

A National Counsel Model For Vehicle Fleet Accident Cases

By **Clifford Mendelsohn** (April 1, 2019, 3:12 PM EDT)

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An area that is sometimes overlooked when it comes to the efficient operation of a vehicle fleet is accident investigation and the defense of claims and lawsuits. After years of seeing steady declines in the annual number of fatal accidents on U.S. roadways, the Insurance Institute for Highway Safety recently reported that the number of fatal crashes and deaths increased in 2017.[1] And these numbers do not include the non-fatal accidents.



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It is clear that managing claims and lawsuits arising from accidents is becoming an increasingly important function for commercial fleets. Companies can achieve considerable efficiencies and economies of scale by consolidating their defense of claims and lawsuits into a national counsel model, in which a specific team of in-house and outside lawyers manage and execute the defense of all motor vehicle accident claims and lawsuits.

Using a designated team of personnel — as opposed to different lawyers in each city or state — can provide for more consistent application of defense strategies, improve communication between the company and its outside counsel, reduce the amount of time spent searching for and collecting relevant information in each case, and reduce the amount of time spent educating outside counsel about the company's fleet policies and procedures. In turn, this can reduce and create greater predictability of defense costs.

Personal Injury Claims Share Many Common Features From State to State

Understanding the nature and types of legal claims that arise from motor vehicle accidents helps explain how efficiencies can be obtained by consolidating the defense of these claims into a national counsel model.

Lawsuits that arise from a typical motor vehicle accident share a number of common features, regardless of where they are filed:

- Most cases involve some combination of the same legal claims, including negligence, negligent hiring/training/entrustment and vicarious liability.
- The facts that a plaintiff must prove to establish each of these claims are relatively consistent from state to state.
- Thus, plaintiffs request the same type of information from a company in almost every case, including information about the company's accident investigation, insurance coverage, maintenance history of the vehicle, existence of telematics relating to the vehicle/driver, driver safety policies and driving history/record of the driver.

- The injuries alleged are relatively consistent in each case, with most cases involving some combination of orthopedic injuries, spinal injuries, muscle sprains/strains, closed head injuries, lost wages and loss of earning capacity.
- The information that a company needs to obtain from the plaintiff is consistent from case to case, such as information about the accident, the plaintiff's alleged injuries, the plaintiff's medical history including pre-existing conditions, and the plaintiff's alleged economic damages.
- Given the consistency in the types of claims and nature of alleged injuries from case to case, the types of experts needed in each case usually involves some combination of experts in the fields of accident reconstruction, biomechanics, orthopedics, neurosurgery, neuropsychology, psychiatry, occupational therapy and economics.

Thus, while every case is unique and requires individual attention, the common features of lawsuits arising from motor vehicle accidents create the opportunity for companies to develop procedures to make their defense of these claims more efficient.

Predictability of Lawsuits Allows for Early Preparation

The earlier a company starts preparing for litigation, the more efficient it can be in developing its defense. As noted above, plaintiffs typically request the same types of documents in every case. It is important for a company to understand — as early as possible — what story these materials will tell.

Early knowledge of this information can play a critical role in developing the defense strategy. Being aware of this information pre-suit will also help with budgeting. Not only can complicating factors increase a company's potential exposure, but they can increase the costs of defense by requiring more written discovery and depositions once a lawsuit is filed.

For these reasons, it is important that a company establish procedures for quickly locating and collecting the relevant documents. It is preferable for the materials to be collected as close to the accident as possible, or immediately upon receipt of a claim. In some circumstances, a company will have a legal obligation to preserve relevant documents.

Assigning the responsibility to a designated individual or team will create accountability and consistency in the collection efforts. Creating a checklist of materials that should be collected in each claim/lawsuit will also aid in consistency.

A company can further improve its efficiency by creating a library of global documents that are not specific to an individual accident, such as insurance policies, driver training manuals and driver safety policies. Such a library will make it easier to find the relevant and responsive materials in any given case once formal discovery begins, as opposed to initiating a new search in each individual case.

Scrambling to collect these materials on an ad hoc basis once a lawsuit has already been filed and the plaintiff has formally requested these materials is inefficient. If the materials are spread throughout the company, it may be difficult to collect them in a timely manner and allow for a thorough review of the documents before they are produced. Delayed production may result in motions to compel or motions for sanctions, which not only cost

money to defend, but also hurt the company's credibility with the court.

Further, if the company is unaware of the information in the materials prior to discovery, it is possible that the materials may conflict with a position already taken by the company in the lawsuit, and/or require the company to adjust or change its defense strategy. These types of midstream changes further weaken the company's overall defense, and often result in added defense costs.

Finally, uncovering this information once the lawsuit is well underway can result in missed opportunities. For example, perhaps the company could have negotiated a better pre-suit settlement had it been armed with helpful telematics data.

In short, knowledge is power. The more the company knows about the facts and issues that will come to light during litigation, and the earlier it knows these things, the better it will be able to develop the most effective and efficient strategy.

A Designated In-House and Outside Counsel Team Creates Efficiencies During Suit

Opportunities for efficiency continue after the filing of a lawsuit and commencement of discovery. As noted previously, the types of allegations in these cases are relatively consistent from case to case and state to state. Indeed, the complaints filed in many of these cases look remarkably the same from state to state.

It makes sense, therefore, for a designated team of counsel — whether it is someone in the legal department or a designated outside counsel — to draft or oversee a company's responsive pleadings in all motor vehicle accident cases. Having the same counsel draft the responsive pleadings makes the process more efficient, because it prevents the company from having to educate different lawyers in different states about how it prefers to respond to various allegations, and what defenses it likes to assert.

This way, the company is not paying outside counsel to reinvent the wheel in each case. More importantly, it allows for greater consistency from case to case. A company does not have to worry about outside counsel in one state admitting an allegation that outside counsel in another stated denied.

Similarly, the type of information that a company will request from the plaintiff during discovery is relatively consistent in each case. It does not make sense for a company to have different outside counsel in each case prepare a fresh set of discovery requests. The legal department, or a designated national counsel, can develop standard written discovery requests to push to its outside and/or local counsel, who then need to make only minor adjustments to account for the specific circumstances of the case.

Using Vendors to Collect Outside Records Further Improves Efficiency

Centralizing record collection efforts during discovery provides yet another opportunity for efficiency and cost savings. One of the most important aspects of discovery in any personal injury case is the collection of the plaintiff's medical records and bills. A company cannot rely solely on records provided by plaintiffs, which may be cherry-picked or incomplete for a variety of reasons.

Rather, it is important for a company to collect the plaintiff's medical records directly from the healthcare providers using a HIPAA-compliant medical authorization and/or subpoena. It is also important for a company to collect records from any relevant pre-existing medical

conditions/injuries. More often than not, the plaintiff has a relevant pre-accident condition involving the same body parts he/she claims were injured in the accident.

Collection of medical records involves more than just the narrative records of the doctors. It also involves collecting medical bills and radiology films. In many large hospital systems, these records are housed in different locations, making the collection of all relevant information complicated. Further complicating the collection of the relevant medical records are the privacy protections on healthcare information.

As a result, record collection tasks can become complicated and expensive. Not surprisingly, there are many vendors that provide this service. Where a company has a consistent volume of personal injury litigation — which is common with many large vehicle fleets — a company can achieve significant cost savings by centralizing its record collection efforts with a single vendor.

Many vendors offer volume discounts. And having a single vendor for this service will save the legal department and outside counsel significant time and resources in tracking this important function.

A National Counsel Model Can Reduce Costs and Improve Consistency of Defense Strategies

When a company operates on a national basis — and faces lawsuits on a national basis — it is important for the company to approach discovery in a consistent manner from state to state.

The plaintiffs bar is well-organized and proficient in communicating their experiences with different companies. How a company responds to written discovery in one case, or what a company witness says at a deposition, can and will be used against it in subsequent lawsuits. Just because a case is several years old or pending in another state does not mean that it will go unnoticed.

Coordinating a company's discovery activity — especially where a company has a significant volume of litigation — can be a daunting task even for the most organized legal departments. A national counsel model reduces the risk of inconsistency, because it reduces the number of outside counsel involved in responding to discovery.

It helps the legal department monitor and enforce consistency in each case. Further, it allows the outside lawyers to gain an understanding of the legal department's approach to discovery.

Depending on how involved the legal department wants to be in the individual matters, national counsel can develop and/or work closely with the in-house attorney in preparing the form responsive pleadings and discovery requests discussed above. If desired, national counsel can also work with the company representative responsible for record collection efforts pre-suit.

Having a designated representative from national counsel coordinate with the company's designated representative for record collection further streamlines the process and creates clear lines of accountability both with the company and national counsel. The same rationale applies to outside vendors used to collect medical records.

Using a national counsel model also allows a company to educate its national counsel about

its fleet policies once, rather than educating new counsel in each individual case. Further, when national counsel is knowledgeable about the company's policies and procedures at the outset of a claim or lawsuit, they are better able to identify issues that may arise during discovery, and start developing an early defense to any allegations that a company violated its fleet policies. Thus, national counsel will be able to serve as an extra set of eyes and ears in the field with respect to identifying problems in the application or consistency of a company's fleet policies.

Additionally, when a corporate representative is deposed on a specific topic, the institutional knowledge of that deposition and witness is retained by the national counsel team. In the event that the same witness is noticed for deposition in a future case, the company will not have to spend time and resources educating new outside counsel about the history of the witness.

A national counsel model also helps with case reporting and other communication. When the legal department has a single team to contact to learn about the status of its cases — as opposed to multiple lawyers in multiple states — it becomes easier and cheaper to stay abreast of the status of its litigation and claims docket. In addition, as national counsel learns what information is most important to the legal department when assessing cases and setting reserves, it can tailor its reporting to ensure that the critical information is communicated.

Over time, the relationship that develops between the legal department and national counsel can bring additional benefits. The more national counsel learns how the company values different types of cases and injuries, the more effective national counsel will be at developing defense strategies, assessing the value of cases and recommending settlement strategies.

National counsel will need assistance and guidance from local lawyers in each state in which it does not have offices or attorneys licensed to practice law. This can be done by hiring local counsel, and having someone from national counsel move for admission pro hac vice. That way, national counsel can still manage and dictate the defense consistent with the company's overall goals and objectives for this area of litigation, while getting assistance on local practice and procedure from in-state attorneys.

If national counsel and local counsel properly coordinate their activities, the addition of local counsel should not add significant defense costs. Any additional costs associated with the extra layer of local counsel will likely be more than covered by the cost savings achieved elsewhere through the national counsel mode.

A National Counsel Model Can Create Greater Predictability of Costs

When a company applies a consistent approach and strategy to all motor vehicle accident lawsuits, it reduces the number of variables involved in predicting the costs of defense. Differences in defense costs can no longer be attributed to different lawyers applying different strategies. Similarly, a great deal of "fat" is trimmed because the company is no longer spending money while new lawyers are learning about the company's policies — or getting up to speed on new developments since their last case for the company months or years in the past.

As more cases are accumulated under a consistent national counsel model, the company gathers more and more cost data that accurately measures the true cost of defending these types of claims. With fewer variables to consider, it becomes easier to predict costs of

defense. In addition, the company's ability to assess the effects of relevant variables — such as type of injury or geographic region — improves.

Conclusion

On the long, winding road toward an efficient fleet, a company should not ignore the costs incurred after an accident. There are considerable cost savings to be obtained through the early and consistent application of a global defense approach managed by a designated team of in-house and outside counsel.

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[1] See <https://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/overview-of-fatality-facts>.

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