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COMPLEX LITIGATION

Managing parallel proceedings

Some of the issues a company and its counsel will face are complex, requiring coordination.

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WITH INCREASING FREQUENCY, a single operational or financial issue can balloon into multifront litigation. Whether it is a significant product defect, an accounting restatement, a large data security breach, substantial investment losses or criminal conduct within the company, a single problem can prompt the interest of multiple regulators, civil plaintiffs' attorneys and perhaps the press. In such circumstances, regulatory, civil and, in some cases, criminal, proceedings may commence and unfold in parallel.

There can be no single blueprint for navigating such "parallel proceedings," but there are some issues that are common to nearly all of them. The term "parallel proceeding" historically has referred to parallel civil and criminal regulatory investigations, particularly to a civil investigation by the U.S. Securities and Exchange Commission and a parallel criminal investigation by the U.S. Department of Justice. In this article, the term is used more expansively, to refer to more than one state or federal civil private, civil regulatory and criminal action or investigation around a common set of facts or issues.

This article provides in-house counsel and their advisers with an outline of practical issues to consider in managing parallel proceedings in an effective and cost-efficient manner. The points raised below are certainly not exhaustive, and each merits extensive treatment in its own right. But this article is designed to serve as a check list of considerations a general counsel should consider and act upon at the onset of parallel proceedings to avoid adverse and potentially damaging pitfalls down the road.

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The decisions made at the outset of parallel proceedings are critical. Some required initial steps may be missed, and business priorities may compete with sound legal strategy. Some of the issues a company and its counsel will face immediately are complex, requiring coordination among management and counsel, including maintaining the confidentiality of information, avoiding securities laws violations, taking steps from the outset to maximize discovery protections, and handling difficult employees.

Parallel proceedings frequently begin as a confidential inquiry, whether by a government subpoena or by an internal inquiry. It is critical to remind informed personnel to maintain strict confidentiality. While controlling the information may be an obvious business imperative, widespread discussion also has potentially adverse legal consequences: Civil plaintiffs' attorneys may, when tipped off about an issue, call low-level employees digging for information; regulators later may construe unfettered discussion of a matter as an effort by employees to "get their story straight"; and, as discussed below, privileges may be pierced if intracompany discussions leak to third parties. Maintaining confidentiality is particularly critical in the context of a public company, as leaks may lead to trading on the basis—or other misuse—of material nonpublic information in violation of the securities laws. Maintaining confidentiality and restricting communications to those who "need to know" is essential to avoiding these pitfalls.

> **Providing prompt notice to insurance companies is critical.**

Immediate priorities

An immediate priority is preserving documents, particularly electronic documents. The obligation to preserve evidence arises once a party has actual notice or should have known that the evidence may be relevant in actual or potential litigation or regulatory investigations. See *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (finding duty to preserve arises when company reasonably anticipates litigation); see also *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932, at *1 (S.D. Calif. Jan. 7, 2008) (sanctioning attorneys and awarding costs when 40,000 relevant documents were located post-trial). In most cases, relevant personnel should immediately receive a document-preservation memorandum, and routine "sweeps" of electronic information should be immediately suspended. A significant challenge is the vast array of data among different corporate divisions, subsidiaries and offices in different states and countries and the frequent need to collect data from former, as well as current, employees. In matters involving cross-border issues, privacy laws in certain countries may affect the preservation and collection of potentially relevant documents.

Providing prompt notice to insurers is also critical. While companies often instinctively give notice to their director and officer liability insurers, other insurance policies—such as Employee Retirement Income Security Act/fiduciary liability, products liability, errors and omissions and general commercial liability policies—may also be relevant. It is also important to make certain that all primary and excess insurance policies are properly noticed and that any separate policies maintained for potentially affected subsidiaries or divisions of the organization are given notice. See, e.g., *Asbestos Settlement Trust v. Continental Ins. Co. (In re Celotex Corp.)*, 299 Fed.Appx. 850 (11th Cir. 2008) (denying coverage for asbestos claims when excess insurers were not timely noticed). If the basis of the claim is confidential, such as a nonpublic subpoena or other inquiry from a prosecutor or regulator, it may be prudent to put in place confidentiality and nonwaiver agreements with the insurance brokers and insurance carriers that will be involved with the claim.

Protecting applicable privileges is a difficult challenge in parallel proceedings, particularly as counsel begins to investigate and develop the core facts. For example, using experts on a consulting basis to understand the underlying facts raises potential privilege and work-product issues. Generally, discovery may not be sought from nontestifying experts who were retained in anticipation of litigation. See Fed. R. Civ. P. 26(b)(4)(B). But the applicability of the work-product doctrine can be undermined when the company's existing advisers provide consulting advice. See *Hexion Specialty Chems. Inc. v. Huntsman Corp.*, 959 A.2d 47 (New Castle Co., Del., Ch. 2008) (denying work-product protection to presentation of company's investment banker, finding the materials consisted of business, not legal, advice). It is often advisable to retain independent litigation consultants to preserve maximum work-product protection.

Maintaining the attorney-client privilege can become tricky when the interests of multiple constituencies diverge, such as the company, its related entities, individual directors, management and shareholders. For example, if certain directors have interests adverse to the company, the disclosure of privileged materials to the directors with adverse interests may destroy the privilege. See *Ryan v. Gifford*, 2007 WL 4259557, at *3 (New Castle Co., Del., Ch. Nov. 20, 2007) (finding privilege asserted by special litigation committee was waived by disclosing its findings to board containing director defendants with adverse interests). Furthermore, representation of a parent company and its subsidiaries may present similar waiver issues if the parties to the joint representation later become adverse in litigation. See *In re Teleglobe Communications*, 493 F.3d 345, 366 (3d Cir. 2007) (holding that the adverse-litigation exception to a privilege claim applies to documents created in the scope of joint representation of parent and subsidiary).

Joint defense agreements and other common-interest agreements are a common fixture in parallel proceedings. Many jurisdictions permit oral joint defense or common interest agreements. See, e.g., *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003); *U.S. v. Stepney*, 246 F. Supp. 2d 1069, 1080 n.5 (N.D. Calif. 2003); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs.*, 870 N.E.2d 1105, 1113 (Mass. 2007). However, the prudent course is to document the existence and terms of any joint defense or common interest agreement. See, e.g., *In re Grand Jury Subpoena*, 274 F.3d 563, 569 (1st Cir. 2001) (rejecting claim of joint defense agreement unsupported by evidence apart from attorney's affidavit). In particular, it is important to address clearly and explicitly all potential conflict and waiver issues among the members to a joint defense or common interest group.

When employee wrongdoing or misjudgment may be the cause of the multifront litigation, it often is a business reflex to terminate the responsible personnel. But former employees who are disenchanted with the company or, worse, have an ax to grind, frequently become a regulator's or civil plaintiffs' attorney's best source of in-formation. There also may be legal limitations on terminating an employee who has reported potential misconduct or who is cooperating with government regulators—particularly when such actions can be construed as retaliation for reporting misconduct. Given these considerations, management may be well-advised to consider alternatives to termination, including placing such an employee on administrative leave. A paid leave pending resolution of the investigation allows the company adequate time to understand the scope of the parallel proceedings it faces and to form a coordinated strategy before making any employment decisions.

Parallel proceedings often involve a significant public relations issue. So-called "crisis" public relations firms can provide valuable experience and contacts within the media. The use of such firms raises questions concerning privileges. Courts have begun to afford protection to communications with public relations firms. See, e.g., *In re Grand Jury Subpoena Dated March 23, 2003*, 265 F. Supp. 2d 321, 328 (S.D.N.Y. 2003) (affording privilege to communications between attorney and public relations firm); *Haugh v. Schroder Inv. Mgmt. N.A. Inc.*, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003). But a court may allow discovery of such communications in some circumstances, particularly when the principal purpose of the communication was not to assist in the provision of legal advice. See, e.g., *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000) (denying privilege claim by public relations firm when communications were for ordinary public relations advice).

Companies are often forced to hire multiple law firms.

Managing costs

Parallel proceedings often force companies to use multiple law firms and endure extraordinary e-discovery burdens; as a result, costs can reach into the millions or even the tens of millions of dollars. Consideration of a few key points can minimize costs significantly.

Litigating in the context of parallel proceedings forces a company to make substantial document productions to multiple regulators and multiple civil plaintiffs. As a result, e-discovery is frequently the most costly expense of parallel proceedings. Increasingly, prosecutors and other regulators are requesting that defense counsel discuss in detail the plan for collecting and producing documents—particularly electronic documents.

In the civil context, the revised Federal Rules of Civil Procedure now require adversaries to meet and confer concerning the specifics of electronic discovery. Fed. R. Civ. P. 26(f)(3)(C). Care with respect to two points concerning those negotiations can save significant sums. First, attempting to negotiate a single document production plan to apply to all proceedings, including both regulatory and civil proceedings, can save millions of dollars. E-discovery expenses are exponentially higher when the scope and timing of multiple productions vary. Second, the most important terms of any e-discovery agreement are the number of custodians to be produced and the search terms to be used. Taking the time and consideration to negotiate what may appear a minor or mundane issue—an appropriately tailored search-terms list and list of custodians—can save hundreds of thousands, if not millions, of dollars.

As an additional cost-saving measure, the company may consider engaging contract attorneys for so-called "first level" review of raw, unculled (or minimally culled) electronic data. Cost savings must be balanced with quality control. This is particularly the case in the increasingly frequent context in which contract attorney reviews are being conducted remotely—and some are even undertaken overseas, in places like India. The challenges in maintaining the quality of the review, complying with civil and criminal requirements, and protecting the privilege in such circumstances can be considerable.

Companies often engage a "virtual law firm"—that is, a collection of teams from separate law firms to handle specific cases or issues in the parallel proceedings. The virtual law firm must coordinate defense strategies and themes, and the needs of one proceeding may require compromises in the other. For example, the need to cooperate with a government investigation may impede privilege claims that would otherwise be made in one or more of the civil matters. Also, the order of events in the various proceedings often requires outside counsel to adjust the strategies they might otherwise employ in the absence of multiple proceedings.

Shared work product is increasingly essential, including interactive document databases with a single set of issue codes, a common fact chronology with the ability to run case-specific, issue-specific or witness-specific subchronologies, a common calendaring mechanism and shared work product—such as coordinated interview outlines and interview memoranda.

Multidistrict consolidation

When facing multiple cases in multiple jurisdictions, there may be strategic and cost-savings benefits to consolidation, including the potential transfer and consolidation of the various actions by the Judicial Panel of Multidistrict Litigation. In determining whether to transfer actions and claims to a single district court, the panel also considers a variety of factors, including: whether the actions share common issues of fact; the convenience of parties and witnesses; and the just and efficient conduct of the actions. 11 U.S.C. 1407(a). In practice, the panel will also consider additional factors, including the progress of discovery, familiarity of the transferee judge with the relevant issues and the size of the litigation. See *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006).

To be sure, the issues outlined above are only a few of the considerations a company and its counsel will face when confronting the challenge of multifront litigation. But careful attention to these issues, which reoccur in the context of parallel proceedings, should help avoid making decisions and judgments at the outset that have damaging or expensive consequences months or years later as the litigation unfolds. NLJ