404 - High Stakes Litigation: Achieving Optimal Results without Breaking the Bank

Hilarie Bass
Shareholder
Greenberg Traurig, LLP

Alison Brotman
General Counsel - Northeast Area
Verizon Wireless Legal

Lori G. Cohen
Shareholder
Greenberg Traurig, LLP

Ted C. Raynor
Vice President and Senior Counsel
Hilton Hotels Corporation

Philip R. Sellinger
Managing Shareholder
Greenberg Traurig, LLP

Faculty Biographies

Hilarie Bass

Hilarie Bass is a shareholder in the Miami office of Greenberg Traurig, where she chairs the 500-member National Litigation Practice Group and serves on the firm's executive committee. Over her career, she has successfully represented clients in scores of commercial cases in jury and non-jury trials involving hundreds of millions of dollars in controversy. Her practice focuses on class action defense, receiverships, securities fraud defense, complex commercial litigation and alternative dispute resolution.

Ms. Bass is listed in Best Lawyers in America, Chambers & Partners USA Guide, "Lawdragon 500 Leading litigators in America" and was recently recognized in the area of securities litigation in the first edition of Legal 500 US Volume III: Litigation.

Ms. Bass is an active member of the ABA, currently serving as chair of the legal opportunity scholarship committee, chair of the select committee of the house of delegates, member of the Task Force on Attorney Client Privilege, chair of the Judicial Intern Opportunity Program of the Litigation Section, and a member of the ABA's nominating committee and house of delegates. She served as president of the Florida Bar Foundation, a member of the Florida Bar Rules of Civil Procedure Committee, and is past chair of the board of the United Way of Dade County.

Ms. Bass received a J.D., summa cum laude, from the University of Miami Law School and a B.A., magna cum laude, from George Washington University.

Alison Brotman

Alison B. Brotman is the area vice president & general counsel for the Northeast area at Verizon Wireless. She joined Bell Atlantic Mobile, a predecessor company, as an Attorney with subsequent positions as regional counsel, associate general counsel, and associate general counsel for headquarters and shared services. She has provided legal support for every aspect of the business, including corporate, compliance, corporate governance, mergers/acquisition/joint ventures/strategic alliances, procurement, litigation, antitrust, advertising & consumer clear disclosure, network siting/land use and telecommunications act issues.

Prior to joining Verizon Wireless, she worked in Bell Atlantic Corporation's Legal department, at Dechert Price and Rhoads in Philadelphia, PA, and as a law clerk for the Honorable Thomas N. O'Neill of the U.S. District Court for the Eastern District of Pennsylvania.

Ms. Brotman is also an arbitrator with the American Arbitration Association.

Ms. Brotman earned a J.D. from Columbia University and a B.A. with honors at Yale College.

Lori Cohen

Lori Cohen is a shareholder with Greenberg Traurig, where she co-chairs the Atlanta Litigation Group and chairs the National Pharmaceutical and Medical Device Litigation Group, focusing on product liability litigation. She has served as both national counsel and regional counsel for pharmaceutical and medical device companies and has expertise in mass tort, multidistrict, and class action litigation, as well as jury trials of all kinds. Ms. Cohen has defended numerous healthcare providers, including physicians, hospitals, and managed care entities nationwide. She lectures widely regarding the use of technology in courtroom presentations of complex medical, scientific, and other catastrophic injury cases.

Ms. Cohen has been recognized by the National Law Journal as one of "The 50 Most Influential Women Lawyers in America" and "Top 40 Under 40." She is listed in Best Lawyers in America, Outstanding Lawyers in America, Chambers & Partners USA Guide, The International Who's Who of Products Liability Lawyers, "Top 100 Georgia Super Lawyers" and "Top 50 Female Georgia Super Lawyers."
Ms. Cohen is active in the International Association of Defense Counsel, the Product Liability Advisory Council, and the ABA. She is a member of the Defense Research Institute, where she is on the steering committees for Industry-Wide Liability, Products Liability, Medical Liability, and Drug and Medical Device. She is an instructor at the National Institute of Trial Academy and Emory University's Trial Techniques Program and lectures nationally.
Ms. Cohen received a J.D., with distinction, from Emory University School of Law and a B.A., cum laude, from Duke University.

Ted Raynor

Ted Raynor is vice president and senior counsel, handling litigation, for Hilton Hotels Corporation (and its predecessor, Promus Hotels Corp.) in Memphis, Tennessee. In that capacity, he has overseen "high profile" cases all over the country including injunctions seeking to halt major transactions, severance disputes with CEO's and top executives, death and serious personal injuries, terrorist bombings, intellectual property concerns, bankruptcies, substantial commercial disputes, and franchise concerns. In addition, he has helped Hilton collect over $1M+ every year for each of the last seven years. Mr. Raynor is currently helping lead Hilton's electronic discovery initiatives.

Mr. Raynor was a civil trial attorney at Leitner, Williams, Dooley and Napolitan prior to moving in-house. At his firm, he personally tried five jury trials, 54 non-jury trials, and handled six appellate arguments. He represented both plaintiffs and defendants in "high profile" litigation including, environmental / toxic tort cases, death and serious personal injury, sexual harassment, copyright and trademark infringement, products liability, and commercial disputes.

Mr. Raynor received his undergraduate degree from the University of the South and his law degree from the University of Memphis. His law review article, "Tennessee Workers' Compensation: Where is the Proper Venue" 20 Univ. Memphis Law Review 189 (1990) was cited and adopted by the Tennessee Supreme Court in a major law change on the issue.

Philip Sellinger

Philip R. Sellinger is managing shareholder of Greenberg Traurig's Florham, New Jersey office, a member of the firm's executive committee, and one of the leaders of the firm's national litigation practice. He serves as lead trial attorney for large cases around the country. His practice focuses on class actions, computer technology, insurance coverage, environmental, and a diverse range of other complex litigation. In the past few years alone, he has defeated several class actions on behalf of some of the largest companies in the country either at the class certification stage, through motion, or otherwise.

Mr. Sellinger is a former federal clerk and assistant United States attorney. He is considered one of the preeminent trial lawyers and litigators in New Jersey.

Mr. Sellinger is the founding chair of the New Jersey State Bar Association's class action committee. He serves as chair of the lawyers advisory committee to the New Jersey federal judiciary, and he has served on the New Jersey Supreme Court civil practice rules committee advising the state judiciary. He serves on the board of directors of the Atlantic Legal Foundation, the Board of Trustees of the New Jersey Network (NJN) Foundation Board, and is an active member of the Lawyers For Civil Justice. Mr. Sellinger has been listed in Best Lawyers in America and Chambers & Partners USA Guide, an annual listing of the leading business lawyers and law firms in the world.

1. UNDERSTANDING THE IMPORTANCE OF AN INITIAL FACTUAL INVESTIGATION AND LEGAL ANALYSIS AT THE VERY OUTSET OF A COMPLEX LITIGATION

It is critical that corporate counsel either conduct, or supervise lead outside counsel in conducting, as thorough an investigation of the facts as possible from the outset of a complex case to learn the strengths and weaknesses of the defense. As part of this investigation, corporate and outside counsel must first analyze the claims alleged in the complaint and the various potential defenses, and assess the company's exposure and objectives in defending the case. Counsel should then familiarize themselves with the universe of documents that may be required to be produced (both good and bad), interview the critical company fact witnesses and consult outside sources as necessary. These documents should be compiled by corporate counsel for review as early in the case as possible, and in a comprehensive fashion, rather than piecemeal.

If properly conducted, the investigation should lead to the formulation of an effective and coherent strategy and to tactics that will govern the defense of the entire case. For example, the results of the investigation will ultimately determine the categories of discovery that the company should produce and resist producing, dictate the activities that are worth spending money pursuing and their respective priority, and suggest where resources should best be allocated to achieve a successful result. In other words, by the end of the investigation, corporate and outside counsel should be able to envision what a trial of the case would look like. They can then use that vision to plan accordingly.

[Part and parcel of this approach is to involve in the investigative process corporate counsel (and where appropriate, outside lawyers as well) who have previously represented the company in similar matters. These "veterans" of past litigation will likely already understand the key personnel, structure and corporate operations implicated by the matters raised in the complaint. As a result, considerably less time will be spent in completing the investigation, and counsel will thus be able to more quickly formulate winning strategies.]

The initial investigation should, at a minimum, include the following:

- Obtain a full understanding of each separate product, service or corporate practice at issue in the litigation, as well as the manufacturing, design, scientific, and other processes by which the products are manufactured, the services are made available for sale to the public, or the course of dealing takes place in the ordinary course of business. Do not let plaintiffs' counsel start discovery with greater knowledge of the company's goods, services, practices, and operations, or of the science behind a particular pharmaceutical.

- Investigate each separate factual allegation in the complaint. How was plaintiffs' counsel able to obtain the factual basis for the allegation? Are they relying on publicly available documents or company statements pulled from the Internet, or on discovery from an earlier litigation? Is a disgruntled former employee "feeding" them information and documents? Is the allegation easily defeated, or does it represent an area of vulnerability? What internal documents support and dispute the allegation? Who are the most knowledgeable company witnesses about the allegation? Is the allegation

something of which the entire industry is aware, and if so, have outside industry experts been publishing articles about it?

- Thoroughly analyze each of the legal claims alleged in the complaint, as well as all available defenses and the company's likely exposure. Decisions on how to tailor discovery and dispositive or other significant motion practice, and whether, when and on what terms to settle the case, should not be made "on the fly" as the case is proceeding. Think about how plaintiffs' counsel would actually go about trying the case, and how it would be received by a jury in that venue.

- Seek (and preserve) documents and electronic data from any department in the company that could conceivably have relevant information about the facts of the case. Consider expanding your search to include documents and databases maintained by parent, subsidiary and sister companies, as well as component part vendors, raw materials, ingredient or chemical suppliers, original equipment manufacturers, or other third party partners in the manufacturing, operations or customer support processes.

- If at all possible, interview (or at least be present at the interviews of) all company witnesses identified by the documents and the investigation as potentially knowledgeable. The goal of these interviews is not only to gather facts, but to assess the strength and jury appeal of each witness. If the witness has previously testified for the company at a deposition or trial, locate the transcripts and make an honest assessment of the witness's prior performance. Corporate counsel should also make a determination as to whether he or she would be comfortable producing each witness in response to a Rule 30(b)(6) deposition notice. Ask yourself whether you would trust the witness to bind the entire company with his or her testimony.

2. RESOLVING THE REMOVAL DILEMMA: WHEN ARE CASES BEST LEFT IN STATE COURT?

Defendants in complex cases are frequently faced with an initial dilemma within the first 30 days after receiving notice of the complaint. The complaint was filed in state court, but either includes claims arising under federal statutes, is one in which complete diversity of citizenship exists between the parties, or is a putative national class action that clearly falls within the expanded jurisdiction of the federal courts in such cases, pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453 ("CAFA").[1] Should the case be removed to federal court? Many corporate counsel will reflexively order the removal papers drafted before the envelope containing the complaint has even been fully opened. Is this always wise?

No. While the federal courts sometimes have more experienced and higher quality judges, less tolerance for meritless claims, and insulation from the political process, and some state courts should be avoided at all costs, state court sometimes may be the better option. When deciding whether to remove a case to federal court, it is imperative to learn as much as possible about the background, political leanings, written decisions, experience in handling complex cases, and general reputation of the judge to whom the case has been assigned, the degree of political influence that plaintiffs' counsel wields in state court, and the record of the local federal court in class actions and similar complex litigation, to make a fully informed, case-specific decision. In addition, a state court judge's lack of experience with such cases is not necessarily a negative factor: such a judge may be reluctant to commit himself or herself to years of managing an enormous case. There is no correct answer for every case, but the decision must be a strategic and not instinctive one.

For example, you may want a case to remain in state court if:

- The relevant federal court is a "rocket docket" jurisdiction primarily concerned with pushing cases to early trial dates (especially if the case will require significant discovery of plaintiffs' claims), or, if your client is not interested in discussing a settlement, one in which its judges take a heavy hand in setting and conducting mandatory settlement conferences.

- You anticipate significant fights about the scope or timing of discovery, and the magistrate who would supervise discovery is known to permit broad discovery or to adhere to strict deadlines, regardless of the circumstances.

[1] CAFA expanded the diversity jurisdiction of the federal courts, providing them with jurisdiction over class actions consisting of at least 100 proposed class members, in which the citizenship of at least one proposed class member is diverse from that of one defendant, and the amount in controversy, after aggregating each proposed class member's claim, exceeds $5 million, exclusive of interest and costs. CAFA provides mandatory exceptions to this grant of federal jurisdiction in cases where more than two-thirds of the class members *or* the primary defendants are citizens of the state in which the action was originally filed, as well as those involving particular securities or state law claims related to corporate governance. The statute also vests the federal courts with discretion to remand cases where more than one-third but less than two-thirds of the class members are citizens of the "home" state.

- The relevant federal jurisdiction assigns all class actions, mass tort claims or similar complex litigation to a particularly plaintiff-friendly judge or one who is known to liberally certify class actions, or a number of questionable classes have been certified in that court in the past several years.

- Your company has similar cases (especially mass tort cases) pending in the jurisdiction, and you have been dissatisfied with the judge; most federal district courts will automatically assign such "related" cases to the same judge.

On the other hand, you should probably remove the case, if possible, if:

- It has been venued in a notoriously pro-plaintiff or "judicial hellhole" jurisdiction, particularly one known as being a magnet for class or multi-plaintiff actions.

- Plaintiffs' counsel is known to be particularly politically connected in the jurisdiction, or to be able to get away with close to anything before the judge to whom the case has been assigned.

- The judge has a track record of favoring plaintiffs, of being unable to competently handle complex litigation, of never granting motions to dismiss or for summary judgment, of accepting "junk science," or of handing down decisions that are unfair or which disregard or distort the controlling law to justify a particular holding.

- State or local law permits abusive practices, such as requiring high level corporate executives to appear at trial or hearings upon the mere provision of notice.

3. MAKING THE MOST OF OFFENSIVE DISCOVERY AND CASE-DISPOSITIVE MOTIONS EARLY IN THE LIFE OF A COMPLEX CASE

Many corporate counsel view the initial weeks of a new complex litigation or class action as a relatively calm time to retain outside counsel, negotiate extensions to respond to the complaint and brace oneself for the coming storm. This, however, is hardly the time in the case to take a breather. In addition to conducting the initial factual investigation and legal analysis discussed above, counsel should be planning a detailed strategy that lays out a roadmap for the sorts of information that the company needs to learn about plaintiffs' case and the allegations (including class allegations), the ways to best use the discovery process to obtain that information, what claim-dispositive or case-dispositive motions will be made to narrow the complaint or dismiss it altogether, and when in the life of the case each of those motions should be made.

If you believe that only some of the claims in the complaint are vulnerable to a motion to dismiss for failure to state a claim upon which relief can be granted, you should usually make the motion. Doing so serves the parallel goal of trying to keep discovery and other pretrial costs in line and to spend defense dollars wisely, as any success on the motion will not only narrow the scope of discovery, but the issues to be tried as well. This, in and of itself, can actually save the company a multiple of the motion costs in the long run. In addition, in the interests of judicial economy, most federal and state courts will not require a defendant to answer the complaint until an initial motion to dismiss has been resolved, and will thus not permit discovery to proceed. This time can be used to complete the investigation and finalize the defense strategy.

Moreover, the opposition papers – which will have to be prepared well before plaintiffs' counsel has had the benefit of significant discovery to learn the case's strengths and weaknesses and focus on the most effective theories of liability – may contain helpful judicial admissions that can be used later in the litigation. Finally, initial motions to dismiss are excellent opportunities to "condition" the judge to the overall equitable themes of the defense. If defense counsel can strike the right chord in these initial motion papers, they may be able to predispose the judge to look upon the defense case favorably from the very outset of the litigation. There is thus significant potential upside and (ordinarily) little downside to an initial motion to dismiss only some of the claims, as long as the motion is premised on credible and persuasive legal arguments.

Once you have answered the complaint, be aggressive in your offensive discovery. Most cases are won or lost in discovery, and being aggressive on discovery-related issues gives the company a better chance of learning facts that allow it to make early, case-dispositive motions and, if those are unsuccessful, to help defeat class certification or prevail at trial. Moreover, once an initial decision is made to litigate, there are few disadvantages to taking an aggressive approach to discovery because most plaintiffs' counsel will aggressively pursue discovery regardless of whether or not the company does.

Thus, you should thoroughly depose the named plaintiffs. While you should obviously explore every aspect of plaintiffs' allegations, and plaintiffs' (and their families') past and

current use of the company's products and services, or their medical histories, a defendant in a class action cannot stop there. In those cases, look for other facts that make plaintiffs and their claims stand out as atypical, and especially anything that seems to put their interests at odds with those of the absent members of the class. Try to learn plaintiffs' motivation for serving as a class representative, and what they knew about the company and its products or services before counsel was hired. Ask plenty of questions about the circumstances under which plaintiffs decided to bring suit, and how they came into contact with counsel; much of this information is not privileged. Ask whether one plaintiff has met the other named plaintiffs, or discussed the case with any absent class members. Determine plaintiffs' level of involvement in the litigation once they agreed to have their names on the complaint. A plaintiff who remains uninvolved and defers completely to counsel is not an adequate class representative.

Use written discovery efficiently. Unless the plaintiff itself is a large, commercial institution, most plaintiffs in such cases have a limited number of discoverable documents in their possession, so there is no need for the enormous number of largely duplicative document requests typically seen in commercial litigation. Interrogatories are most effectively used to identify witnesses, to answer discrete factual questions left open in the complaint, or to obtain an itemization of damages.

If the subject of the case is a product that a plaintiff still owns, maintains or uses, ask to inspect it. Depending on the nature of the product (such as a computer or motor vehicle), line up a reliable consulting expert to conduct or attend the inspection well before serving the notice. If personal injuries are at issue, insist on an independent medical examination of each plaintiff.

Most lawyers subscribe to the traditional maxim that summary judgment motions are premature until all discovery has been completed. While you certainly do not want to make any motion that can easily be defeated by pointing to the need for discovery of critical documents or witnesses, many summary judgment motions can be made within the first few weeks or months of discovery, once an initial traunche of documents has been produced or a single knowledgeable witness has been deposed. Plaintiffs cannot defeat summary judgment merely by invoking the mantra "I need discovery." Rather, ask whether plaintiffs can realistically demonstrate, by affidavit, *what* discovery they need, *why* it is needed to overcome the motion, and *how* the discovery would yield relevant and material evidence that would raise a genuine issue of disputed fact. If plaintiffs cannot convincingly do so, the time may be ripe to take an early shot at removing one or more claims from the case.

4. PREVENTING CLASS AND MULTI-PLAINTIFF ACTIONS BY LEARNING TO IDENTIFY AND RESOLVE PROBLEMS THAT COULD FORM THE BASIS FOR LITIGATION, AND AVOIDING CREATION OF "SMOKING GUNS"

The unspoken tragedy behind many of the multi-district suits and class actions being brought today is that they could have been prevented from becoming potentially multi-million dollar problems through careful planning and preventive measures taken when the subject matter of the claim should first have become apparent to corporate counsel. While there are limits to even the most astute and prescient corporate counsel's ability to thwart the entrepreneurial efforts of an increasingly more sophisticated and enterprising plaintiffs' bar, there are also many steps that can be taken to prevent today's problem from becoming tomorrow's massive contingent liability.

First, corporate counsel should become involved from the outset of any persistent engineering or design problems, higher-than-expected failure rates or high numbers of customer complaints. These problems are typically first documented in internal correspondence with or among customer relations and technical support departments or groups, and then in engineering or other technical documents. Corporate counsel should assist in the drafting of such documents so that the same information is conveyed in a less harmful way – or perhaps advise that no document be written in the first instance. At a minimum, this approach could extend the protections of the attorney-client privilege to otherwise harmful documents in which candor is needed to discuss particular problems. More importantly, corporate counsel should try to learn the lessons of past litigation and take a proactive role in proposing steps to render future litigation less likely – such as suggesting changes in the application of customer service or warranty policies designed to leave fewer customers unhappy.

Second, if corporate counsel has determined that a problem exists which could give rise to a number of similar suits, do not assume that the problem is being addressed. Bring the problem to the attention of senior management as a potential litigation risk. It is better to be advised that a solution is being implemented, than to find out from a wave of complaints filed in multiple states, or in a class action pleading, that the problem went unremedied for months or years. Similarly, if the company's executives believe that litigation is only the "lawyers' business," the company may repeat mistakes that led to litigation because it will be unable to heed those lessons.

Third, if the company is relying on component part vendors, suppliers of ingredients or chemicals, original equipment manufacturers, or other third party partners in the manufacturing, product design or customer support processes to troubleshoot problems and design solutions, corporate counsel should supervise all such efforts. For the same reason, corporate counsel should negotiate strong duties of cooperation from such third parties. To the greatest extent practicable from a business perspective, corporate counsel should include provisions in future contracts with third-party vendors that ensure immediate access to their documents and witnesses, and any indemnities should include the payment of the company's attorneys' fees.

Fourth, corporate counsel should "vet" any new advertising or promotional campaign. Advertising and public relations agencies will typically have no conception that their words and presentations could come back to haunt the company. Be particularly vigilant that advertising and marketing materials do not embellish a product or service through claims that can be readily demonstrated to be false or exaggerated. Do not make promises that could fall short of a product's actual performance, that it will deliver a result that all consumers may not be able to achieve, that it (or its component parts) will be "guaranteed" to last a quantifiable length of time, or that it could serve as an all-purpose replacement for some health practice or other common household product.

Fifth, corporate counsel should monitor key channels of communication about the company and its products or services. The most important of these channels are:

a. Internal failure projections and actual failure experience – Because this type of data is often introduced in cases alleging a common product defect as evidence of the existence or pervasiveness of the defect, it is important to monitor the data closely and as early in the distribution process as possible. Corporate counsel should play an active role in developing and adopting uniform procedures for tracking product performance and failure rates on an ongoing basis.

b. The media – Some problems become the subject of months (or even years) of prior discussion in the popular media, and groups of people unhappy with a particular product have been known to create entire Internet websites and "chat rooms" devoted to the sharing of complaints and information. Several of these references threaten litigation. Monitoring these media can thus help corporate counsel determine whether one of the company's products or services is causing its consumers concern on a large enough scale to merit attention and intervention. Special attention must also be paid to communications among the plaintiffs' bar, which frequently recruit large groups of plaintiffs and then refer them to attorneys in their individual home states. Corporate counsel should consider retaining the services of a specialist in "media mining."

c. Authorized dealers and service providers – Many companies have longstanding relationships with the authorized dealers who sell, and the authorized service providers who repair, their products and services. Corporate counsel should use these relationships on a proactive basis to solicit observations regarding the company's products and failure trends.

Finally, corporate counsel must ensure strict compliance with the company's existing document retention policies. Several members of the plaintiffs' bar have been known to use charges of document destruction and spoliation of evidence as an affirmative litigation strategy. At the first specific threat that a particular problem may become the subject of a lawsuit, corporate counsel must ensure that all existing and future paper and electronic documents pertaining to the matter are preserved. Such a directive should be communicated on both a company-wide basis and through individualized notice to those employees who are the likeliest custodians of such documents.

5. STEERING DISCOVERY TOWARDS THE DEVELOPMENT OF THEMES THAT DEFEAT THE REQUIREMENTS FOR CLASS CERTIFICATION OR CLASS OR NARROW THE SCOPE OF THE CLASS

The briefing of a motion for class certification is typically the watershed event in the course of a class action. Yet, some corporate counsel treat class certification as an inevitability, and are reluctant to spend significant defense dollars in opposing a motion that they are sure will be granted. This is a shame, as unlike certain securities and insurance policyholder fraud, and other types of cases which naturally lend themselves to class treatment under the right set of facts, many other types of class actions are inherently more vulnerable to partial or even total denials of class certification. Before a single witness is deposed, a single interrogatory propounded or a single document reviewed, counsel must have at least a preliminary sense of what their strongest arguments in opposition to class certification will be.

Offensive discovery must be conducted to provide the best factual basis upon which to premise the company's strongest arguments in opposition to class certification (as well as to the merits of each claim), and to be consistent with the themes that emerge from those arguments. Examples of this include:

- The roles that individual customer patterns, manner and frequency of use of the product or service play in causing the problem of which plaintiff complains.
- Plaintiff's poor general health and pre-existing medical conditions illustrate the critical importance of medical causation to liability, and show how individual inquiries as to each class member's health will swamp any supposedly common factual questions.
- Plaintiff acted too late in asserting his claims, thus raising statute of limitations concerns that weaken the case and injure the class by having him as its representative, rendering him inadequate.
- Plaintiff's 30-year smoking history demonstrates that she disregarded clear, government-mandated warning labels about the health risks of products; because the gravamen of this case is defendant's failure to warn of the health risks of its products, plaintiff's claims are atypical and she is an inadequate representative.
- Some class members purchased extended warranties or special protection plans that covered the losses at issue, while others received no coverage under their basic warranties. Numerosity may thus be an issue.
- Where exterior property damage to a house or other building is at issue, individual inquiries as to regional weather conditions and building maintenance differences overwhelm any common factual questions.

- Plaintiff's predominantly business use of the product or service distinguishes his experience from that of other class members, presenting typicality and adequacy problems.

Even in those cases in which the court has given strong signals from the outset that it is inclined to certify a class, counsel can eliminate millions of dollars in contingent liability by tailoring discovery to narrow the ultimate scope of an extremely broad putative class (or as to certain aspects of a complex non-class case). This is particularly important in the modern world of class actions, as CAFA does not appear to have deterred the plaintiffs' bar from seeking the largest classes imaginable.

For example, the named plaintiff may have a viable claim of a latent defect in the specific television model that he purchased which causes the picture to periodically flicker, but seeks to certify a class that includes owners of 30 other models manufactured by the company, or consumers who purchased multiple different versions of the model over a period of many years. Or, the plaintiff claims to have been deceived as to the contents of an advertisement broadcast on television or printed in a newspaper about the nutritional content of the offerings of a popular fast food chain which only reached residents of his state and two neighboring states, yet seeks to certify a nationwide class of supposed victims of the company's false advertising. Defense counsel in these two examples should focus their offensive and defensive discovery efforts, respectively, on the overarching themes of critical engineering and performance differences across models and improvements and changes made to the models over the years, and differences in the content and audience of the franchisor's television and print advertising throughout the country.

While defense counsel obviously has control over the depositions they take, the written discovery requests that they serve and the third parties on whom they serve subpoenas, how can one steer *defensive* discovery to the same themes? With respect to written discovery, make sure that any response to an interrogatory or document request is drafted in such a manner that is not only accurate, but is consistent with the company's class certification and merits defense themes. There is almost always room in written discovery responses to place a discrete issue in a larger factual context.

In preparing company witnesses for depositions, start by explaining the nature of both sides of the case to the witness. Then explain what plaintiffs' counsel is trying to accomplish in deposing the witness, and how that testimony could relate to the class action elements of numerosity, commonality, typicality, adequacy, predominance of common legal and factual issues, and superiority of the class action device, or to the legal elements of particular claims. While witnesses must obviously be instructed to answer all questions truthfully, sensitizing a witness as to the background and bigger picture should at least help minimize the chances that damaging testimony as to key issues will be inadvertently volunteered, or that the witness will unknowingly provide an answer that opens the door to a more damaging line of inquiry.

6. DEVELOPING STRATEGIES TO PROTECT THE DISCLOSURE OF SENSITIVE DOCUMENTS

Like any commercial litigation, complex actions pose a tremendous risk that embarrassing, commercially valuable and otherwise sensitive internal company documents will be produced in discovery, and then shared liberally throughout the plaintiffs' bar for citation in dozens of future complaints, briefs, press releases, and Internet postings. Once corporate counsel has identified these documents from the initial factual investigation discussed above, he or she must act promptly to devise a strategy to protect the timing and conditions of disclosure of the documents during discovery.

The best and most obvious way to do so is to negotiate or move for a comprehensive protective order at the earliest opportunity in the life of the case. While all lawyers have their preferred forms of such confidentiality stipulations or stipulated protective orders, this order should contain a few essential terms. These include:

- A definition of "confidential information" that, consistent with governing law, is broad enough to include not only the specific documents with which corporate counsel is initially concerned and true "trade secrets," but any document, discovery response or deposition testimony that might prove to be embarrassing, commercially harmful, or proprietary in nature.

- A provision strictly limiting use of confidential materials to the currently pending, specific lawsuit only.

- A provision requiring the return or destruction of confidential materials immediately upon the dismissal of the action, regardless of whether the dismissal is by settlement, is voluntary or involuntary, or is with or without prejudice.

- A "survival and continuing jurisdiction" provision, by which the parties remain bound to their confidentiality obligations, and the court retains jurisdiction to enforce or modify the order, after the dismissal of the case.

- A provision requiring that any court filing which includes confidential materials be made under seal.

Another effective means by which to protect the disclosure of sensitive documents is to negotiate a stipulation, or more likely, make a discovery motion designed to ensure that a category of documents which includes the most troublesome documents need not be produced until some later time in the case. The earlier event can be a decision on class certification, discovery on less controversial issues, or the establishment of some threshold preliminary finding.[2]

[2] Many federal and state courts have adopted the concept of "phased discovery" in class actions, by which discovery is initially limited to only those issues related to plaintiffs' ability to meet the elements of class certification. In such cases, discovery related solely to the merits of plaintiffs' claims is deferred until after there has been a decision as to what, if any, class will be certified. If class certification is

Accordingly, if there is a compelling need to protect particularly troublesome documents from early discovery, corporate counsel should consider proposing the conduct of discovery in stages. While not every court will embrace this concept, the sheer process of litigating these issues can often cause enough delay in discovery to allow the momentum of the case to shift (at least somewhat) to the company.

Another manner of protecting sensitive documents in class actions is to move for a protective order limiting discovery to the particular model or type of the product or service that plaintiff purchased until a class has been certified that includes other models or types. A motion of this nature can often appeal to a court's sense of proportion, efficiency and judicial economy. If successful, in addition to dramatically reducing the costs associated with defensive discovery, such a motion may allow the company to avoid immediately (or, if class certification is denied or limited by model or type, permanently) producing a variety of sensitive documents that did not involve the specifics of plaintiff's situation.

The company may also want to consider moving to dismiss some of the claims in the complaint, or making an immediate post-answer motion for partial summary judgment on one or more claims, if counsel's initial factual investigation has disclosed a number of particularly sensitive documents. Having one or more claims dismissed at the outset of the case provides counsel with credible arguments for narrowing the scope of discovery. Without certain claims in the case, some of the most sensitive documents in the company's files could very well become non-discoverable.

denied, it is thus likely that many otherwise discoverable sensitive documents may never have to be produced in a case which has adopted such phased discovery.

7. CULTIVATING PLAINTIFFS' COUNSEL AND PICKING YOUR BATTLES

Many corporate counsel assume that once senior management has made the decision to vigorously defend a complex litigation, rather than set the case up for an early, favorable settlement, they need to hire the meanest junkyard dog on the block as the company's primary outside counsel. Such a "Rambo litigator," counsel reason, will fight every battle to the death, will exhaust the adversary's resources and patience by his or her sheer toughness and doggedness, and will be so unpleasant to deal with, that plaintiffs' counsel will regret the day that they chose to pick on the company, and instead scramble for a face-saving exit from the case. While this may sometimes work, in other cases, this is a fantasy. Such a decision sometimes turns out to be as ill conceived as it is unnecessarily expensive for the company.

While no one would ever advocate that defense counsel be seen as "fraternizing with the enemy" by developing an overly close or friendly relationship with plaintiffs' counsel, far more is sometimes accomplished in complex litigation by cultivating a productive working relationship with one's adversary than an endlessly contentious one. At a minimum, it is essential for defense counsel to be known to plaintiffs' counsel as honest and reasonable, and to be worthy of their trust.

As but one of many examples, a defense lawyer who has a good relationship with plaintiffs' counsel will likely be able to secure agreement to confidentiality stipulations, interim scheduling orders, briefing schedules on important motions, limits to the scope or timing of certain discovery, and accommodations to deposition schedules and locations that minimize the inherent disruption to the company's business that the discovery process always brings. By contrast, a Rambo litigator may be unable to secure his adversary's consent to anything, and may needlessly consume defense dollars and resources on dozens of matters that could otherwise be handled with a telephone call or a brief exchange of correspondence.

Even if the case does not turn out to involve a need for multiple stipulations and a high level of cooperative case management planning, complex litigation, by its inherent nature, usually involves an extended period of active litigation, especially if significant discovery needs to take place or a class is ultimately certified. The lawyers are thus frequently before the court over a long period of time, and it is simply not worth the risk of being seen by the court at any time as obstructionist, duplicitous, unfair, or unreasonable. More importantly, the company should never be seen as unnecessarily increasing the court's workload through motion practice that could have been avoided through a more cordial relationship with opposing counsel.

Moreover, while there are many battles that need to be fought in a complex case, battles that do not advance a particular litigation strategy should oftentimes be avoided. Such fights usually not only cost substantially more than the value of the results they yield, but often undercut the company's credibility with the court, which will be needed for the most important battles in the case: the motions for summary judgment and, where applicable, class certification.

Thus, in choosing to litigate over what might later be perceived to be a minor issue, corporate counsel should ask the following questions:

- Will prevailing on this issue make it any easier to obtain summary judgment, defeat class certification or otherwise achieve the company's ultimate objectives?
- How solid is the legal support for the position that counsel will be advancing?
- Will submitting an affidavit on the motion from one of the company's witnesses lock the company into a particular factual position, contradict the witness's prior deposition testimony or positions taken in documents produced in the case, or undermine the company's ability to make another argument later in the case?
- Does the requested relief have any realistic chance of being granted?
- Will the court deem the litigation of the issue to be trivial, or blame the company for not making a strong enough effort to resolve it outside of court?
- If the company is seeking to foreclose or obtain discovery of a particular topic or from a particular witness, will it make much of a difference to the defense of the case if the discovery is provided or the witness is deposed?

Many lawyers adopt a "fight every battle" mentality because they believe that they can quickly make the litigation too expensive for plaintiffs. It is often a major mistake, however, to assume that plaintiffs' counsel will simply fold their tents in a war of attrition. Several members of the plaintiffs' bar have earned significant fees over the years, and some have "war chests" of savings used to finance large, complex cases that can rival the resources of a Fortune 100 company. Never assume, to paraphrase General George S. Patton, Jr., that you can win a complex case merely by making the other side spend all of their money.

Finally, corporate counsel are often provided with their own internal budgets for defending a large case (or at least have certain fee ceilings in mind). In handling the defense, corporate counsel ask outside counsel to adopt a philosophy of spending the company's money as if it were the firm's own. This will better ensure that the case stays within budget, so that later efforts to vigorously litigate important issues (such as summary judgment and class certification motions) are not hamstrung or deprived of resources because a formal or informal budget was "blown" in the early stages of the case.

8. MASTERING COST-EFFECTIVE CASE MANAGEMENT TECHNIQUES

Once a complex case survives a motion to dismiss for failure to state a claim upon which relief can be granted, it can often be particularly expensive to defend, regardless of its lack of substantive merit or the novelty of its underlying theories of liability. While corporate counsel must be realistic, and should expect to pay significant legal fees to defend a case with millions of dollars of potential liability, there are several techniques that can prevent such a case from becoming a blank check. In fact, a recent survey reported that the "process costs" of litigation (as distinguished from the "outcomes," such as judgments or settlements) averaged 30 percent of the budgets of the legal departments of the 1,000 largest companies in the United States.

The largest area of prudent financial management of defense costs actually comes at the outset of the case, when corporate counsel must select outside counsel to defend the action. In selecting counsel, the company should not just hire a *litigator*. Rather, complex actions require experienced *trial lawyers* who will know how to most effectively defend the case at trial or at any evidentiary hearing necessary to help resolve particularly critical issues (such as class certification). Outside counsel must also be sensitive to the company's corporate culture and level of risk aversion, and understand the company's business and other goals.

The firm that is ultimately selected to serve as defense counsel should be asked to submit an initial budget for the litigation, which estimates a likely range of costs for the various defense activities expected to take place. After that, updated budgets should be submitted on a periodic basis to adjust for the past progress of the case and the expected course of the next several months of litigation. Budgets should include significant litigation-related costs that will not appear on outside counsel's bills, such as expert witnesses' and consultants' fees. These budgets will ensure that the company and outside counsel stay focused on the ultimate objectives of the defense.

In controlling defense costs, corporate counsel's focus should be on spending discretionary defense dollars on activities that will help determine the major issues of liability on the merits and, where applicable, class certification. Although complex cases obviously involve significant exposure, counsel need not turn over every rock, depose every potentially knowledgeable witness, or research every conceivably relevant legal or factual issue. Rather, counsel should develop an overall defense strategy and "roadmap" for the case as soon as their initial factual investigation and legal analysis has been completed. Once such a strategy has been formulated, the litigation should be tightly managed to ensure that every tactic promotes the company's strategic goals. Through such management, the company can decide to forego particular litigation activities (such as discovery or motion practice) that would cost more than their incremental value.

The company's strategy can best be developed through teamwork and "partnering," in which outside counsel, corporate counsel and a key business executive join together in candid communication to seek a favorable result in the most cost-efficient manner possible. This approach embodies the concept of "strategic strengths," which recognizes that no one person has all the insights and perspectives necessary to fully represent a company's interests. When such

partnering takes place, the company receives the maximum representation at the most reasonable cost, and its outside law firm can operate profitably.

Frequent communication among the team members is critical. It requires outside counsel to understand the lines of communication and the standards and procedures for the work they perform, and corporate counsel and company management to stay aware of all significant case developments and activities. Such communication avoids situations in which the company is billed for work that corporate counsel believes is unnecessary, and ensures that outside counsel knows of changes in the company's short or long term objectives that it can structure the litigation to achieve.

9. DEALING WITH THE UNIQUE CHALLENGE OF CLASS ACTION ALLEGATIONS IN ARBITRATION

Many Fortune 500 companies have long included mandatory arbitration provisions in their product warranties, customer service agreements and similar consumer-oriented documents. In the past, when faced with a class action, defendants were often able to obtain rulings both enforcing the arbitration clause, and holding that class arbitration had either been waived or was otherwise beyond its scope. This resulted in the "double whammy" of reducing an eight or nine-figure putative class action filed in the court system to an arbitral claim on behalf of one or a small number of plaintiffs worth only a few thousand dollars in total. Although California recognized class arbitrations since the early 1980s, its courts still repeatedly held that they – not the arbitrators – retained responsibility for certification, notice and fairness approvals. Outside of California, class arbitrations were practically unheard of.

The tide shifted dramatically, however, in June 2003, when the U.S. Supreme Court held in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), that class arbitration is permissible under the Federal Arbitration Act in the absence of specific contrary language in an arbitration clause. This, in turn, has led to a puzzling dilemma: how can putative class claims be resolved in arbitration, which was designed specifically to handle individual disputes between two contract parties?

Arbitration clauses can either refer disputes to a general arbitration forum, such as the American Arbitration Association (the "AAA") or JAMS, or to a forum specific to the company's industry (such as the National Association of Securities Dealers). In October 2003, in response to *Bazzle*, the AAA enacted Supplementary Rules on Class Arbitration, and took the position that it would enforce class action waiver provisions in arbitration clauses unless a court held such a waiver to be unenforceable. JAMS also drafted a set of Class Action Procedures in February 2005. It initially stated in November 2004 that it would not enforce class action waivers in its cases. However, after JAMS received harsh criticism from commentators and the courts, it reversed course in March 2005, agreeing to apply the law on class action waivers on a case-by-case basis in each jurisdiction.

The most significant of the AAA and the JAMS class action rules are the following:

- Construction of the Arbitration Clause – AAA contemplates an initial phase of the proceedings in which the arbitrator must construe the arbitration clause and determine whether it permits a class arbitration. The decision is issued by an interim written award, and there is a mandatory stay for 30 days thereafter to allow the losing party to challenge the decision in court, which can be extended by the arbitrator. JAMS grants its arbitrators discretion as to whether to issue an interim award, and does not provide a framework which facilitates judicial review.

- Class Certification – Under both rules, following resolution of the issue of class arbitrability, the arbitrator then determines whether the action should proceed as a class action. The test follows Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure,

but also requires that all class members have agreed to an arbitration clause substantially similar to that in plaintiff's agreement.

- Confidentiality – The AAA rules eliminate the presumption of privacy and confidentiality in arbitration proceedings, and permit public filing of transcripts of arbitral hearings and the attendance of class members and their individual counsel at such hearings. JAMS continues to allow the parties to maintain confidentiality of the proceedings, and grants the arbitrator discretion to exclude non-parties.

- Form and Publication of Final Awards – Following the publication of notice to the class and the resolution of the manner by which class members can exclude themselves (which mirror those set forth in Fed. R. Civ. P. 23), both rules provide for trial on the merits by the arbitrator. The AAA rules make written final awards (which must provide the reasons for the award) both mandatory and publicly available on a cost basis. Further proceedings are subject to a mandatory stay of 30 days to allow the losing party to challenge the decision in court. By contrast, the JAMS rules only provide for a written statement, as to which the parties can agree whether or not the reasons for the decision will be included, and whether or not the decision will be made publicly available.

The law in this area is still developing. Indeed, we are unaware of any published decisions reviewing class certification grants or final awards issued by the AAA, JAMS or other private arbitral bodies. A small body of case law has developed from early efforts to seek judicial review of interim arbitral awards finding class arbitration permissible under an arbitration clause. These cases have, to date, consistently come out in favor of class arbitration. *See Genus Credit Mgmt. Corp. v. Jones*, 2006 WL 905936 (D. Md. Apr. 6, 2006) (upholding AAA arbitrator's decision that contract embodying defendant's debt management plan did not preclude class arbitration of consumer claims); *Marron v. Snap-On Tools Co.*, 2006 WL 51193 (D.N.J. Jan. 9, 2006) (upholding AAA arbitrator's interim award that class arbitration was permitted under franchise agreement's arbitration clause); *Garcia v. DIRECTV, Inc.*, 115 Cal. App. 4th 297, 9 Cal. Rptr. 3d 190 (2d Dist. 2004) (reversing trial court decision that AAA arbitrator lacked authority to resolve class action issues, including construction of arbitration clause in cable television provider's standard Sales Agency Agreement with its dealers as permitting class arbitration); *Cable Connection, Inc. v. DIRECTV, Inc.*, 2006 WL 2709407 (Cal. Ct. App. Sept. 22, 2006) (reversing trial court's vacation of AAA interim arbitration award construing arbitration clause in same form agreement; trial court erroneously concluded that arbitrators exceeded their powers by rewriting agreement for the parties).

One interesting area of uncertainty arises when an arbitration clause requires that the entire arbitration process – from initiation to the issuance of the final award – be completed within a relatively short time frame (for example, 60 days). AAA and JAMS would likely respect the specific timing provisions negotiated by the parties, unless they both agreed to waive such a provision. Accordingly, because it would likely be difficult to conduct even a scaled-down class arbitration from start to finish in only a few weeks or months, the company would appear to have an effective argument that such a clause cannot be interpreted to permit class arbitration.

There are three main advantages to requiring class actions to proceed in arbitration. First, plaintiffs would likely be entitled to far less (or in some cases, perhaps to no) discovery in arbitration. This could place the company at a distinct tactical advantage, as most defendants have far less to gain from extensive discovery of plaintiffs' cases than plaintiffs have to gain from a thorough document review and depositions of multiple high-level corporate officers or employees.

Second, because even without a specific time restriction an arbitration would proceed at a much faster pace than a state or federal court action, the expedited schedule would likely save the company significant legal expense in the long run. By contrast, in the judicial system, class actions sometimes involve years of protracted and expensive litigation.

Third, given the absence of authority in the area, the time frame and the uncertainty as to what type of class relief (if any) can even be awarded by the arbitrator are factors weighing against class certification. Moreover, any arbitral decision to attempt to accommodate class claims by extending the process beyond specific time parameters or other conditions set forth in the arbitration clause would arguably render the arbitral award vulnerable to vacation in the court system.

There are three significant disadvantages to requiring class actions to proceed in arbitration. First, while the law in this area is still developing, there has historically been little appellate recourse to an unfavorable arbitral decision. Rather, review of such decisions is limited and initially conducted by trial level courts. Such courts can only overturn an arbitral award based upon a showing of some irregularity in the proceedings (such as corruption or fraud, arbitrator bias, or failure to follow proper arbitration procedure upon a party's objection), the resolution of issues that are beyond the scope of the parties' arbitration agreement, or a manifest disregard of the law.

Second, arbitrators are not governed by formal rules of evidence, and can therefore premise decisions upon evidence that would not otherwise be admissible in a state or federal court. Accordingly, this compounds the inherent and appreciable risk in allowing an arbitrator with practically unlimited discretion whose substantive decisions are not subject to any meaningful judicial review to resolve a claim with a potential liability in the millions of dollars (or more).

Third, forcing plaintiffs' counsel to arbitration does nothing to prevent other plaintiffs who are not parties to agreements with arbitration clauses from bringing their own class action suits against the company. The company could end up with the worst of both worlds – an unpredictable and practically un-appealable class arbitration, proceeding simultaneously with an expensive and lengthy class action dispute in the court system.

10. CONCLUSION

In today's increasingly litigious environment, corporate counsel must be able to navigate their company through proceedings in complex litigations and class actions that challenge the very integrity of the performance and marketing of the company's goods, services and business practices. While these cases represent significant exposure, they need not become crisis events in the life of a company. Careful planning on the part of corporate counsel can be the difference between a case that settles for a nominal amount, or goes away entirely, and one that lives seemingly forever, consuming millions of dollars in defense costs each year and requiring lengthy judicial proceedings and tens of millions of dollars to achieve finality.

Corporate counsel should thus always strive to prevent a problem from becoming the subject of a complex action in the first place by confronting and resolving issues before they cause customers to start writing about their concerns on the Internet and telephoning local plaintiffs' lawyers. Once such a case is filed, however, the time to learn the facts and the bases for and likelihood of the company's liability is immediately. Once that has been accomplished, a comprehensive strategy should be devised as to how the case will be defended and a "roadmap" should be drawn detailing the short and long term goals that need to be accomplished in pursuit of the defense.

From that point on, every decision in the case, from whether to seek removal to federal court, to what substantive motions to make in what order, to how discovery and trial will be conducted, to whether to enforce an arbitration clause, must focus on how each action taken in the case will promote the strategy and accomplish the goals. If the overall strategy has been carefully designed, winning themes that establish that the company has no liability on the merits and that can defeat the requirements for class certification (or narrow the scope of the class) will began to emerge from the day-to-day litigation of the case. Moreover, only then will corporate counsel have the optimal opportunity to predict outside counsel fees and keep them within a realistic budget without the risk of short-changing the overall defense of the case.

PRACTICAL ADVICE ON HANDLING "HIGH PROFILE" LITIGATION EFFECTIVELY

Ted C. Raynor
Vice President and Senior Counsel
Hilton Hotels Corporation

There are many styles, strategies and techniques employed in the handling of litigation, especially litigation that presents material exposure to the company. The tips that follow are some of the things that I and the other members of our department's litigation team use to handle such litigation effectively.

Careful Selection of Outside Counsel is Essential

- High profile cases may require you to move beyond your normal list of outside counsel. My first General Counsel once told me that there are *"horses for courses"* meaning that you must try to find the right "fit" in your counsel selection based upon the various factors in play in the current case including subject matter of the dispute, venue, presiding judge, opposing counsel, etc. You will not have the luxury of educating your counsel on any of these topics. Ideally, you will find one that has a depth of experience around each.

- If using counsel that you have employed previously on more routine matters, reflect on how effective they were on the last several cases they handled including the ability to achieve key objectives effectively and on budget. Consider whether this counsel knows and embraces your company's culture and risk tolerance.

- Rouge lawyers waste time, cost more and create undue complications. Avoid lawyers who have a tendency to get involved in collateral distractions, e.g. discovery disputes. Tiger Woods wins majors by staying focused.

- Ask yourself: "Can I trust this attorney with my clients?" At some point in time they will likely be interfacing with your General Counsel, top executives, possibly even the Board of Directors.

- Knowledge about your company's practices and leadership can help counsel move quickly to the key, dispositive issues in the litigation rather than facing two learning curves at once.

- Consider recent results of counsel for other clients – obtain references especially if you have not used counsel previously or have not used counsel in this "high profile" capacity. There is a subtle but important difference in mentality between handling a routine commercial dispute and dealing with a "high profile" matter.

- Confirm that counsel has the capability to take the matter all the way to trial – not just to the eleventh hour settlement table. Can counsel effectively advocate your position to a judge or jury? How many meaningful cases has counsel taken to verdict in the last 3 years?

- There is nothing more reassuring than knowing that your counsel can try the case if it comes to that and, conversely, nothing more terrifying than knowing / learning that your counsel can not possibly handle a trial on the merits and being forced to settle (or having to change counsel mid-stream).

- A high risk case will often mean that you need to consider representation that may be too expensive for the typical case but justified in the current instance. To prevail, you will need experienced and fearless trial counsel.

- There will most likely be great lawyers knocking your door down trying to represent the company on the "high stakes" matter du jour. Consider conducting a RFP to force your top several candidates to compete with each other. Ask potential candidates to outline for you their respective areas of expertise and experience as it relates to the current subject matter, how they would approach the matter strategically, how they would staff the team, as well as any other factors they would consider persuasive in choosing them to handle the matter. Competition is a good thing.

- When evaluating your RFP responses, base your selection of counsel on their ability to convey the skills, experience, diversity, compatibility and litigation savvy they might bring to the current matter.

Gather and Analyze Your Key Evidence Quickly

- Litigation holds are a way of life now. Get them out as a first step. However, do not necessarily rely on the witnesses or document custodians to do your work for you. You should get your hands on the most important documents (including electronically stored information) fast! Through this process you will also learn who your key witnesses will be.

- Conduct some preliminary interviews of all of your key witnesses. These are typically the business people who have been dealing with the subject dispute on the front line and will know where the nuances or difficulties lie. Get an understanding of what they know and what they have. Then, make sure that they shut down any communications outside the company on the subject matter. Tell them to anticipate more detailed briefing sessions with outside counsel later.

- Have your counsel perform a rigorous and realistic risk analysis as their first assignment. It will serve as a good dose of reality and force them to focus on the key issues in play. It can be revised as the case moves forward. We recommend and use software available at www.treeage.com. This exercise will also give you, the inside counsel, an early example of how well your outside counsel can analyze and predict.

- If your company is the plaintiff, determine right away the evidence you will need to establish your damages. In these cases, recovering your damages is the end game. Do not wait until the discovery phase to get this proof ready. You should review it thoroughly and carefully with outside counsel before the complaint is filed. Anticipate how the adverse party might attack your damages claims.

Balance Your Time

- Invest the time necessary on the front end to accomplish the above listed objectives and to develop the key strategic direction. Your internal clients will be looking to you, not outside counsel, for guidance.

- Identify the end game. What is the client's preferred outcome? Does the client's preference coincide with the best interests of the corporation's big picture? Are there any key company principals involved? Does the company really care to "make law" on a given subject or is it better off getting back to business? This analysis will help you determine whether the current "high profile" matter should be resolved early. Can mediation (or some other form of ADR) achieve the same objectives that come from months/years of litigation?

- Determine what steps outside counsel will handle and those that will be handled internally. Simply turning over the matter to outside counsel will not produce effective and efficient results. Establish clear expectations and accountability.

- Establish communication channels. Do you really need to create more email? Team sites work very effectively by serving as a central collection point of all key events, documents, updates, etc. If properly secure, they also help to better preserve privilege protection.

- Strike the proper balance between limiting disruptions to the company's business, including executives' time, and keeping the right people informed and calm.

- As inside counsel, you will need to be able to predict accurately outcomes not only at the end but at important stages along the way. Create a road map for your clients to help manage their expectations.

Class Actions are Unique and Require Special Strategies

- Best strategy is avoidance. Be mindful of your industries. Read the trades and especially the litigation alerts. Learn from your competitors' experiences.
- If faced with a class action, determine whether you can erode the class by moving quickly to strike settlements with those involved.
- When reaching class wide settlements (as opposed to individual "erosion" settlements), watch out for unexpected extra expenses such as professional objectors (determine an opt out break point) and notice / publication costs.

Budgeting

- For outside counsel, this will be the most unpleasant aspect of the case. For inside counsel, it could become the most important. Work with outside counsel to develop an early and realistic budget based on currently known circumstances. It can be revised later should things change.
- Monitor as the case moves forward. Discuss variances candidly with counsel and alert management before they alert you.
- Our budgeting requirements are incorporated into our Outside Counsel Guidelines – which become incorporated into any engagement documentation.
- Consider whether there are alternative billing arrangements that make sense. We have used contingency fee, flat fee and "success bonus" models in addition to the traditional hourly model.
- Electronic billing is now required by all of our outside counsel. It enables faster payment turn around (which the outside counsel love) and better metrics management.

Learn from Your Experiences

- Having successfully concluded your "high profile" matter, try to find ways to avoid the next one. Most disputes arise through relationships with your company's customers, business partners, suppliers, employees and/or competitors. Once the litigation is over, your company will still be dealing with these same constituencies. Draw lessons from the litigation to improve these relationships going forward.

- Consider whether it would be useful to conduct some internal training and/or adjust the company's existing policies around the subject matter of the dispute to hopefully eliminate future vulnerabilities. Use training to drive awareness, understanding and improve compliance with company policies and applicable legal obligations.
- Grade your outside counsel. How well did they perform in achieving the key objectives? How was their budget performance? If they missed the budget projections, did they advise before exceeding them or try to explain afterwards?
- Solicit input from your clients about your outside counsel selection. How satisfied were your clients with outside counsel's ability to advocate their position and accomplish the business objectives?
- Load effective motions, briefs or other pleadings into your department's brief bank for later use.

Good luck on your next "high profile" case!!