



## IN-HOUSE COUNSEL QUARTERLY SPECIAL FOCUS

# Making the case for national counsel

**With several different models to choose from, using national counsel can offer accountability, consistency and efficiency.**

**By C. Paul Carver and Charles (C.J.) Schoenwetter**

**E**arly this year we tried a case in New Jersey. The trial lasted about 10 weeks and resulted in a verdict for our client.

We were discussing the case at a local eatery and the waiter overheard the conversation. Strangely, he was not interested in the facts of the case, our brilliant performance or even our strategy for success.

Instead he asked, "New Jersey? Why did they hire a lawyer from Minnesota to try a case in New Jersey?"

Of course, that's not a strange question at all. Anyone who watches "Boston Legal" knows that lawyers and experts all come from within a few miles of the courthouse. In the old days, that was the prototype. A national corporation with a case in Minneapolis hired a Minneapolis lawyer. The experts were also local and generalists just like the lawyers.

Today, many sophisticated companies handle their litigation differently. The lawyers you hire should be more than minimally qualified to handle your case. In the simplest terms, you need an expert. That is what national counsel is: an expert in your issues, your business concerns, and your best possible advocate.

Several different models for national counsel programs exist. They can be as big or as little as you need. The model you choose depends on your goals.



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The **centralized control model** uses a single firm to handle all aspects of a case, including attending court appearances, taking and defending depositions, preparing and arguing motions and trying the case. This model works best for a smaller volume of cases, each having a relatively large exposure. Use of this model recognizes the return on your investment in having trained counsel on issues unique to your company. It offers the advantages of clear lines of communication due to a reduced number of players. Disadvantages include the lack of a competitive environment that may lead to innovation.



The **coordination model** uses one outside firm to coordinate the management of cases. These include such things as discovery, witness preparation, motion practice and trial strategy. Implementation, such as the taking and defending of depositions and trying cases, is handled by local attorneys where the cases are filed. This model works well with high-volume, low-exposure cases. An offshoot of this approach involves a firm creating a "playbook" for handling certain types of cases you regularly face — including a description of typical claims, responses thereto, form discovery, etc.

Whenever a new case is filed, you provide the playbook to a local lawyer. Under this version of the coordination model, you share more managerial responsibility to make sure the individual lawyers are following the playbook. Alternatively, if you keep national coordinating counsel involved, then they are responsible for actively verifying that the playbook is being used.

The **regional control model** involves the selection of several key firms located where cases arise. Each is coequal in responsibility to the others.



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## There are many benefits to using national counsel

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In that regard they act like the central control model, with one significant difference — they must coordinate efforts among themselves to ensure uniformity. The major disadvantage is the necessity of constant communication among the several firms. Companies must remain active to ensure this occurs through, for example, periodic required telephone calls. An advantage is exposure to more firms from which good ideas percolate up to your other legal counsel.

Finally, you can adopt a **task model** where each national counsel handles one aspect of litigation. Under this model, a firm might handle only your written discovery or motions and appeals. For example, a motion in limine in one state, once written, can easily be adapted to a new state's law using the counsel that you have in that state. This model lends itself especially well to appeals since not all firms have appellate practitioners. A disadvantage to dividing litigation along task lines is the absence of a "buck stops here" person. You must ensure there are no gaps in coverage.

Given the menu of options, you must first decide what your needs and goals are, then create a model that most efficiently achieves it.

### Benefits of national counsel

Using national counsel ensures maximized efficiencies, a uniform response, a better return on investment and a formidable advocate.

**Maximized efficiencies.** Using national counsel results in tremendous efficiencies. Of course, economies of scale are proportional to the number of claims handled. However, financial economies can be realized through the use of national counsel regardless of the number of claims.

For example, assume you have three cases, one in San Diego, one in New York and one in Miami. The cases have the same allegations about the same contract with distributors. Retention of one national counsel for all cases recognizes an immediate two-thirds reduction in startup costs. An even greater reduction may exist if the selected counsel is familiar with the company's business. Likewise, in-house counsel has only one phone call to make on three cases.

Economies of scale will be recog-

nized as the cases develop. For example, written discovery served on you in San Diego is likely to overlap with discovery served in New York and Miami. Once your national counsel has responded to the San Diego discovery, the economies of scale are recognized in the reuse of legal work. What might have caused three different lawyers to bill time to answer three sets of discovery instead causes one lawyer to bill a fraction of that.

It is highly likely your company's written discovery responses in one case will surface in one if not both of the others. Your opponents will use inconsistent responses against you. Therein lies an important lesson — your opponents are coordinating their efforts, you have no choice but to do the same.

Extending the discovery example, assume a San Diego lawyer answers the San Diego discovery, a New York lawyer answers the New York discovery and a Miami lawyer also separately answers discovery. Without coordination, there is likely to be variation in the responses given. Even with coordination, the potential for variation still exists. Each of these cases will also require preparation of an answer to the complaint, affirmative defenses, counterclaims, expert reports and dispositive motions. In order to maximize efficiency and uniformity, national counsel is the preferred approach.

**Uniform response.** The value of uniformity is further illustrated if, instead of three cases, you have 300. By the time case exposure rises to that level, typically there is a significant amount of coordination by your adversaries. That means you are seeing the same discovery served time and again in a variety of jurisdictions. National counsel provides a top-down approach to ensure uniformity across all cases.

Perhaps the exposure in each of the 300 cases does not warrant national counsel handling day-to-day matters. Nevertheless, to ensure uniformity, national discovery counsel is desired. Although it has a more limited role, national counsel serves the vital need of ensuring uniformity so cases can be handled on their merits rather than being resolved based upon the idiosyncrasies of numerous different lawyers, some of whom may not perform as well as others in responding thoroughly and timely to discovery.

Uniformity is also best achieved through national counsel in case evaluations of pattern cases. If you rely on your outside counsel to evaluate exposure, those evaluations will be more reliable if the dataset your counsel uses is larger. When national counsel is looking at large numbers of cases, they develop an expertise that helps standardize your approach to claim resolution. Further, the subjective views of a single evaluator remain consistent rather than varying from case to case.

**Return on investment.** In a product liability case, for example, the lawyer learns the product — history of design, testing, challenges the engineers encountered, changes made along the way, field performance and every other important detail. The manufacturer pays the lawyer to learn its product. When the same allegation comes in a second time, the manufacturer can either hire the same lawyer to travel to where the new case is, or hire new counsel there and pay them to learn the product.

Obviously, the more times that "same case" gets filed, the more sense it makes to recover the return on investment represented by the lawyer's previously acquired knowledge. You paid for that education. It is your investment.

Any lawyer you send to trial also gains a valuable asset at your expense — trial experience. Not many cases get tried, and thus not many lawyers develop significant trial experience. If you pay a lawyer to go to trial, you invest in making a better lawyer for your next case.

Part of your overarching strategy is presenting a credible trial threat. By using the same people over and over, you cultivate skills and create better trial lawyers to serve you. You invest in your own strategy. Sending 20 lawyers to trial one time does not create as credible a threat as sending two lawyers to trial 10 times each. The national counsel program allows you to focus resources as investments in your future.

**Formidable advocate.** Once your national counsel program is established, your investment will pay dividends in terms of the efficiencies achieved and the ability to direct your army through a streamlined chain of command.

For example: You face 400 cases

across the United States involving three principal adversaries, and you perceive a coordinated effort to leverage higher settlements. First, you are able to detect that trend sooner as a result of the streamlined communications offered by national counsel. Second, you can respond across a broad base in a very short time through the same chain of command, with a coordinated strategy, implementing a consistent message.

Your adversaries no longer will reap the benefits of your inconsistencies or a lawyer's failure to zealously represent you because you are not a top priority client. A single, clear voice delivering your consistent message will be heard louder than the chatter of dozens of attorneys in isolation.

Preparation for trial will be streamlined. Reinventing the wheel (and paying for it each time) will not happen. The same winning summary judgment motions and motions in limine will continue to be reused and refined. The subtleties of special verdict forms and jury instructions tailored to suit your unique position will be leveraged to great advantage.

Your national counsel will speak to the court and opposing counsel with authority and credibility, and will be familiar with both the strengths and weaknesses of your case. This advantage, gained by working closely with you over time, knows no substitute. Confidence gained from such experience and detailed knowledge of your company carries through to jury selection, opening statements, cross-examination of expert witnesses and closing arguments.

National counsel act as experts, advocating your position and protecting your interests. They provide accountability, consistency and efficiency. They provide dedication and loyalty to your company as a priority client.

National counsel provide a credible, persistent threat to those who seek to make you responsible for their personal misfortunes.

Instead of asking, "Why hire national counsel?" the better question may be, "Why haven't we hired national counsel yet?" ☐

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