

## National Coordinating Counsel: Key To Virtual Mass Tort Team

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A “virtual law team” is a collaborative and technology-based team of lawyers selected for specific tasks in defending a single client’s litigation. In this seventh article in the series examining key roles on virtual law teams in mass tort litigation, we examine the role of the chess master of the virtual law team, the national coordinating counsel.

The role of national coordinating counsel is not a new concept in the practice of law. Clients involved in national complex litigation regularly hire a national coordinating counsel to coordinate cases with similar facts and legal theories and to guide the efforts of local counsel. Traditionally, this is accomplished through supervising factual investigation, reviewing pleadings, managing discovery, preparing company witnesses, supervising the work of experts, preparing the case for trial and overseeing settlement negotiations.

In a virtual law team, the role of the national coordinating counsel is magnified. In this setting, the national coordinating counsel may manage law firms responsible for discovery, the company case, settlement, science and experts, trial and legal briefing. A familiar saying warns about too many cooks in the kitchen. The national coordinating counsel in a virtual law team is called on to manage too many kitchens in the house. The client relies on the national coordinating counsel to lead the other leaders, to define the roles and to ensure that the cost of the expertise and initiative is worth the benefit.

Against this backdrop, we examine four key responsibilities of national coordinating counsel in a mass tort litigation and practical suggestions for being effective in each responsibility:

1. Building the virtual law team
2. Leadership
3. Providing subject matter expertise
4. Ensuring consistency and efficiency

### Building the Virtual Law Team

Before the national coordinating counsel can be the chess master of the virtual law team, there must first be a team. The national coordinating counsel is responsible for building that team, in consultation with the client. The effectiveness of the virtual law team model hinges primarily on the structure and strategic design of the team. Well-designed teams and



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coordinated strategy lead to success. Because the national coordinating counsel must design its team to foster consistency, efficiency and alignment, taking into account the particular needs and circumstances of the litigation.

When building the virtual law team, clients and the national coordinating counsel should assign roles and design systems in ways that promote consistency and efficiency. Although there is no one-size-fits-all approach to building the right team, virtual law teams are often comprised of various subject matter teams to manage, and report on, discrete aspects of the litigation — including, for example, discovery, science and experts, the company case defense, legal briefing and strategy, trial, and settlement negotiations.

In assigning specific firms and lawyers to various teams, the national coordinating counsel should meaningfully consider and leverage firm and individual-specific skills and assign issue-owners based on those skills. On a firm level, for instance, the national coordinating counsel should take into account subject-matter expertise. Does a firm have specific subject-matter expertise? Which lawyers within the firm have experience in those subject matters? On an individual level, specific roles should be assigned based on experience and expertise, as well. For instance, has an individual managed company witness depositions? Does he or she have expert vetting experience? Additionally, clients and national counsel should consider whether a firm has the resources necessary to execute a specific role. Does the firm have the resources to handle the workload in a manner that is profitable but not over-leveraged? How should resources be deployed efficiently and in a cost-conscious manner?

The national coordinating counsel should also strive to thoughtfully pair firms and individuals. For instance, a firm might have experience working with another firm in a different matter where efficiencies were realized through prior work. Strategic pairing should also leverage diversity of skills and expertise based on the objectives of the specific pairing. The goal of thoughtful pairing is to draw on best practices and skill sets that are complementary — the best of best in each area.

## **Leadership**

Once the virtual law team is formed, the national coordinating counsel's role is to strategically lead that team. With hundreds, thousands or even tens-of-thousands of cases to manage, this can be a challenging task. Four suggestions to successfully lead a virtual law team include:

1. Define the objectives and defense strategy
2. Convey information to team members when they need to know it
3. Engage the client
4. Communicate, play well with others, do not micromanage and manage expectations

## ***Define the Objectives and Defense Strategy***

The client and the virtual law team look to the national coordinating counsel for leadership, and that begins with case strategy. At the onset of the litigation, the national coordinating counsel must consult with the client to identify the key case objectives. Is early settlement the goal? Or should the team develop a long-term strategy to maximize the strength of the client's trial defense? Is there a strong dispositive defense that can be exploited early in the litigation? Does the client have material business interests that are threatened by the litigation and, if so, which must be preserved to the extent possible?

Once the key objectives are identified, the national coordinating counsel can work with the client and the virtual law team to determine the strategy on how to achieve those objectives. While the facts, applicable law, and jurisdiction may vary between cases in any given mass tort, the overall defense strategy as defined by the client and the national coordinating counsel, provides the presumptive path forward in every case and by every component of the virtual law team.

### ***Convey Information to Team Members When They Need to Know It***

One of the hazards of task specialization is the foreseeable risk that right hand does not know what the left is doing. In complex litigation this can spell disaster if not appropriately managed. It is the responsibility of the national coordinating counsel to maintain a holistic view of the case and be able to provide the information to the virtual law team members.

The national coordinating counsel is responsible for knowing each piece of the puzzle and for establishing and maintaining the vision of how the pieces are put together.

Further, the national coordinating counsel must discern the extent to which the right hand needs to know what the left is doing. Knowing which individual piece needs to be fit into the larger puzzle at the correct time ensures efficiency while allowing each virtual law team group to be effective.

### ***Engage the Client***

Clients pay the national coordinating counsel to coordinate the virtual law team, to know when the client needs to be involved and to know what can be handled without them. Clients hire national coordinating counsel to take the stress of managing national litigation off the client's shoulders and carry it to the finish line.

Navigating client involvement requires the national coordinating counsel to be in tune with the client's expected involvement. This requires regular communication with the client about fulfilling expectations. If the national coordinating counsel is not aware of the expectations, they may not be national coordinating counsel for long.

Direct client involvement is sometimes unavoidable. Every working group is beholden to the client and in service to the client's overall litigation goals. If a working group fails to comply with the national coordinating counsel's direction in navigating overall goals and strategy, the client may need to communicate with the working group leader directly. In such a situation, the national coordinating counsel should exhaust all possibilities for resolving the issue absent client involvement, and the national coordinating counsel should fully inform the client regarding the issue and why client involvement is unavoidable.

### ***Communicate, Play Well with Others, Do Not Micromanage, and Manage Expectations***

Leadership comes in all shapes and forms. That said, there are four nonnegotiable requirements to be an effective national coordinating counsel. First, the national coordinating counsel must clearly communicate instructions, strategy, goals and expectations. Second, the national coordinating counsel must work well with a variety of personalities and be able to collaborate with each. Third, micromanagement is the death of a national coordinating counsel. Mass tort litigations that require virtual law teams are too big, too complex and have too many moving parts to be micromanaged. The national coordinating counsel must trust each subgroup of the virtual law team to operate independently to achieve the ultimate goals of the client. Finally, the national coordinating counsel must manage high expectations. Because potential exposure can be high, mistakes are magnified and clients

pay for, and expect, exceptional results. The best national coordinating counsels do not shy away from these expectations, but instead lead the virtual law team to deliver the results expected.

### **Subject Matter Expertise**

As a general rule, mass tort litigation is not brief. The breast implant litigation involving over 400,000 claimants that produced one of the first virtual law teams spanned four decades. Throughout long-term litigation, the national coordinating counsel becomes expert in the client, in the virtual law team and in the litigation. By staying apprised of each individual team's accomplishments or challenges throughout the litigation, the national coordinating counsel collects, and is capable of sharing, the core of the information with the client or any other subgroup that could benefit from the information at a moment's notice. Therefore, a national coordinating counsel's goal should be to consistently provide reliable information to the all working groups.

By combining the expertise of discovery, company case, science and experts, law (including appellate issues), trial and settlement, the national coordinating counsel becomes the subject matter expert of the entire litigation. In some limited circumstances, the national coordinating counsel develops such an expertise in the subject matter of the litigation that he or she is called on to testify as an expert witness in coverage disputes with insurance companies that arise after the dust settles on the mass tort.

### **Consistency and Efficiency**

The key to success in a virtual law team, and what a national coordinating counsel should strive for, is a one-team mentality regardless of the number and diversity of firms on the team. Because a firm — or combination of firms — is responsible for a different piece of the litigation puzzle and the puzzle is not complete without all the pieces fitting together, alignment is key: The right hand must know and stay consistent with what the left is doing. Without alignment, the virtual firm runs the risk of negatively impacting the success of the case and creating inefficiencies, leading to higher costs for the client. By building a virtual law team on the principles of consistency and efficiency, the national coordinating counsel best positions their clients for efficient and cost-effective case management to achieve case objectives and litigation victories.

The national coordinating counsel must establish processes and systems to facilitate consistency and efficiency. There must be, for instance, established channels of communication such as working group list-serves, standing calls, agendas and other touch points to ensure coordination. At the same time, these channels should be efficient: Productive, and not time-wasting and burdensome.

Calls should not take the place of the time team members need to roll up their sleeves and get work done. The national coordinating counsel must ensure that the right people are on the right calls and emails at the right times, and more people is rarely better. There must also be protocols for communicating and meeting deadlines, such as coordinating with the client about briefing deadlines and facilitating client sign-off.

The processes should also be designed to utilize and consolidate resources, such as by using central data repositories for documents accessible by the virtual law team and maintaining a central source for work product sharing.

### ***Efficiency and Consistency: In Practice***

In the end, the most important aspects of alignment in the virtual law team are ensuring that information sharing and strategy is consistent and aligned within courtrooms across cases and

jurisdictions. An expert report in one jurisdiction, for instance, cannot undermine a causation argument being made in another. And a legal brief in one court cannot undermine a client's positions elsewhere.

Competent opposing counsel can and will exploit inconsistencies. For instance, opposing counsel may leverage inconsistent records such as briefs, court transcripts or deposition transcripts to expose inconsistencies that might ultimately undermine an argument. Taking a position in front of one judge that is not aligned with a position taken in front of another will inevitably be used against the offending party. Other examples include: Providing information in one jurisdiction but refusing in another; taking a legal position in one jurisdiction, either conservative or aggressive, that can be leveraged in another jurisdiction under less favorable legal or regulatory conditions. Inevitably, the other side will be coordinating too, including by sharing documents and other information to hem success in the litigation.

The virtual law team's speaking with one voice of by way of national coordinating counsel establishing the right structure, and ensuring consistency and coordination across the cases and jurisdictions, can mitigate inconsistencies leading to inconsistent records.

## **Conclusion**

With an effective national coordinating counsel at the helm of both the design and execution of the virtual law team, the virtual model can work well to provide excellent case management and better litigation outcomes for clients. While there is no one-size-fits-all approach to designing a virtual law team, nor is there a standardized scope of duties for the national coordinating counsel. The national coordinating counsel should generally provide case leadership, have subject matter expertise in the particular litigation and ensure consistency and efficiency throughout the litigation. With these goals and characteristics in mind, firms engaged as national coordinating counsel can establish lasting best practices that can carry over into varying mass tort litigations in the future.

*This article is part of a series spearheaded by Faegre Baker Daniels LLP on the virtual law team.*

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