

What Should In-House Counsel Look For In National Coordinating Counsel?

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It's five o'clock on a Friday afternoon. You just finished surprising the CEO with the unpleasant news that the company had been fined \$1.7 million in sanctions after accidentally serving inconsistent discovery responses across different jurisdictions in multistate litigation. Coat and briefcase in hand, you're heading out the door for a much-needed weekend trip. Then your phone rings. It's your local counsel on the West Coast. He asks, "Are you available to come out here on Monday?" He goes on to explain that a case – one you haven't heard about in nearly a year – is starting trial on Monday morning. What's more, he's hoping that you have some creative ideas about how to defend the case. As you break into a cold sweat, you realize that you could have – and should have – avoided this nightmare by hiring effective national coordinating counsel.

Although this scenario may be a bit dramatic, it highlights the fact that having the right national coordinating counsel ("NCC") can make an enormous difference in the management and ultimate success of a company's multistate litigation. Knowing what to look for in NCC may seem difficult, particularly when you must choose from a field of candidates clamoring to show you how well-qualified they are, but there are certain things to look for that can increase the likelihood of choosing the best one. You should ask potential NCC candidates the following list of questions – and more importantly, you should look for the following answers – to ensure that you select the best possible representation for your company.

What Do You Believe Is The Primary Goal In The Defense Of This Litigation?

The responses you will receive to this question will vary widely depending on the type of litigation in which your company is involved, but the best NCC candidates' answers will reflect a common strategic goal: promoting the business interests of the company.

The ideal NCC is sensitive to the business aspects of defending a national litigation. Rather than developing its approach to litigation in a vacuum or to suit NCC's own firm's business needs, NCC should make it a priority to confer with in-house counsel and company management to gain an understanding of the company's business needs and constraints, thereby allowing NCC to shape the litigation strategy around those needs.

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Execution of this business-minded approach to litigation demands NCC that can be flexible in adjusting litigation strategy as needed to fulfill the company's changing goals and needs. This can mean anything from attempting to resolve all cases as soon as they are filed, to fighting every case tooth and nail, depending on what will best promote the business interests of the company.



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Do You Have Experience With This Type Of Litigation?

Many NCC candidates will regale you with descriptions of their years of experience and long-used strategies as NCC for other clients in similar litigations to show you how qualified they are. The ideal NCC candidate, however, expresses a willingness to take a personalized, business-minded approach to representing your company, as opposed to relying on a cookie-cutter litigation strategy without regard for your specific needs. Although your first instinct may be to hire the candidate with the longest track record, the best NCC for your company is dedicated to developing a plan of attack for *your* situation, rather than mechanically applying stale procedures that have little bearing on your company's circumstances.

What Will You Do To Limit The Company's Exposure To Nationwide Litigation?

An effective NCC understands the importance of making strategic choices to reduce the company's liability in the future. The likelihood of success on dispositive motions and at trial can vary widely by jurisdiction, by plaintiff's firm, and by judge. As a result, NCC must be extremely selective about the forums in which the company files significant motions or takes cases to trial. Litigating first in friendlier forums and against the appropriate adversary greatly increases the chances of obtaining a favorable decision that can possibly be applied offensively on the company's behalf in future litigation, or conversely, avoids rulings which could adversely affect the company's ability to defend future cases.

How Will You Facilitate The Flow Of Information Between In-House And Local Counsel?

One of NCC's biggest challenges is keeping in-house counsel in the loop about pending litigation without overwhelming them with too much information about the many cases pending in multiple jurisdictions. Local counsel in multistate litigation maintain incredible quantities of case- and jurisdiction-specific information, including the facts of each individual case, typical tactics of major plaintiffs' firms and co-defendants, volume and climate of the respective trial dockets, judicial profiles, and procedural requirements. Many of these

facts are crucial to in-house counsel when developing litigation strategy and evaluating the company's potential liability in each case, but the overall universe of information is too voluminous to be manageable.

The ideal NCC candidate recognizes this challenge and should be able to propose several solutions for distilling the information received from local counsel into a "big picture" that in-house counsel can easily utilize. Possible solutions include providing in-house counsel with a weekly master trial calendar that provides a snapshot of all pending claims nationwide and forwarding detailed reports for cases that warrant special attention. Implementing such a system keeps NCC abreast of the specifics of every case on the national docket while sparing in-house counsel the in-depth details of less significant cases.

How Often Do You Plan To Speak With In-House Counsel?

Part of ensuring that in-house counsel receives up-to-date, relevant information about the nationwide docket includes maintaining regular lines of communication. NCC should propose a schedule of weekly or monthly status meetings with in-house counsel to share concerns about the litigation, discuss issues raised by the pre-trial reports and weekly trial calendars, address administrative matters, and evaluate the state of the litigation in general. As mentioned above, company management should periodically be included in status meetings to make sure that NCC has a clear understanding of what litigation approach is currently necessary to fulfill the company's business needs. These scheduled meetings foster dialogue between in-house and local counsel and supply in-house counsel with the information necessary to make educated decisions about the litigation.

How Do You Plan To Manage Information Gathered For And Through Discovery?

NCC should be familiar with the current technology available for information management. Such tools often result in leaner staffing, increased efficiency, and long-term cost savings. Be wary, however, of NCC candidates who push expensive electronic solutions for information management in every situation; such solutions may not always serve the ultimate goals of the company and preserve the specific nuances of the litigation. Instead, the ideal NCC is flexible enough to develop a management plan that weighs the information management needs of litigation against the company's goals and financial resources. The resulting plan may be to electronically store all of the information, none of the information, or something in between.

What Is Your Plan For Handling Discovery Responses?

A good NCC candidate recognizes the importance of ensuring that the company's discovery responses are uniform

across jurisdictions. Inconsistent responses undermine the company's credibility and could even result in the opening hypothetical.

Because cases in multistate litigation often share multiple factual and legal issues, discovery responses can be substantially similar in most cases. Rather than asking local counsel to draft their own discovery responses in every jurisdiction, NCC should develop a standard set of discovery responses to be used as a model by all local counsel. Local counsel need only insert case-specific information, conform the responses to the respective jurisdictions' practices, and return the draft responses for NCC's final review and verification before serving them on plaintiffs' counsel.

How Do You Intend To Choose Expert Witnesses?

NCC's approach to selecting expert witnesses should walk the line between relying upon established witnesses and keeping expert testimony unbiased and updated. Many NCCs prepare a national pool of trial experts familiar with issues relevant to the defense of the company. Although this saves time and money, repeated use of the same experts runs the risk that plaintiffs will begin challenging the experts in court as biased hired guns. Furthermore, the experts' testimony can become stale and the company could be missing out on the testimony of emerging experts whose opinions lend considerable strength to the company's defense. The solution to this conundrum is for NCC to prepare and maintain a constantly-updated fluid pool of experts that is large enough to avoid having to use the same two or three experts in every trial.

How Do You Intend To Handle Trials?

An ideal NCC centralizes trial preparation on as many issues as possible without taking total control of the trial out of the hands of local counsel. Because local counsel is most intimately acquainted with the facts and issues of each case, knows the local judges, and is someone the local jury pool can relate to, NCC should allow capable local counsel to participate in the trial of their own cases. However, as reinforcements, NCC should identify a small group of litigators with proven track records who are well-versed in the company's business and defenses and deploy them nationwide to assist local counsel with potential high liability trials. Using such a trial team ensures that local counsel receives the assistance of the most qualified and knowledgeable attorneys available and strengthens the company's overall response to litigation, which may require trying multiple cases at the same time in multiple jurisdictions.

Following these criteria ensures that in-house counsel selects the best NCC for their circumstances, leaving them feeling confident on a Friday afternoon as they get ready for that long-overdue weekend escape that their national litigation is under control.

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