

Discovery Counsel Vital In All Phases Of Mass Tort Litigation

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(September 6, 2019, 11:36 AM EDT)

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 eighth article in the series examining key roles on virtual law teams in mass tort litigation, we examine the role of discovery counsel.

Companies often engage groups from multiple law firms, each retained to handle a different aspect of litigation but all working together as one virtual law team to represent the company’s interests, particularly in large or complex, multijurisdictional cases. Dedicated discovery counsel is a significant piece of the legal team puzzle for several reasons.

First, discovery is often not only the most expensive stage of litigation, but it’s also the one most fraught with potential missteps that can result in severe sanctions for a client that does not have the assistance of counsel with both the substantive and technical knowledge required to handle large-scale discovery efforts.

The need for experienced discovery counsel is particularly crucial in complex cases, such as mass torts and multidistrict litigations, where discovery can involve millions of documents and numerous individuals and locations with potentially relevant electronically-stored information, or ESI, or hard copy documents.

Second, in mass torts courts spend the first two years or more focused primarily on shepherding the parties’ massive discovery efforts, and overseeing and resolving the parties’ inevitable disputes. Thus, the court’s first impressions of the competence of the client’s overall legal team will depend on the performance of the discovery team — and those first impressions can echo throughout the remainder of the litigation.

Finally, the heart of discovery counsel’s role is to collect, manage and cultivate the information that will eventually form the basis for the parties’ arguments, the court’s pretrial rulings and the fact-finders’ ultimate decision in the case. Thus, before trial counsel can win courtroom battles, discovery counsel must build the foundation for those victories by winning the information battle.



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Role of Discovery Counsel

Discovery counsel is an experienced team designed to manage the preservation, collection, review and production of ESI and other relevant documents and information. The team typically comprises not only lawyers, but also consultants and paralegals armed with cutting-edge knowledge of the newest and most cost-effective technologies for collecting, hosting, reviewing and producing documents and ESI in the litigation.

Armed with knowledge of e-discovery best practices and standards, discovery counsel plays a crucial role in controlling the costs for large-scale discovery efforts and ensuring compliance with preservation and discovery obligations throughout the discovery phase. Discovery counsel also develops a deep knowledge of a client's technology systems and platforms that can then be utilized to ensure reasonable and proportional limits on the discovery requested from an opposing party.

However, discovery counsel's utility extends far beyond the discovery phase. Discovery counsel can assist merits counsel during early stages of fact development, using analytical tools to identify key documents that can inform early case strategy. Discovery counsel can also assist merits counsel after discovery is complete, providing support during deposition preparation, expert witness discovery and even trial by helping to identify and track potential exhibits.

Having a team dedicated to managing the discovery process and providing technical and documentary support throughout all phases of litigation allows case counsel to focus on litigating the merits of the case while leveraging the depth and experience that discovery counsel has in what is becoming an increasingly complex and technical area of litigation.

Benefits of Including Discovery Counsel in Your Virtual Trial Team

Employing experienced discovery counsel as part of a virtual law team is vital to helping shape case strategy and providing necessary advocacy, consistency and efficiency from the beginning of a case through trial, resulting in cost savings to the client and allowing merits counsel to focus on litigating the substance of the case.

Discovery Advocacy

Hiring dedicated discovery counsel allows for critical, expert advocacy during the early stages of discovery that will tailor the scope of a party's discovery obligations. This begins with discovery counsel's negotiation of a favorable ESI protocol that aims to define and limit: (1) the number of custodians from whom documents must be collected, (2) the scope of search terms, (3) the use of technology to locate and review potentially relevant information and (4) the obligations to log documents withheld on the basis of privilege.

For example, in appropriate cases, discovery counsel can negotiate with opposing counsel for use of metadata privilege logs. This can streamline what is often a time-consuming and expensive process in large-scale discovery cases where thousands of documents implicate potential privilege concerns.

Importantly, discovery counsel's advocacy does not end with the ESI protocol. Instead, specialized knowledge of a client's technology systems and case law regarding discovery obligations allows discovery counsel to continue to advocate for reasonable and proportional discovery through objections

to written discovery and pursuing and defending against discovery motions.

Consistency

Discovery counsel can also ensure consistency in document production throughout the discovery phase of any litigation. This is particularly important in mass tort cases that have not necessarily been consolidated into a multidistrict litigation or analogous state court proceeding for purposes of discovery, or those where related cases are being fought on multiple fronts, such as before regulatory agencies and in federal and state courts around the country.

In such circumstances, cases may be pending in multiple jurisdictions with different production requirements and confidentiality concerns. Having a centralized discovery team that can track such productions and ensure consistency across multiple cases in multiple jurisdictions is essential in any large and complex litigation matter.

Additionally, companies often engage discovery counsel to handle all matters in a particular area or across an enterprise, and the unique, global perspective that enables discovery counsel to ensure that consistent approaches and positions are taken in discovery across related cases, including with respect to such issues as scope, relevancy and privilege.

The position counsel takes in one case could possibly affect a client's discovery obligations or interests in another case. Along with national counsel, discovery counsel has the ability to ensure that consistent positions and approaches are taken across cases in mass tort or multiform actions.

Efficiency

Discovery counsel can maximize efficiency at all stages of litigation, from utilizing technology and resources to maximize review efficiency, to assisting case counsel post-discovery and through trial in locating and identifying key documents and exhibits.

During the discovery phase, discovery counsel can employ technology-assisted review or other data analytics to make document review and production more efficient by tailoring the population of documents placed into review, and identifying and highlighting documents likely to be privileged.

This is particularly important in cases involving a large volume of documents over a broad period of time, or where production is ordered within limited time constraints. A more efficient review and production process results in greater cost savings to the client and helps keep the litigation moving forward.

The assistance of discovery counsel can also increase efficiency post-discovery during depositions, witness preparation meetings and even trial. Counsel's familiarity with the discovery review platform and technologies allows them to more efficiently identify documents needed for use during such meetings, depositions or trial. This frees case counsel to focus on litigating the merits without having to sift through thousands, and sometimes even millions, of documents.

Moreover, discovery counsel teams often include technical specialists who can help quickly locate information for case counsel should document-related issues arise during a deposition or at trial.

Strategy

Discovery counsel can provide early support during the fact investigation stage of any litigation by helping collect, review and identify key documents that can be used by case counsel to inform early case strategy.

Discovery counsel can also play an ongoing role in shaping both offensive and defensive discovery strategy.

Data analytics can be used to identify gaps in the opposing party's production that can serve as a basis for a motion to compel or for sanctions. Such technology can also be used defensively to demonstrate the propriety and proportionality of a client's productions when fighting discovery challenges from the opposing side.

Conclusion

Large-scale discovery in complex cases, such as mass torts or MDLs, is often the most time-consuming and costly phase of litigation. If not done correctly, it can have lasting and severe consequences for your client both during discovery and at trial.

These risks can be mitigated by employing experienced discovery counsel early in the case to manage all aspects of discovery and provide critical support to national counsel and trial counsel before, during and after the discovery phase — including through trial.

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

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