

Lessons Learned in Three Decades as National Coordinating Counsel

By Scott Dickens

Scott Dickens is the managing member of Fultz Maddox Dickens PLC, a 27-lawyer firm with offices in Louisville, Kentucky, and Indianapolis, Indiana. In addition to his role as national coordinating counsel, Mr. Dickens has represented a variety of clients in pharmaceutical, nursing home and assisted living facility, mass tort, insurance coverage, personal injury, property damage, landlord-tenant, and trucking litigation throughout the United States. Mr. Dickens also volunteers weekly in a faith-based reentry program for incarcerated fathers at a state prison. He is a member of Trial Attorneys of America, the Federation of Defense and Corporate Counsel, and DRI.

For the past 28 years I have had the privilege of serving as national coordinating counsel (NCC) for a major home appliance manufacturer. The purpose of this article is not to extol the proven advantages of the NCC model for the defense of liability claims and lawsuits (consistency, efficiency, and expertise, to name a few). Rather, I want to share some of the important lessons that I have learned along the way. Although many of them apply equally to other forms of the attorney–client relationship, I include them here because I think that they are particularly useful for purposes of maintaining the long-term and high level of client satisfaction required of anyone who is, or wants to be, in an NCC role.

The genesis of my NCC opportunity was an adverse jury verdict in South Carolina in the late 1980s. The manufacturer had a significant market share for the product at issue, with each

unit posing the same potential risk if subjected to abnormal use. Understandably, the manufacturer wanted to get a handle on the situation and to avoid any repeat losses. As a young associate, I was part of the team of lawyers that would pitch my firm's proposal to be named national coordinating counsel for this discrete line of claims and lawsuits. Long story short: we got the business, achieved excellent results, and gradually expanded the role to include the client's entire product line (dishwashers, refrigerators, clothes washers and dryers, microwave ovens, among others).

Mostly as the result of attrition and dumb luck, I eventually assumed primary responsibility for the relationship. In 1995, I resigned from my original firm and helped found my current one, where I continued to serve in that role.

In no particular order, I am convinced that the following practices are essential to maintaining a successful and healthy NCC relationship.

Understand the History and Culture of a Client

NCC cannot properly defend the interests of a client in a vacuum, and so the NCC will be well-served to do what is necessary to become thoroughly familiar with the client's origins and history. If you cannot locate resource materials on your own, ask your client for any that it may have. In addition, there may be long-time employees and retirees who can be tapped as resources regarding company history.

It is equally important to gain an understanding of what values are emphasized within an organization. This understanding will not only inform your strategies for portraying a client in the best possible light, but it will also help you to blend more quickly and seamlessly into the inner workings of the business. Mission statements, as well as programs, policies, and employee

handbooks, often shed light on the heart of a business. For example, an incentive program that offers financial rewards to employees for new design inventions will reflect an emphasis on innovation and product improvement. Similarly, a company that allows time off and pays tuition costs for employees seeking academic degrees places value on education and advancement. A policy requiring rigorous safety review of any proposed changes in the design of products will of course reflect an emphasis on consumer safety. Just as they are with an individual, the priorities of a client as demonstrated by its actions are the best reflection of the client's true character.

I also believe that visiting and touring a client's facilities are invaluable. The experience of personally observing the employees and operations will contribute significantly to your understanding of the work environment, the work logistics, and the technology required to manufacture the products.

Document and Write the Client's "Story" as Early as Possible

Particularly when a client is facing mass tort or other serial litigation exposure, it is essential that NCC assemble facts and craft a story that will become the foundation of the overall defense. That story should include anything in the client's history that demonstrates its contributions to society, core values (including consumer safety), and industry leadership, as well as the reasonableness of its policies and procedures. The sources of information needed to put a story together may have finite availability (such as historical documents and older employees), and therefore they should be identified and consulted sooner rather than later. Also, a story's narrative should be a living record, to be supplemented and refined as additional relevant content becomes known.

Locate and Preserve Product Literature

While some manufacturers may retain copies of such things as technical specifications and design documents indefinitely, the same is not necessarily true for literature that is typically shipped with products, such as owner's manuals, installation instructions, and on-product warning labels and tags. Also, manufacturers often revise product literature and sometimes do not retain copies of the superseded versions. As NCC you will be well-served to establish a repository (hard copy or electronic, or both) of all versions of all owner's manuals, installation instructions, and on-product warnings for all models. The ability to prove which specific warnings and instructions were provided with a particular product may be crucial to a successful defense in a given case. Therefore, as early as possible, I recommend conducting a sweep for all relevant product literature and creating a procedure for preserving copies of revised and new literature on an ongoing basis.

Stay Current on the Client and Its Market

Clients appreciate the effort of its outside legal counsel to be informed of what is happening not only with the client in particular but also in the client's industry and market. Google Alerts are an easy and free means of doing this. In some instances, you may even have the opportunity to be the first to inform a client of a significant announcement or event affecting its interests. Also, if there are trade publications pertaining to a client, a subscription will help ensure that you remain informed of significant concerns, trends, and other developments in the relevant business sector.

Respect the Client's Employees

Sometimes it is easy to view a client's employees as fungible resources whose primary role is to help you do your job. The reality is that they have full-time professional responsibilities having nothing to do with litigation support, and they almost certainly do not receive any additional compensation for assisting outside legal counsel. Respect and protect their time. Call upon them only when absolutely necessary, and do it efficiently. Make sure that you notify employees' managers in advance that you are asking them for assistance. Acknowledge and thank them. Doing these things will generate goodwill, which will come in handy on those occasions when you must interrupt the employees' performance of their regular job duties. Finally, inform them of outcomes. Failure to do so may imply that you do not value their contribution toward the effort, and it will also undermine their genuine desire to know how things turned out.

Cultivate and Maintain Personal Relationships

A strong and lasting national coordinating counsel relationship is built upon personal relationships with the individuals who make up the client. These are the people whom you will call upon time and time again for input and assistance. There will be occasions when you will need them to extend patience, grace, and even forgiveness, and vice versa. Those virtues are more likely to exist in relationships between people who have made a personal connection with – and who genuinely care for – one another. This level of personal bonding is possible, although slower to evolve, in long-distance relationships. I recommend that anyone in an NCC position be deliberate in spending face-to-face time with the client periodically, whether to discuss substantive issues or just to catch up with one another. I also recommend that the costs

associated with visits of the latter variety be treated as a firm expense rather than charged to the client.

Respect and Leverage Local Counsel

Selecting competent and well-connected local counsel is no less important when a client also has NCC. Even in situations in which NCC will be performing much of the heavy lifting, local counsel are a valuable resource for insight regarding such things as opposing parties and their counsel, the local community, and the court in which the matter is pending. Local counsel should be entrusted to take the lead on oral argument and other hearings unless there is a compelling reason not to. Otherwise, a judge and others may infer that a client lacks confidence in them. One of the primary benefits of having local counsel is that they help level what may otherwise be a not-so-level playing field. Entrusting them with substantive and visible responsibilities will maximize that effect.

I have always tried to approach my relationships with local counsel as a partnership in which responsibilities are allocated based upon the particular strengths and assets that each has to contribute to the cause. For the sake of a client's best interests, egos must be checked at the door. To relegate local counsel to little more than a mail-drop role is to miss out on the contributions that they are uniquely situated to make. It is important at the beginning of any engagement to establish with local counsel your respective roles and responsibilities. Failing to do so will likely result in misunderstandings, duplication of effort, and mistakes, and it will almost certainly strain the relationship.

Also, NCC should never ask local counsel to do anything that the NCC would not be willing to do him- or herself. If you would not be comfortable standing before a judge, looking

him or her in the eyes, and making a particular argument, then you should not put your local counsel in that position. After all, it is your local counsel's home venue; to risk his or her goodwill and credibility with the court and opposing counsel would be unfair.

Look for and Adopt Best Practices

Pride and complacency can sometimes interfere with our ability to recognize that someone else has come up with a better way of doing something. A humble spirit and open mind will help to ensure that we identify and use the best practices relevant to a particular NCC role. There are many talented lawyers out there, including, if you are fortunate, those who serve as local counsel. They are a rich resource of written work product, tactics, and strategies that can and should be incorporated into the NCC play book.

Identify and Connect with Competitors' NCC

Depending on the particular client, it may have one or more competitors which also have NCC. If so, then I recommend establishing a reciprocally supportive relationship with them. While it will of course be important to protect the attorney-client privilege, peer national coordinating counsel can be a resource for such things as information regarding opposing counsel, expert witnesses, and other similar claims and lawsuits. Also, depending on the nature of the products, there may be occasions upon which one of your client's products is mistaken for the product of a competitor, resulting in the competitor sending an expert and possibly legal counsel to an incident scene or product inspection. If you have established a relationship with the competitor's NCC, you will receive notice of the incident (and perhaps that NCC will share what was learned at the inspection), and you can then get word to the client of the imminent claim.

Avoid Surprises

Avoiding surprise is a lesson that applies to all attorney–client relationships, and I am not speaking of those surprises that are beyond our control. A good NCC will stay on top of all things at all times and will make no assumptions regarding whether local counsel or anyone else is doing what they should be doing. I have heard others say that an attorney lies awake at night thinking about issues so that his or her client can rest peacefully. While I do not advocate sleep deprivation, I do agree that clients—and especially those with NCC—should reasonably expect their outside counsel to maintain a level of attention, anticipation, and communication that will avoid surprises and their resulting disruptions.

On a more practical level, providing a litigation budget at the beginning of a matter, and updating it periodically, will help avoid surprises of that variety. Likewise, NCC should always obtain budgets from outside expert consultants at the beginning of an engagement and provide those to the client.

Be Ultra-Responsive and Highly Accountable

A client rightfully expects its NCC to treat it as the attorney’s most important client. Although we owe all clients a duty to respond to phone calls and emails reasonably promptly, those clients for which we serve as NCC should, generally speaking, be our highest priority. My personal practice is to respond to garden variety phone calls and emails within 24 hours, but my response time as national coordinating counsel is usually much shorter. NCC is essentially an extension of a client and must be available whenever needed.

Strong relationships are built on honesty and accountability. Clients do not expect perfection and know that national coordinating counsel will sometimes make mistakes. When

that happens, NCC should accept full responsibility without excuses, apologize to the client, and take steps to avoid a repeat. Similarly, NCC should never sugar-coat bad news. Clients who need national coordinating counsel in the first place are presumably sophisticated and experienced in litigation. For that reason, they are able to handle the truth and will expect and appreciate your absolute candor.

Pay Attention to Detail

All clients are important, but when we serve clients as national coordinating counsel, they deserve extraordinary service. They also probably have the highest expectations. For these reasons, I cannot overemphasize the importance of attending to details. This attention should manifest itself, for example, in reviewing all pleadings and discovery responses before they are filed or served. One of the roles of NCC is to ensure consistency in a client's responses to certain allegations in complaints and to recurring types of discovery requests. Even if the preparation of those responses is delegated to others, NCC is responsible for making sure that they are consistent with the overall predetermined and unified approach.

Special attention must be given to any sort of admission on behalf of a client, whether in a responsive pleading or a discovery response. And the need for attention to detail carries through to the very conclusion of a matter, including preparing a settlement agreement and release. I recently received a draft release prepared by a reputable law firm that was defending my client pursuant to the contractual obligation of a supplier. The release identified the supplier (which was not named in the lawsuit) as a released party but not the actual client! No lawyer wants to have to explain to a client why it was not named in a release. Relaxing before a matter is finally put to rest can be risky.

Treat a Client's Money as Though It Is Your Own

I cannot imagine serving in an NCC role and not becoming grafted to the client's organization. Once that happens, you will instinctively treat your client's money as though it is yours—and not simply when it comes to making a settlement recommendation. For example, if you see what seems to be an excessive charge in a retained expert's invoice, discretely point it out. Look for opportunities to avoid unnecessary expenses for such things as overnight delivery of documents if a less costly method would suffice. (I often receive materials via FedEx or UPS when regular mail or email would have been fine. It is a waste of the client's money.) Fly economy class. Do not stay in high-priced hotels or dine extravagantly. I have yet to meet a client that does not appreciate frugality.

Significantly Discount Your Fees

As NCC your client presumably will be sending you a substantial volume of work over an extended period of time. For that reason, the client deserves and should expect discounted billing rates. Taking it a step further, a client that has honored you by selecting you as its NCC should be the exclusive recipient of your lowest billing rates. That gesture will endear you to the client and will help solidify the relationship. More likely than not, the long-term benefits to you and your firm will far outweigh any shorter term economic effects.

Some of the long-term benefits of serving as national coordinating counsel may not be so obvious. For example, most would agree that getting invoices paid on a regular and timely basis and with minimum hassle is a good thing. Serving in an NCC role will likely yield that benefit. Also, the relationships that NCC develop with local counsel can generate new and different opportunities. For example, some local counsel serve as NCC for their own clients. You could

end up serving as *their* local counsel in *your* home jurisdiction. Even those local counsel who are not themselves in an NCC role may have opportunities to refer business to you due to conflicts of interest or other reasons. And in the more intangible realm, serving as NCC helps establish credibility and stature in a crowded legal services marketplace.

For all of these reasons, I believe NCC should be willing to discount billing rates steeply. This reality reminds me of the advice of financial advisor Dave Ramsey regarding sacrifice: “If you will live like no one else, then later you can live (and give) like no one else.” Likewise, if you are willing to make sacrifices now for the sake of an NCC relationship, then perhaps later you can live and give like no one else.

Solicit Client Feedback

Rather than fear constructive criticism, national coordinating counsel should view it as a valuable opportunity to gauge client satisfaction and to identify areas for improvement. Even if a client thinks that you hung the moon, it will still appreciate the fact that you ask for feedback. There is no reason to risk allowing an issue that may not even be on your radar to fester and potentially damage the relationship.

Always Be Mindful of the Big Picture

It is sometimes easy to become narrowly focused when dealing with the specific facts and issues in a given matter. This can be problematic, because what may seem an appropriate thing to do in a particular case may conflict with the broader interests of a client. For example (and this is entirely hypothetical), evidence may suggest that the manner in which some third party installed your client’s product contributed to an occurrence. A natural reaction would be to point to that

third party's actions as the proximate cause. But what if employees or other agents of your client have installed that same type of product in the same fashion? While it might be beneficial to criticize the manner of installation in that particular case (through expert witness testimony and other means), the potential negative effect on other claims and lawsuits involving the same type of product may be unacceptable. As a variation on that example, what if the product had been installed by employees of a company with which your client is pursuing a business relationship? While it may make sense to try to shift liability away from your client and onto the installer, doing so could interfere with a more important business objective of the client. For these reasons, NCC must keep a client informed of significant developments and planned strategies, and as much as possible, be aware of the client's business interests.

Understand the Limits of Your Role

A client may want your legal advice but may not be interested in your recommendations regarding business decisions. For example, while a client may appreciate your analysis regarding whether the failure to implement a possible safety improvement may increase liability exposure, it may not welcome your opinion regarding whether the business should in fact implement that improvement. Also, offering unsolicited advice concerning a business decision could be viewed by some within the organization as an attempt to usurp the authority of the employees whose job it is to make such decisions. It could also expose you to criticism (and even jeopardize the relationship) should the business decision prove to be poor and the employees decide to invoke the "lawyers told me to do it" defense. For these reasons, NCC must understand a client's expectations regarding the scope of services to be provided.

Avoid Turnover Within Your Team

Frequent turnover within a national coordinating counsel team is the enemy of consistency, productivity, and efficiency. While the occasional departure and replacement of personnel are inevitable, NCC should be deliberate in selecting the attorneys and paralegals who are the firm's best, brightest, and most willing and able to remain committed to the relationship for the long term. Doing so will not only provide a client with the full value of having NCC, but the relationships between your team and the client's points of contact will have the opportunity to grow strong.

Conclusion

Serving as national coordinating counsel has been an honor and a highlight of my legal career. While my personal experiences may not be entirely representative all such relationships, I think that they are for many and therefore I hope that these suggestions are beneficial, whether you are already serving as NCC or intend to pursue that opportunity.