated, combined with the informal nature of this type of communication, can make it the most important resource in litigation. National coordinating counsel must have the resources to employ automated strategies to collect, process and review this data. Electronic documents cannot be ignored, and traditional methods of generating paper equivalents are unworkable and cost-prohibitive.

5. Presentation Technology

Multimedia presentations now are commonplace at trials, hearings, arbitrations and client meetings. National coordinating counsel must have the technical hardware and software, as well as the support, to make effective presentations. Sanction and TrialDirector are the leading litigation presentation software packages. Effective multimedia courtroom presentations also require specialized hardware, including laptops to run the software, external data storage devices to satisfy the enormous byte-size requirements of video, high-quality projectors for clear and quiet visual display, and scanner/printers for document preparation.

J. Management of Budgets and Reporting

As in all litigation, multijurisdictional litigation must be managed for purposes of reserves, cost budgeting and, if applicable, ***365** coordination with the insurer. National coordinating counsel serves as the central point to collect budgeting and reports from local counsel and then prepares periodic reports on the entire case for the defendant company. Any budget or case development issues that arise at the local level can be resolved by national coordinating counsel, corporate counsel, or both.

Electronic billing by outside counsel is gaining acceptance among in-house counsel as a method to manage litigation and eliminate paper billing. Serengeti (www.serengetilaw.com) is one of the industry leaders in providing both electronic billing and matter management in one system. In-house counsel can track not only spending but also current status, key dates, documents, budgets, outside counsel performance and results. This information is all organized for quick online retrieval and reporting.

Auditing of legal service billing also is emerging as a budgeting tool for the management of complex litigation.

K. Pretrial and Trial Strategy

National coordinating counsel plays a key role in determining pretrial and trial strategies. They identify and engage jury consultant firms for case evaluation, mock jury exercises, jury selection, as well as for preparation for key hearings, mediations and witness preparation.

A member of the national coordinating counsel typically will try any case called to the trial docket. Depending on the unique characteristics of the jurisdiction and its rules, local counsel's role may vary anywhere from providing an introduction at the commencement of the trial to acting as lead trial counsel.

L. Settlement Strategy

Among national coordinating counsel's most challenging roles is formulating and managing a national settlement strategy. Consistency across jurisdictions is essential. Settlement in one jurisdiction creates the potential for a precedent to have been set for litigation pending in other jurisdictions. National coordinating counsel must work with corporate counsel to determine the company's position regarding whether one, more or all cases are to be settled, and the timing and positions to be taken at court settlement conferences and mediations.

When class actions are at issue, settlement requires close attention to the form and method of service of the notice of settlement to class members regarding the terms of settlement, the management and response to objections, and the briefing and hearings necessary to achieve an enforceable order approving the settlement.

CONCLUSION

Corporations will continue to be the primary targets of group litigation claims. Although federal legislation may be enacted to reform class action proceedings, the high stakes of group claims invariably will generate new waves of filings. Corporate counsel's recruitment of experienced national coordinating counsel is an essential response to multijurisdictional and class action litigation. The team approach, including the use of centralized, sophisticated litigation technologies, provides practical solutions for the management of cases in a cost-effective and strategic manner.

[FNa1] . *Christopher N. Weiss is a partner in*

Stoel Rives LLP in Seattle and is vice chair of the firm's litigation practice group. His litigation practice focuses on the resolution of business disputes, products liability and pharmaceutical claims. He is national coordinating counsel for the Harvard Drug Group LLC in fen-phen litigation and in phenylpropanolamine litigation. He is a graduate of Hamilton College (B.A. 1981) and Vanderbilt University (J.D. 1984). The focus is primarily on the defense perspective, recognizing that businesses rather than claimants usually are the target defendants in multijurisdictional and class action litigation.

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LEE M. HOLLIS

Partner

Lightfoot, Franklin & White, L.L.C.
The Clark Building
400 20th Street North
Birmingham, AL 35203

Direct Dial: 205-581-0766
E-mail: lhollis@lfwlaw.com
Fax: 205-380-9166

Lee was the first law student recruited by the firm in 1992 and has been a partner since 1999. Lee currently serves as Chair of the Firm's Recruiting Committee.

Lee has tried serious wrongful death and personal injury cases to defense verdicts. Currently, Lee spends most of his time defending high stakes personal injury litigation, especially products liability, pharmaceutical and medical device cases. He also, spends a significant amount of time handling commercial cases on both the plaintiff and defense side. Lee is currently serving as national coordinating counsel for a national biomedical service company. He also has developed a niche of being called on by major excess insurance carriers as cases approach trial to assist in the settlement and/or trial of high exposure cases. In that role, Lee often serves as appellate counsel at trial to handle legal issues and preserve the record, in the event of an appeal. He is admitted to practice in all State and Federal courts in Alabama, as well as the Eleventh Circuit Court of Appeals and the United States Supreme Court.

Lee served as Co-Chair of the Alabama Defense Lawyers Association's Trial Academy from 1995 to 1998. He is a member of the American and Birmingham Bar Associations, the Defense Research Institute and the Alabama Defense Lawyers Association. Lee is a devoted alumnus of Washington & Lee University. After serving as president of the Nashville and Birmingham alumni chapters, Lee served on the Board of Directors of the Washington & Lee Alumni Association from 2002-06 and served as its president in 2005-2006.

Lee is a member of Saint Stephen's Episcopal Church and is the proud father of three children who have unfortunately inherited their father's lawyering skills at a very young age.

Practice Areas:

- Business Litigation
- Pharmaceuticals and Medical Devices
- Product Liability

Education:

- J.D., Vanderbilt University Law School, 1992.
- B.S., Washington & Lee University, 1986, *cum laude*.

Admitted:

- Alabama, 1992