Conflicts
Avoiding Problems in Joint Defense Groups

by Mark D. Plevin

No one is ever satisfied with joint defense groups. Lawyers for the major defendants fret about keeping the lawyers who represent the minor defendants in line and getting them to do their "fair share." Lawyers for the minor defendants complain about being kept in the dark by the leaders of the group and worry about being left behind if the major defendants settle out.

Consider these scenarios. Each one will be familiar to those who have participated in a joint defense group.

Scenario 1: Becky represents one of the principal defendants in Mighty Corp. v. Big Insurance Company, et al. For months, she has tried to persuade other members of the joint defense group to take on a greater share of the work. But the other defendants have been content to let Becky's firm take the lead on every significant project. As a result, Becky and her associates drafted and argued the group's joint motion to dismiss, propounded the initial joint discovery requests, and negotiated the case management order with the plaintiff. The deference shown by the other members of the group gave Becky a welcome measure of control over the defense. Now, however, with the plaintiff about to produce more than a million pages of documents, Becky's client, Chuck, has started to complain about the bills.

"What's everyone else up to? Why aren't the other defendants doing any of the work? Can't you twist their arms and get them to help?" Chuck was exasperated, his questions coming rapidly. "I don't want you to be the only one reviewing documents," he warned.

With Chuck's admonition ringing in her ears, Becky convened a meeting of the Mighty v. Big joint defense group. She reported what Mighty's counsel had said about the upcoming document production set to begin next Monday and explained the need for broad participation in the document review effort. Then she asked for volunteers to help in the review. Becky looked around the table expectantly. But she saw only vacant stares. No one wanted to commit any lawyers or paralegals to help.

Suddenly, a hand shot up across the table. It was Frank, a second-year eager-beaver associate at one of the big firms in town. "I'll be glad to talk to the partner about it," he said, earnestly. "He's out of town for a few days, but I should be able to get in to see him early next week. Maybe we can send someone for the last day or two, if the review is still going on then." Frank's offer, meager as it was, was a godsend. At least Becky could tell Chuck someone else might help, if only a little bit.

"I hate joint defense groups," Becky thought.

Scenario 2: The moment had been months in the making. Early on, Julie and counsel for the other defendants in ABC Corp. v. Huge Corp., et al. had conceived of the novel legal theory that might support summary judgment. Then, Julie carefully crafted and implemented a discovery plan that required the participation of most of the defense group. Finally, the brief was painstakingly drafted, circulated twice for comment, and revised several times to garner the support of all the defendants.

As the principal drafter of the brief and counsel for the lead defendant, Huge Corp., Julie orally argued in support of the motion. And it had gone very well; the judge's comments suggested that he had seen things Julie's way.

As counsel for the plaintiff rose to respond, out of the corner of her eye Julie saw Bob Bumbler, counsel for one of the other defendants, rush toward the podium. Bob only occasionally made it to the monthly joint defense meetings. When he did, he seemed to be on a different page from the rest of the lawyers in the joint defense group. Julie recalled that the brief had to be changed just before filing in order to persuade Bob's client to join it. She began to shudder.

Bob quickly gave his appearance, then said, "Judge, I'd just like to clarify a point made by counsel for Huge." Bob spoke for only two minutes, but his "clarification" was enough to muddy things in the judge's mind. The plaintiff's lawyer never even had to say a word. "Summary judgment denied," the judge ruled from the bench. "I hate joint defense groups," Julie muttered under her breath.

Scenario 3: The letter seemed innocuous, but it was enough to ruin Brian's day, if not his year.

"Please be advised that our client, Massive Corp., has settled
with plaintiffs and hereby withdraws, effective today, from the joint defense group in XYZ Company v. Massive Corp., et al."

Just then the phone rang. It was Robin, who represented another defendant in the XYZ case.

“What are we going to do now?” he wailed. What, indeed?

Brian recalled how pleased he was last spring when Mary, the general counsel of Minor, Inc., called and asked him to represent the company in a “major piece of litigation.” Brian remembered how impressed he was with Massive’s counsel at the firm of High & Mighty and his plans for coordinating the defense of the XYZ suit. Every month, Brian sent his junior associate to the meeting of the joint defense group and reviewed his report of all the activity being undertaken by Massive’s counsel on behalf of the group. Every once in a while, Brian asked Mary to send a check to cover Minor’s share of the group’s joint defense costs. Brian was confident High & Mighty would roll over XYZ in the courtroom at trial. Brian would be a hero to Minor, Inc., and Mary would send lots of business in the future. Or so he thought.

Now, with Massive suddenly out of the case, things looked a lot different. Brian realized that he knew next to nothing about the lawsuit. Massive’s counsel had taken the lead on reviewing XYZ’s document production; to save costs, Brian sent one junior associate to the document review for three days, but she was no longer at Brian’s firm. The document imaging system and deposition database were housed at the offices of High & Mighty; besides, neither Brian nor anyone else at his firm knew how to operate the database. No one from Brian’s firm attended the dozens of depositions of XYZ’s witnesses, or even read the transcripts; instead, Brian relied on the deposition summaries prepared by other defense group members. Brian was not prepared to file any motions for summary judgment even though the deadline was next week; he had been waiting for High & Mighty to circulate a draft group motion. Finally, trial was scheduled to start in only five weeks, and the judge never granted continuances.

How could this have happened? Where did things go wrong?

If no one likes joint defense groups, why do we have them? The answer is easy in some cases: because the court says so. Judges sometimes require defendants to file joint briefs, or serve joint discovery. They sometimes limit the defendants to a specified number of interrogatories or document requests. They sometimes order the defendants to designate a lead questioner at depositions, and they sometimes appoint a “defense liaison counsel,” a “defense coordinator,” or a defendants’ “discovery committee.” See, e.g., Manual for Complex Litigation 3d § 20.22; Central Illinois Public Service Co. v. Allianz Underwriters Ins. Co., 158 Ill.2d 218, 633 N.E.2d 675, 676-77 (1994). The need to comply with the court’s orders forces defense counsel to work together.

But even where the court does not mandate the organization of a joint defense group, it is likely that the defendants will organize one anyway. Joint defense groups, if properly managed, can be a powerful tool. They are frequently the most effective and efficient way of managing and coordinating multiparty litigation from the defense side.

First, joint defense groups enable each defendant to reduce substantially its costs of defense. These cost savings come in two forms. One is sharing of work. The defense firms may divide the legal research tasks in a case, then share the memos. One firm may prepare a joint set of document requests, while another drafts a joint set of interrogatories. A different firm might interview expert witnesses. If the plaintiff is producing a million pages of documents at a distant warehouse, each defense firm can contribute one or more lawyers or paralegals to the on-site review. When depositions begin, the witnesses can be divided among the participating defendants, saving each firm from having to prepare separately for each deposition. A similar division of responsibility can be implemented at trial. The defendants can split up motions in limine and witnesses.

Joint defense groups can also provide huge savings in expensive “out of pocket” costs. These can include the costs of experts, consultants, and court reporters. One of the largest costs assumed in “big document” cases is the cost of creating a computerized database of the plaintiff’s documents. Typically, all members of the joint defense group have access to the database. This is a significant cost that no single defendant—at least no minor defendant—would take on if it had to pay for the whole thing.

Cost savings are not the only benefit to be gained from joint defense groups. There is also the benefit derived from combining the expertise, knowledge, and skills of the lawyers in the group. Some of the lawyers may have specialized knowledge about the substantive law at issue. Others may have experience dealing with the particular industry or business involved. Perhaps one of the lawyers has recently tried a case before the judge. Taken collectively, the group has better qualifications, deeper knowledge, and more expertise than any single lawyer.

A third benefit of joint defense groups is the ability to coordinate strategy and tactics. A joint defense group enables the defendants, who often face a single (and single-minded) plaintiff, to speak with one voice, staying “on message” and avoiding (or at least reducing) conflict on their side of the case. A joint defense group also can help to ensure that one defendant’s strategy doesn’t work at cross-purposes with another’s.

But the benefits are frequently elusive, as the above scenarios indicate. The biggest reason is that joint defense groups are riven by inherent conflicts between major and minor defendants.

Major defendants are those with the most to lose. They want to control the defense, to protect their large stakes. As a result, major defendants often do most of the group’s work. Because the case is riskier for them, major defendants typically invest considerable time and effort in carefully establishing each possible ground of defense. This can be
extremely expensive—but for a major defendant, this cost may pale against its potential liability.

Minor defendants, by definition, ordinarily have a lesser stake in the case. They are often comfortable deferring to and relying on the major defendants. This permits the minor defendant to realize significant cost savings and fits well with the major defendant’s desire for control. However, the minor defendants sometimes balk at incurring the cost of the gold-plated defense which the major defendant believes is warranted, creating dissension within the group and threatening the major defendant’s control.

Major and minor defendants also frequently disagree on strategy issues. The minor defendant may be more willing to risk an early summary judgment motion which has the potential of springing that defendant from the case before it gets too expensive, while the major defendant may be more interested in having that issue decided later, after discovery has been completed and the record is fully developed. The minor defendant’s desire for an early resolution of a potentially dispositive issue interferes with the major defendant’s grand strategic design, again threatening the major defendant’s control.

Organizing the Group

There also may be a conflict between the major defendant’s interest in control and its desire to spread the workload. The major defendant—Becky’s client in the first scenario—wants other defendants to help carry the litigation burden, but may not want to cede or share control of the defense. But if the other defendants respond to Becky’s pleas for help by becoming more active, it will become more difficult for Becky to continue controlling the defense, since they will want more say in how the defense is being prepared and presented. Eventually, Becky and her client may be forced to decide which is more important to them, cost savings or control. Finding the right blend may be difficult.

The minor defendant often faces a mirror-image conflict, between its interest in cost savings and its opposing desire to participate actively. Minor defendants—Brian’s client in the third scenario—want to be involved, but not necessarily so involved that they incur huge costs. On the other hand, too much reliance on the group can be disastrous, as Brian learned in the third scenario. The minor must be active enough to protect its own interests.

Yet another conflict pits the need for group consensus against the need to be proactive. To move forward on any project—whether it is the filing of a motion, the retention of an expert, or the creation of a database—the group must develop a consensus. The larger the group, and the more disparate the interests of its members, however, the harder it is to develop any consensus in a timely fashion. The failure to develop a timely consensus leads to missed opportunities: motions not filed, or filed at the wrong time; depositions not taken; discovery not served; initiatives overlooked. These opportunity costs can be impossible to measure, or even to recognize, even though they may be significant.

Whether you represent a major or minor defendant, navigating through these cross-currents requires organization, leadership, diplomacy, and diligence. A little bit of luck sometimes helps, too.

First, organize the joint defense group. This means contacting the other defense lawyers as early as possible. Time may be of the essence if you want to remove the case from state court to federal court, or persuade other lawyers to avoid raising certain sensitive issues in a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or comparable state law.

Keep in mind at the outset that your discussions with other defense counsel about joint defense strategy are probably shielded by the “joint defense privilege,” a judicial doctrine that protects from disclosure many communications between counsel for similarly-situated parties about the litigation. See, e.g., Michael G. Scheininger and Ray M. Aragon, “Joint Defense Agreements,” Litigation 20:3 (Spring 1994); Gerald F. Uelman, “The Joint Defense Privilege: Know the Risks,” Litigation 14:4 (Summer 1988). As these articles point out, however, the joint defense privilege is not without gray areas as to where and when it applies. One way to make these gray areas black and white is to ask the judge, in a case management order, to include an express recognition of the joint defense privilege and protection for joint defense activities. Particularly where the court is requiring, or at least encouraging, coordination among the defendants, judges and plaintiffs are usually amenable to such a provision.

When you have your first joint defense group meeting or telephone conference call, address head-on the question of whether the defendants want to formulate a joint defense group and, if so, for what purposes. Will the group just talk from time to time about the direction of the case, or will the group meet regularly in an effort to formulate and follow an integrated strategy? Will each defendant review and organize the plaintiff’s documents on its own, or will the group contract with a vendor to provide a document management system accessible by all defendants? Will experts and investigators be retained separately or jointly? The answers may depend on the type of suit, the nature of the plaintiff’s allegations, and the major issues.

An unstructured group that merely agrees to “keep in touch” might be the best course where one defendant has so much more at stake than the others that it wants to defend the case on its own terms, un fettered by the need to accommodate the interests of a joint defense group. Informal groups sometimes also work well where the members of the group have ties apart from the litigation, and the minor defendants are accustomed to taking their lead from the major defendant. Examples include a manufacturer and its suppliers in a product liability case, or the company and its directors and officers in a securities fraud case. Or, there may be an established protocol or pecking order among the defendants that makes it unnecessary to formalize the joint defense arrangement. For example, high-level excess insurance carriers who are defendants in an insurance coverage case will often take their cues from the policyholder-plaintiff’s longtime primary carrier.

In other cases, defendants create joint defense groups with elaborate structures, such as committees (for example, a steering committee, a discovery committee, a technology committee, and an expert committee), formal assignments to “first-chair” or “second-chair” depositions, monthly meetings, and so on. This type of group can work best when there are many defendants, including several having more or less equally large stakes in the litigation; the suit itself is complex, requiring extensive discovery and motion practice; and the stakes are high, justifying the cost of coordinating joint defense activities.

Many joint defense groups enter into two types of written agreements at the beginning. The first is a joint defense agreement, which, at a minimum, declares the parties’ intent
to share work, share costs, and maintain the confidentiality of information shared in connection with the common defense. In order to promote unity, joint defense agreements frequently provide that the defendants will refrain from asserting contribution or indemnity claims against one another until the plaintiff's claim is finally resolved. These agreements may toll any applicable statutes of limitations for cross-claims or third-party claims. If there is a prospect of later litigation among the defendants, consider whether the joint defense agreement should provide that each defendant may use its current counsel without restriction in the subsequent lawsuit. Absent such a clause, there may be a risk that the defendant on the indemnity claim will seek to disqualify counsel for the other defendants on the ground that they learned confidential material relating to the claim during the course of joint defense activities in the original case.

The second agreement is a cost-sharing agreement. This will identify which costs will be shared (for example, shared databases, joint experts, the cost of faxing draft briefs to other members of the group for comment) and which will not (for example, each defendant's attorney's fees, the costs of serving court papers). The agreement typically will include mechanisms for initiating cash calls, approving expenses and contracts, and obtaining reimbursement. The cost-sharing agreement also will declare what proportion of the shared costs will be paid by each individual defendant.

There are different schools of thought in the negotiation of individual cost shares. Some groups try to closely calibrate each defendant's cost share to its potential exposure in the lawsuit. Other groups are content to try to effect rough justice by arranging the defendants into tiers corresponding generally to their roles in the suit. Whichever method is used, most defendants want the lowest possible cost burden. This is so not only for the obvious reason—lowering defense costs—but also because of the fear that some defendants would later propose using the cost shares for determining how much each defendant should contribute to any group settlement or judgment.

But not all defendants strive for the lowest cost shares. Sometimes, a single defendant or small group of defendants are content to have larger cost shares if that enables them to control joint defense group expenditures.

In other words, if the group has decided that approval by 70 percent of the cost shares is required to fund a major expense, such as the creation of a computerized database of the plaintiff's documents, three defendants who are confident of their ability to work together smoothly may not mind having shares of 25 percent each. That way, the 70 percent approval requirement can be met simply by agreement among themselves, ensuring that worthwhile joint defense projects will be approved, with the costs of such projects being spread to all defendants.

In antitrust cases, where the law imposes joint and several treble damage liability on each defendant, but prohibits indemnity and contribution claims, joint defense groups may also enter into a liability-sharing agreement. Such agreements serve to equitably allocate a judgment entered on a joint and several basis against two or more defendants, and are frequently (but not always) based on each defendant's market share percentage. Judgment-sharing agreements also may contain provisions requiring a settling defendant to extract an agreement from the plaintiff to reduce its claims against the nonsettling defendants by the amount of damages for which the settling defendant would have been responsible absent any settlement. See Cimarron Pipeline Construction, Inc. v. National Council on Compensation Ins., 1992 U.S. Dist. LEXIS 18560 (W.D. Okla. 1992); Cranston & Kingdom, Judgment Sharing Agreements, 1985 Research Project of the Civil Practice and Procedure Committee, ABA Section of Antitrust Law (1985).

Don't make the all-too-common mistake of spending too much time on these preliminary organizational matters. Defense groups often become so consumed with these internal issues that they overlook the need, which may be especially critical at the outset, to direct their primary efforts to planning the defense. If the group is not careful, by the time the cost-shares have finally been agreed to, the plaintiff's summary judgment motion will be filed and the group may not be ready to respond.

Major defendants generally want one thing above all else: control. But this usually is not completely achievable. There are too many other group members, there may be several other defendants with significant stakes who are unwilling to cede control, or there may be an assertive minor defendant who refuses to follow the major defendant's lead. If the major defendant can't have control, then it wants substantial influence and discipline among the group's members.

Cost savings are often less important to major defendants than to minor ones. This is good, because a major defendant typically does not realize the same cost savings from participation in a joint defense that a minor defendant does. This is particularly true if the major defendant does a great deal of the group's work in order to better maintain control.

In fact, a major defendant may incur significant additional costs from its participation in the group. There are the direct costs of coordination, which can be considerable: attending meetings, sending and reviewing faxes, communicating constantly with other defendants. In addition, counsel for the
major defendants are often treated by minor defendants as a sort of on-call information clearinghouse, expected to answer questions and provide documents and other support essentially on demand.

If, as a major defendant, you want control, it is presumably because you have a strategy that you want the group to follow. The key is to persuade the group to follow your plan. Some lawyers representing major defendants think they can rule by fiat, but most defense groups won’t knuckle under. No one likes a bully. If you dictate to the group, no one will follow you, at least not for long.

You Don’t Know Everything

In most cases, persuading the group to follow your plan requires communication. As one of the major players, you will likely know more than the smaller players. You will have thought more about the case, spent more time considering the pros and cons of any strategy, and spoken more often with plaintiff’s counsel. If you want the group to go along, you must share your knowledge and your thoughts.

Be honest with the group, otherwise no one will trust or follow you. Report developments fully and promptly. Let the others know what you and plaintiff’s counsel discussed. Give other defendants a chance to react to developments in a timely fashion. Discuss the pros and cons of any proposed action thoroughly, particularly if you are purporting to speak on behalf of the group.

Listen to what other lawyers in the group have to say. You don’t know everything. Especially as the case goes on, and your role deepens, you may become even more sure that your strategy is best. But the other members, if they’ve been doing their jobs, have also been thinking about the case. Often, they’ve been looking at it from different angles. When you discuss strategy and tactics in meetings, they may have useful ideas and suggestions. Don’t ignore them. Use them. If you don’t, you’ll be failing to capitalize on a principal benefit of being part of a group.

Listen carefully for signs that the minor defendants are dissatisfied with their roles. Find out what is bothering them, and allow them to air their concerns. Be responsive by developing a consensus that keeps them working with you; the last thing you want is for a frustrated minor defendant to break with the group on an important issue. Make accommodations where you can, keeping your eye on the major strategic issues.

A significant part of the communication takes place in formal group meetings. Prepare a detailed agenda for the meeting, and distribute it to all participants ahead of time. The agenda should make clear what issues will be discussed, so that all of the group’s members can contemplate the issues and, if necessary, discuss them with their clients. That way, when the meeting occurs, the group can take action and make timely decisions, not simply defer decisions to the next meeting. Joint defense groups frequently place themselves at a disadvantage relative to the plaintiff by repeatedly tabling items that need prompt action.

Follow-up is essential as well. Without it, the brilliant thoughts expressed, the assignments agreed to, the grand strategies hatched, often evaporate as soon as the meeting ends.

Within a few days after the meeting, the group’s leader should circulate minutes to all, including those who did not attend. The minutes should list all of the assignments, and their deadlines. That way, there can be no disagreement over who agreed to do what, or on what schedule. This, too, helps to avoid drift and inaction. The natural enemies of defendants. At the next meeting or conference call, the progress of the projects should be addressed. This will ensure that assignments are completed.

These same principles—communicate early and often—apply to the preparation of group briefs. Discuss the strategy and the positions well in advance of circulating the brief for comments. Help other defendants become comfortable with where you want to lead them. Give them a chance to provide input. Then, circulate the draft well before the filing date so others can, if necessary, secure client approval. If possible, circulate a revised draft that reflects the comments you’ve incorporated. Your goal is to persuade all defendants to sign onto a single brief. It will be easier for the judge to read one brief joined by the defendants than to plow through multiple briefs or even numerous separate joiners in a main brief.

Achieving group consensus on a brief or other filing can sometimes be difficult when dealing with institutional litigants, such as banks and insurance companies, which may have well-established positions on specific issues. You can, of course, change the brief to accommodate their concerns, but the change they want may make it difficult for a defendant already happy with the brief to continue its support. One solution is to add a footnote advising the court that not every defendant necessarily agrees with every point. This may give the defendant concerned about the position being asserted just enough distance to be able to join the group’s brief. Another alternative is for a defendant to file a joinder advising the judge that it is joining the group’s motion or opposition “substantially for the reasons set forth” in the group’s brief.

Defense groups tend to follow the first law of physics: a body at rest tends to remain at rest. A difficult task will be to overcome the problem of inertia. Don’t let the group miss

 opportunities because of a failure to act. Force the consensus to develop. Everyone will be looking to you, the group’s leader, to be the principal source of ideas and strategies for defending the case. Don’t let them down. Assume that if you don’t direct the group, no one else will.

One way to avoid the inertia problem is to just go ahead and do the work. But that can be expensive, and your client may chafe at paying for projects that others ought to be doing. If you’re going to ask others to help, don’t wait until the monthly joint defense meeting, like Becky did in Scenario 1. Raise the issue ahead of time. Work the phones. Call the lead lawyers for the other defendants. Tell them what you want to do. Explain why your idea is good. Enlist their support. Assign projects, then check on everyone’s progress to make sure things get done. Remember what President Reagan said to Chairman Gorbachev: trust, but verify.

Use the right people in the right places. Think of yourself as the general counsel of the group. Honestly evaluate the strengths and weaknesses of the group’s lawyers. Don’t

Just do the work, assign projects, use the right people.
assign a project that needs many people to a firm that’s short-handed. Don’t ask the lawyer who’s known for shoddy writing to prepare the group’s brief. If a particular lawyer is a poor questioner, don’t assign him the important deposition.

And don’t ask for volunteers for projects that are important. Match each project to the right lawyer. Get on the phone before the meeting and ask your preferred person to accept the assignment. Tell them why you need their help, and why they’re perfect for the task. Only rarely does someone object when a particular project is assigned to another. On the few occasions that happens, ask the disappointed lawyer to work together with your first choice. It takes effort to coordinate the litigation of a large joint defense group, but the cost of not initiating or completing important projects is huge.

If you’re not able to persuade someone to accept a particular task, you have two choices: (i) do it yourself, or (ii) don’t do it at all. If it’s important enough, go ahead and do it yourself. Make sure it gets done. But if you’re not receiving help from the others, think again about whether membership in the group is serving your client’s interests.

**Controlling the Renegade**

Despite your best efforts to develop a consensus and maintain defense group discipline, there will be times when counsel for some minor defendant will feel strongly opposed to the group’s consensus on a particular issue. Recognize that there are times when it does not undermine group unity, at least not in any important way, if the members of the group take different positions. Don’t try to enforce unity when it really doesn’t matter: if you can, give a little. Both the lawyer representing the renegade and his client will remember that you accommodated them, which may give you more influence over them the next time, on something more important.

If a particular lawyer insists on following his own agenda, the group may have to decide whether to permit that lawyer to remain in the group or cut him loose. Often, people like to keep the renegade in the group to maintain the lines of communication, on the theory that the group may be better able to respond to the renegade’s actions if the group has advance warning and understands the renegade’s objections. Even if the group decides not to expel the renegade, there may be times when the group wants to discuss how to deal with him or his issues. Save that part of the discussion for the end, and ask the renegade to leave the room for that part of the meeting.

In deciding whether to let a renegade remain, don’t let your decision be ruled by emotions such as anger and betrayal. Focus on important issues: How important is the issue on which the renegade has chosen his own course? Will information disclosed during meetings advance the renegade’s position at the expense of the group? Is the renegade paying a large share of joint defense costs? By focusing on such issues, the group may be willing to tolerate an occasional departure from the group’s consensus.

If you know in advance that the renegade is going to take a contrary position, sometimes you can head him off by going over his head. Ask your client to call her counterpart in the general counsel’s office of the renegade’s client. She may be able to reason with that person, and persuade him to instruct his counsel to agree. This is a particularly effective option for group leaders whose clients have some relationship with the renegade defendant besides being co-defendants. For example, if you represent the manufacturer in a product liability suit and one of your suppliers is about to take a position that will undermine the joint defense, your client may be able to use its business relationship to bring about a reassessment of the supplier’s original position.

Don’t assume you can repeatedly use this back-channel communication. You and your client may have to expend considerable political capital to achieve a change of position, particularly since the whole episode may be somewhat embarrassing to the renegade’s counsel. This action is best saved for the rare time when you absolutely must maintain group discipline and unity.

Sometimes incompetence, rather than a conscious strategy choice, threatens to wreck your carefully constructed strategy. There’s only so much you can do if, as in Scenario 2, Bob Bumbler offers to “clarify” your already persuasive summary judgment argument. You can whisper in Bob’s ear, pull on his suit coat, or pass him a note telling him to shut up. But if Bob won’t listen, you may simply have to wait and then repair the damage as best you can.

I once saw a defense lawyer named Phil make an unexpected but brilliant save when faced with his own Bob Bumbler. During cross-examination, Phil purposefully avoided a troublesome area. Then Bob stood up. His first question asked the witness to comment directly on the topic Phil had so carefully avoided. We were all dumbfounded. All except Phil, who leaped to his feet. “Objection,” he shouted. “Asked and answered.”

Everyone in the courtroom, including plaintiff’s counsel, began giggling at the spectacle of one defendant objecting to another’s cross-examination. Finally, as the laughter died down, the judge spoke. “Sustained,” she said. Everyone laughed again. But Phil’s quick instinct had saved the day.

Be alert that your role as counsel for a major defendant may give you added settlement leverage that you can use to your client’s advantage, particularly if plaintiff’s counsel knows (or suspects) that you’ve been doing most of the work—if, for instance, all of the group’s briefs have come from your office, and you’ve taken most of the depositions.

**Don’t Rely on Reputation**

Removing you and your client from the case may be very important to plaintiff’s counsel, if it would be easier to litigate successfully against the remnants of the group following your departure. After all, plaintiff may conclude, if you’re not in the case, the group suddenly will be left without its workhorse. And if the plaintiff believes that other members are less able or have less expertise, the plaintiff is likely to believe that it will be easier to win without your presence. This may give you settlement leverage. You may be able to settle at a discount from the plaintiff’s original assessment of the value of its claims, the discount reflecting the plaintiff’s evaluation of its greater chances of success against the other defendants if you are gone.

Be aware, however, that making yourself seem indispensable in the plaintiff’s eyes can sometimes backfire. If you’re doing all the work—or at least all the work visible to the plaintiff—the plaintiff may conclude that you have more exposure than it previously thought. The plaintiff could increase its settlement demand to make it commensurate with what you appear to believe is your central role.

The chief benefit of joint defense groups to the minor defendant is the ability to save costs by relying on the work and resources of the major defendants. But it is possible to rely too much.
First, neither you nor your client should rely on attorneys who are not up to the task. To avoid this, constantly evaluate the lawyers who, in their roles as counsel for the major defendants, are leading the group. In making this evaluation, don’t jump to conclusions based merely on the name of the law firm or the identity of the lead lawyer. A firm’s reputation may be obsolete. The first-listed partner may be past his prime, or may be planning to delegate most work to someone far less qualified. In such cases, counsel for a minor defendant may need to be more active than if a first-rate lawyer were personally heading the major defendant’s defense team. Conversely, don’t blithely assume you have to take over leadership just because you don’t know the major defendant’s law firm or the lead lawyer. After all, the firm you haven’t heard of may be populated exclusively by knowledgeable, experienced lawyers who are particularly well-suited to lead, and the junior partner or senior associate taking day-to-day responsibility may be a rising star. The key for you, as counsel to a minor defendant, is to make an independent evaluation of the major defendant’s lawyers.

Don’t relax just because the major defendant has retained first-rate, qualified lawyers who are obviously capable of leading effectively. You can’t lie back and assume that the group is going to win the case for your client. Take Brian in Scenario 3. He thought he was doing a good job for Minor, keeping its litigation costs down by relying on the work being done by Massive’s counsel. Brian assumed that Massive and its counsel would always be there, through the end of trial, representing the interests of the group. He was wrong. Even in a smoothly functioning, cohesive group, plan for the contingency that the workhorse defendants may drop out, leaving your client alone.

This is not to say that Brian should have matched High & Mighty lawyer for lawyer, or abandoned his concern for controlling Minor’s costs. Indeed, the skillful joint defense group lawyer relies on other members for as much as possible. You need to pick your spots. Here, Brian and the other lawyers at his firm might have spent more time helping review XYZ’s documents. He could have become familiar with the databases maintained at High & Mighty. If he’d gone to the joint defense meetings, he might have suggested that the databases be maintained at a more accessible location than High & Mighty’s office, such as the vendor’s office or a document depository.

Brian should have attended—or at least read—the key depositions and the key cases. In short, Brian should have been prepared to continue litigating, even if Massive settled. After all, in a litigation system in which over 90 percent of all civil cases settle, the odds were that Massive would.

A Favorable Settlement

Lawyers representing minor defendants often make a related mistake: they forget their clients may have defenses that are completely distinct from those available to the rest of the group. In representing a minor defendant, you must pursue a separate litigation and settlement strategy focusing on the issues and defenses unique to your client. Never assume that the group is going to think of everything. After all, no other defendant is going to examine Minor’s documents, interview Minor’s witnesses, or research legal issues unique to Minor. If Brian fails to do these things, he may overlook potentially dispositive defenses that neither High & Mighty nor any other defendant’s counsel will advance, because they did not know about them and had no incentive to search for them. If only Brian had done his job and spotted that defense sooner, he might have attended a few of the XYZ depositions to ask five minutes of questions that could have nailed the issue down and ensured early summary judgment. Or, he could have used that testimony as leverage to negotiate a favorable settlement with XYZ. Now, of course, it’s too late: the discovery cutoff has passed. If Brian wants to ask those questions, he’ll have to do so at trial.

The same goes for settlement. Be cognizant of your own client’s interests at all times. If XYZ was willing and able to settle with its main antagonist, Massive, it is likely that it would have been able even sooner to settle with a small player like Minor. If Brian had been on top of the case, and better able to exploit the strengths of Minor’s defenses to XYZ’s claim, XYZ might have viewed settlement with Minor as worth exploring. Now, with Massive out of the case, it may be significantly easier for XYZ to prevail against Minor. Thus, another lesson: look for opportunities to settle before the big players do, because the price may go up once the workhorses are gone.

While it may seem that keeping your client’s interests in mind is too obvious to mention, far too many defense lawyers forget that they are counsel for a specific client, not for the joint defense group. In some ways, this is a natural reaction: the other lawyers in the group are knowledgeable and experienced, they’re friendly, and (collectively at least) they appear to have great wisdom. The one thing they don’t have is perspective—the perspective of your client. Your client, not the group, is paying your bills. Never forget that.

To protect the minor defendant’s interests, participate actively in the group’s efforts. First, attend some meetings to learn what strategies and tactics your co-defendants are planning, and to help direct the defense. If you can’t be there, send someone from your office who’s capable of contributing. And don’t be afraid to speak up. Defense group meetings sometimes resemble stage performances: twenty lawyers may be in the room, but only five or six talk. The rest appear to be merely “monitoring” the meeting, taking copious notes which presumably are later turned into a “report” to the client. From time to time, they may mutter the seemingly magic phrase, “I’ll need client approval before I can respond,” but otherwise they contribute little.

Lawyers who repeatedly send notetakers to meetings miss a valuable opportunity to influence the defense. Well-run joint defense groups use their meetings to discuss strategy and make tactical choices. Should we move to dismiss or file answers? Should the defense take corporate designee depositions under Rule 30(b)(6) before the documents are produced, or after? What third-party discovery should be served? What experts and consultants are needed? What issues should we target for summary judgment?

For a modest investment of time and effort, an experienced lawyer can make a significant contribution to the group’s consideration and evaluation of these issues in a way that a mere notetaker cannot. He can make suggestions based on his deeper litigation experience, steer the group away from dumb ideas, and support useful contributions by other lawyers. But if the experienced lawyer stays home, the strategy decisions will be made by others, who may not be attuned to the minor defendant’s interests. Lawyers and clients who save money by sending junior notetakers to meetings are often being penny-wise but pound-foolish.

A lawyer’s influence is not usually affected by whether she

(Please turn to page 66)
judges and lawyers who subscribe to conventional views about the jury's proper place complain that jurors lack the competence or ability to understand, remember, and integrate all the law and the evidence spoon fed to them in modern-day litigation.

What these opponents of change fail to appreciate, however, is that the perceived failings of jurors arise largely from the adversary system as it is presently structured. By recognizing that a strengthened jury system will enhance the judicial system as a whole, and how it is publicly perceived, the legal profession may contribute to an important democratic institution and thus ensure its place in our system of justice.

---

**Joint Defense**

(Continued from page 47)

represents a "big" player or a "small" player. Helpful and insightful comments are always appreciated, and frequently acted on. But beware: The loud, self-assured lawyer is often accorded more influence than he deserves. The notetakers sometimes mistake a smooth presentation for erudition. Perhaps if you had been there, you might have recognized immediately that Mr. Smooth's ideas were bad ones.

Attending the group's meetings is only the tip of the iceberg. Participate, at least in some fashion, in the group's other efforts: discovery, motions, trial preparation. The best tasks to volunteer for, of course, are those that best advance your client's particular interests. If the group is planning a series of summary judgment motions, and the statute of limitations is your pet issue, volunteer to write that brief. That way, you can be confident that the brief will adequately present your client's views. If you're interested in a particular witness, volunteer to take the lead at his deposition, instead of asking a few mop-up questions.

Participate in the group's work even if it doesn't touch directly on your pet issues. When a draft brief that may affect your client is circulated, review it and provide input. A comment that improves a brief is a valuable contribution and one that benefits your client. It's also an extremely efficient way of enhancing the defense. Counsel for minor defendants are sometimes content to let counsel for other defendants litigate issues without their involvement. They reason that they can take advantage of a favorable ruling under principles of offensive collateral estoppel. On the other hand, if the other defendant loses, they think the ruling shouldn't bind their client because collateral estoppel cannot be used offensively against parties who didn't participate in the matter.

This line of reasoning is hazardous. First, it ignores human nature: once the judge has made up her mind, it is not likely she will later be persuaded to adopt a contrary view.

Second, the very fact of your participation in a joint defense group may lead the court to conclude that your client should be bound by the results of the other defendant's litigation effort. Central Illinois Public Service Co. v. Allianz Underwriters Ins. Co., 158 Ill.2d 218, 633 N.E.2d 675 (1994). In that case, the case management order required the 47 defendants to engage in collective activity, such as joint discovery and joint motions. The trial judge scheduled trial on a discrete sub-issue in the case. Several defendants, who saw their interests as conflicting with the interests of the single defendant who was directly involved in the discrete sub-issue, asked if they could also take part in the trial. The judge said they could not.

Eventually, the jury ruled in favor of the plaintiff on the discrete sub-issue. The plaintiff then argued that the defendants who were not permitted to participate in the trial were bound by the jury's verdict. The trial judge agreed, finding that the single defendant who appeared at trial was the "virtual representative" of the others. "I find that American Empire was, in effect, surrogate for the Joining Defendants, advancing legal theories and proofs on behalf of all defendants . . . . That is substantial participation in the presentation of the case. That is a full and fair opportunity to litigate fact issues in this case." Id. at 681.

Eventually, the trial judge was reversed by the Illinois Supreme Court. The Supreme Court suggested that it ordinarily would reject the request of defendants who did not participate in trial to "relitigate" the jury's verdict, but held that it would not bind the non-participating defendants by the verdict, given the "special circumstance" that "the trial court barred [them] from participation in the trial process." Id. at 678. A dissenting judge argued strenuously that the non-participating defendants should have been bound anyway, because they failed to point to any new or different evidence they would introduce at a second trial.)

The lesson is clear. Any lawyer who merely sits back and watches other members litigate must be prepared for the possibility of being held to an adverse ruling or verdict. Whether you represent a major or minor defendant, get involved.

---

**Literary Trials**

(Continued from page 72)

where the sentries stood. You could look down into that—how would you describe it, may I ask?

**WIRZ**: It has been described—

**CHIPMAN**: As a sort of hell—?

**WIRZ**: Oh, indescribable, sir. Indescribable. I suppose you remember, Colonel, hearing me say that I could not bear the sight of those young boy prisoners in there, sixty to seventy of them, and sent them out to pick blackberries—

**CHIPMAN**: That is in your favor—

**WIRZ**: Thank you—

**CHIPMAN**: It is interesting that you keep referring to that act—as if there is so much else you dare not remember—

**WIRZ**: You twist things, sir—I let Father Whelan bring bread—

**CHIPMAN**: You went to your duties from your home every morning?

**WIRZ**: Yes, sir.

**CHIPMAN**: And I take it you were a normal father and husband, concerned to raise your children properly and teaching them the common virtues—?

**WIRZ**: Particularly in a religious way—yes.

**CHIPMAN**: And you saw nothing strange in leaving your family and your grace at meals to go to your job of overseeing the dying of those men?

**BAKER**: Objection.

**CHIPMAN**: Withdrawn. You have said