

Managing the Noise of Large Cases and Teams

SAM LIVERSIDGE AND COURTNEY SPEARS

Sam Liversidge is a partner with Gibson, Dunn & Crutcher, Los Angeles. Courtney Spears is an associate in the firm's Orange County office.

High-stakes competition at the highest level brings many distractions. Teams playing in the Super Bowl, for example, sequester their players from all the internal and external “noise” so that they can maintain focus on preparing for the game. While litigating large, high-stakes cases does not typically invite a global media circus as the Super Bowl does, it does bring distracting noise that, if not managed, can cause the team to lose focus.

With trials come expansive teams of lawyers, multiple expert witnesses, jury consultants, and support staff who must function together seamlessly despite scattered locations and different disciplines. There are enormous challenges in assembling and managing such a large team with its many voices competing to be heard. In our experience, it is critical from the outset to organize the team with clear lines of communication and authority so the voices on the team are channeled in a productive way that does not create a distracting cacophony. When organized properly, a large and diverse case team can be highly effective, and a well-managed case team is an enormous advantage. The difference between a well-organized functional team and a disorganized dysfunctional team can often make the difference between winning and losing. This article offers several lessons we've learned over the years on organizing and managing large cases and teams to minimize noise and create an environment for success.

The Challenge of Noisy Case Teams: Internal Noise

Staffing 20 or 30 lawyers is often unavoidable in substantively or procedurally complex cases. Having such a large number of lawyers on a team has the potential to create a lot of noise. Let's be honest, most of us did not become litigators to sit quietly in a corner and not express our opinions! And, managed properly, this abundance of ideas can be a strength of a large case team. But it can also create internal noise, which presents itself in a couple ways, each with its own potential challenges.

Sometimes the internal noise is caused by a few loud voices that clash and complicate the achievement of one unified strategy for the case. Other times, internal noise is the result of the sheer number of voices. When members of a large team are hard at work on their day-to-day tasks, sometimes they can lose focus on the big picture, and the team might lose sight of the broader case themes and strategy. In addition, important tasks may fall through the cracks on a large team if there is not a clear delegation of responsibility for each task. Conversely, there may be unnecessary duplication of work when team members aren't aware of what others are working on.

Other factors can sometimes amplify this internal noise. For example, cases are frequently staffed across multiple offices.



Any given matter may be staffed with lawyers from five or more offices across several time zones. Even in today's post-COVID world where seemingly everything is handled on a video call, it may prove difficult to create a sense of ownership and teamwork among team members, especially when, in many cases, team members don't often meet in person until trial. This feeling of disconnection may lead to increased distraction, and information may not be communicated effectively or properly understood.

Even strategies to keep the team organized and functioning smoothly can create internal noise if not managed properly. For example, a common organizational element of litigating a case with a large case team is the weekly team video call. While these calls are essential to keep the team up to speed on events happening across multiple fronts, they often focus on details and reports from team members about what they are working on. Weekly team calls can be bogged down by the minutiae of pretrial work without sufficient discussion of how all the work

being done by individual members of the team contributes to the overall case themes and strategy.

Similarly, when it comes to preparing lay and expert witnesses for deposition or trial testimony, the internal team is by necessity often broken off into smaller witness-specific teams, given the number of witnesses. This can become problematic if close coordination is lacking across these teams. At trial, for example, because the witnesses must cover all of the evidence necessary to prove a party's claims or defenses, and each relevant exhibit must be admitted through a witness, coordination is critical to avoid any gaps in proof where different teams thought another team's witness was going to testify about a document. The same is true for avoiding unnecessary duplication in testimony. Oftentimes fact witnesses have overlapping relevant knowledge, and if the internal teams supporting two different fact witnesses have not coordinated, those fact witnesses may testify to the same or similar subject matter. This is problematic, not only because it unnecessarily cuts into that party's allotted time but also because the two fact witnesses may offer different testimony on the same subject matter, causing juror confusion and damaging the credibility of both witnesses.

The Challenge of Noisy Case Teams: External Noise

Internal noise is only one source of noise that must be managed. Noise also comes from outside the case team, whether from co-counsel, experts, jury consultants, the media, or other sources.

Big, complex cases often involve multiple firms sharing the representation and can also involve multiple defendants represented by their own counsel as part of a joint defense group. Managing the noise from these sources can be challenging, particularly in the joint defense group context. Each firm can have very different views on case strategy or themes. In the context of a price-fixing case, for example, the clients may view their respective roles in the alleged conspiracy very differently, and this may lead to widely divergent views on how to litigate the case. It is important in these cases to try to maintain a cohesive group strategy without losing focus on the best strategy for litigating the case for your own client. Even co-counsel jointly representing your client with you can be a source of distraction, as co-counsel also may have differing views on case strategy.

Experts (and their support staff) likewise often have strong views on the case. They want to be heard, and they want to be prepared. Often experts are well known in their fields and want to make sure their reputations are, if not burnished, at least left intact by their testimony. Nor do they want to risk a negative *Daubert* ruling excluding some or all of their opinions. As a result, they may have strong views on how not only their testimony but also the case should be presented overall. But it is crucial that the

Illustration by Sean Kane

expert's testimony be consistent with the legal arguments, which means it is important to involve the expert in strategy discussions early on. While such communication is essential, it can lead to a lot of noise for the internal case team if not channeled properly.

Jury consultants offer valuable insights into not only jury selection but also the development of effective case themes and witness presentation. Theirs are important voices, but it is important to remember that in their more limited role, they do not have access to all of the facts and evidence. Because of this limited access, the legal team must ensure that a jury consultant's suggestion as to the best point to make in testimony or in argument is consistent with all the evidence in the case and the applicable law.

One unique aspect of large, complex litigation is that it often gains the attention of executives and other non-lawyers at the client company, including board members. Typically, as outside litigation counsel, we deal with in-house counsel who themselves are highly skilled and knowledgeable litigators. The attention of executives at the highest level of the company to a litigation matter, while necessary given the stakes involved, does create potential challenges, although it would be a big mistake for any lawyer to treat it as "noise." Non-lawyers do not have the same legal education and experience; thus, communicating with them requires extra care to make sure they understand the nuances of the case strategy. They may have ideas or suggestions that must be taken into account. There may be aspects of the legal strategy that may be in conflict with certain aspects of the client's business goals or strategies. Thus, while high-level executives at the company can be a tremendous resource and often provide valuable insights, managing communication with C-suite executives and the board can become a potential distraction if the litigation strategy is not communicated clearly, their buy-in to that strategy has not been obtained, and any conflicts between business and legal strategy have not been resolved.

Similarly, these kinds of cases can generate media exposure. Typically, the client's internal public relations team will be involved. Press releases may need to be issued or media inquiries addressed. Beyond that, as outside counsel, we may need to coordinate with the client's media team on the substance of briefs or court arguments to make sure that the legal arguments being presented do not conflict with the client's business strategy or its relations with its own clients. There may be internal information regarding pricing or marketing or technical strategy that, while potentially helpful to the case, the client does not want revealed or wants presented in a certain way. Staying attuned to the concerns of the executives and the business as a whole is critical.

Managing the Internal Noise

The level of noise inherent in large case teams in complex cases can be daunting. But we have found there are effective ways to

manage it. With 20 or more lawyers working on the same case day in and day out, internal noise can be the loudest and most constant, but because it is purely internal, it is the easiest to manage.

Effectively managing the internal noise largely hinges on organization. An organized case is one in which roles and responsibilities are clearly defined, and there is consistent, clear communication. Organization starts from the moment a new case comes through the door and the lead partner begins staffing the case. Staffing decisions should be made with an eye toward certain roles and responsibilities being filled by certain individuals. It may make sense to have subsets of the team dedicated to certain areas of the case for its duration, like an offensive discovery team, a defensive discovery team, and an expert team. The case may also benefit from a dedicated briefing team that is responsible for taking the laboring oar in drafting briefs for dispositive and highly consequential motions (like class certification).

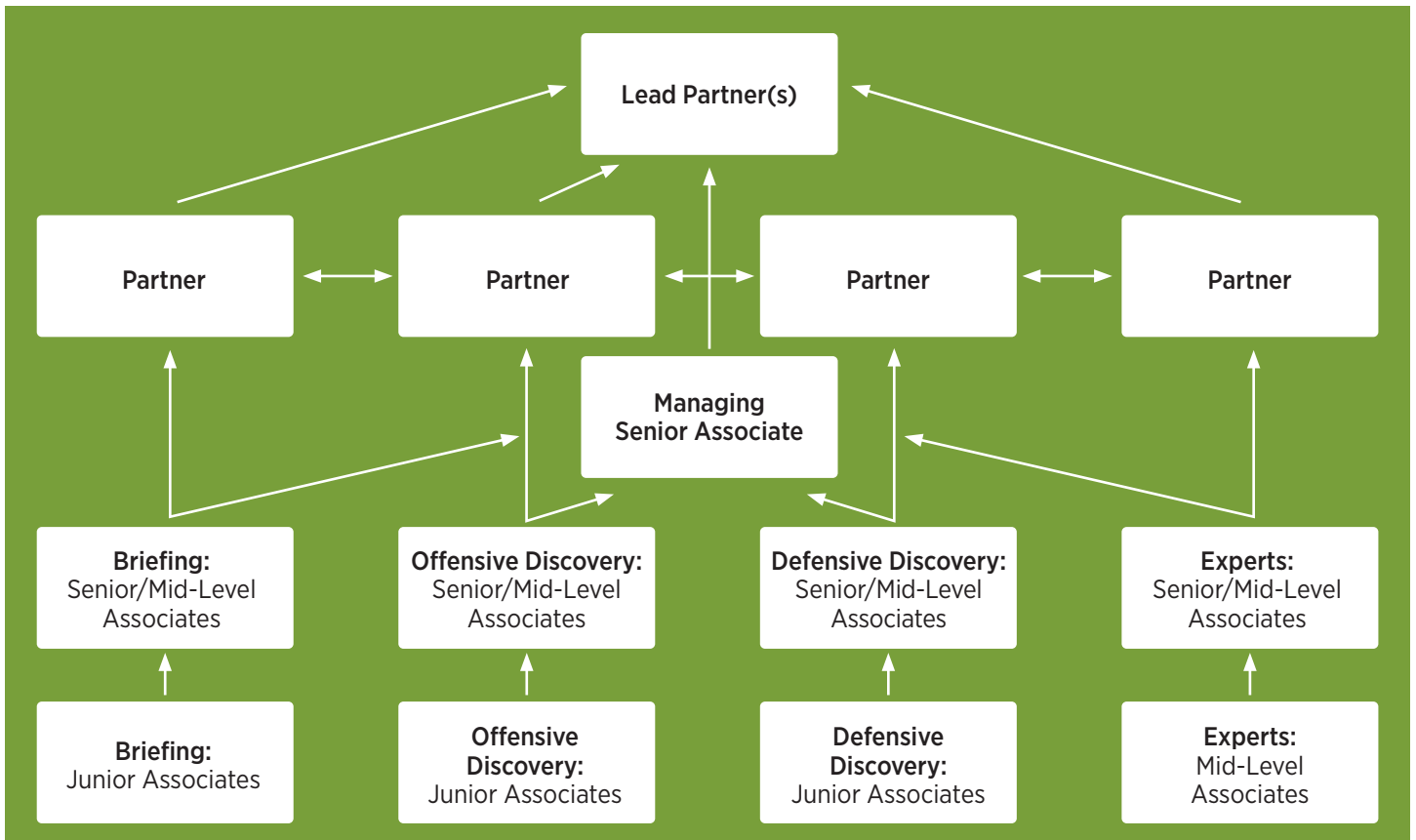
Well-defined roles and expectations give team members a sense of ownership, and the earlier they are communicated to team members, the better; you want to avoid a situation where an associate (or a partner, for that matter) joins a case thinking he or she is going to be responsible for one thing—like written offensive discovery—and instead finds out that he or she is supposed to be working on something completely different—like spearheading efforts to work with experts to draft their reports.

It is important not to forget that members of the team have to stay plugged in with *all* of the individual sub-teams. Finding the right senior associate or junior partner for this role is critical, as the team member in this role is the conduit for the successful running of the trains in your case. The team member in this role must not only make sure all of the case's "trains" stay on track and on time but must also not miss the forest for the trees in terms of the broader case strategy.

An example of a such a team structure is shown on the next page.

While the sub-teams referenced above may be working in their individual capacities like a well-oiled machine, they cannot operate in isolation. It is important for each team member to understand how the work he or she is doing fits into the bigger picture of the case. To facilitate this understanding, it can be helpful to have whole team calls with a regular cadence. During these calls, each sub-team has an opportunity to provide an update on what they are working on. For example, the defensive discovery team can provide an update on how the client's employees are shaping up as witnesses. The offensive discovery team can flag some interesting documents they may have found in reviewing the incoming productions. And the expert team can solicit the evidence they need from both the offensive and defensive discovery teams to provide to the experts for their review.

Teams should also maintain a task list that is updated and circulated weekly. Task lists should lay out what the task is, all



relevant deadlines (internal, client, court), who is working on the task, who is overseeing the task, and the status. Task lists not only give team members a reference for what's happening in the case and who's handling each task but also keep team members accountable and on track. Typically, leading team calls, overseeing task lists, and sending email updates are best handled by the managing senior associate or junior partner on the case.

The need for well-defined roles and responsibilities holds firm in trial. You likely will find that these roles generally assign themselves based on what team members have been working on during the course of the case. The offensive discovery team is likely best positioned to work on the cross-examination of key witnesses from the other side. And the defensive discovery team is probably going to have an invaluable rapport with your client and its employees that will lend itself well to smooth witness preparation sessions and (hopefully) calm the nerves of your witnesses. If you have a briefing team, its members may be responsible for working up the Rule 50 motions and lend a hand with bench briefs or issues that pop up during trial requiring legal research. And the managing senior associate or junior partner will continue to play the same role throughout the case—ensuring that all the ships stay afloat and on course. While the transition of roles from before trial to trial sounds seamless, roles and responsibilities should be communicated as clearly and as early as possible so that team members know what is expected of them (and their time) as trial nears.

In the busy lead up to trial, the following may be helpful:

- **Regular team calls.** The closer to trial, the more likely the need for more frequent team calls. These calls may sometimes seem to take up valuable time when team members could be doing more concrete trial tasks (like drafting or reviewing witness outlines), but they are a great way to ask quick questions and get quick answers, have team discussions about any issues or concerns that may have arisen during trial prep, and generally keep more junior members of the trial team feeling engaged with the team and the upcoming trial. As mentioned above, it is important to keep the big picture in mind and find opportunities to use these calls to make sure all team members understand the overall case strategy and goals and how their work fits in.
- **Email updates.** When team calls can't do the trick (or you can't get everyone on a call at the same time), email updates are the next best thing. Sometimes it is nice to have a written account of the goings-on in trial prep, especially when it comes to recaps of witness prep sessions, summaries of pre-trial conferences, or records of contentious meet and confers.
- **Listservs.** One way to streamline all the emails that are exchanged in the lead-up to and during trial is to use a listserv (or listservs). You may find it beneficial to have an all-team listserv, an all-associates listserv, and an all-partners

listserv. And you also may want to have an external-facing all-team listserv that opposing counsel can use—this increases the likelihood that someone from the team is going to be awake when receiving opposing counsel’s 2:00 a.m. request for edits to the deposition video recording that will be played seven hours later, for example.

- **Task lists.** In preparation for trial, you may find that the task lists discussed above need to be updated and circulated more often. This is a great task for a more junior associate in the first instance; the associate may have more time to spend on updating the task list, and this responsibility may help the associate feel more involved in the trial prep process.
- **Calendar.** You may also find it helpful to create a calendar that highlights key deadlines, hearings, and witness prep sessions (with the names of the lawyers involved in those sessions noted) so that the whole team knows what is coming down the pipeline and who may be nonresponsive on a particular day because they are working with a witness or in court.
- **Order of proof.** To avoid the issues of duplicative or insufficient testimony or other evidence discussed earlier, it is helpful to create an order of proof that sets out the elements of each claim or defense, as well as the testimony and other evidence that support each element. The order of proof can then be annotated with specific witness names or citations to documents. The order of proof also serves as a guide to the “must-have” testimony that witness teams ensure is incorporated into a given witness’s testimony.

Effectively managing the internal noise largely hinges on organization.

Whatever the posture of the case, effectively embracing the internal noise in a complex case requires organization—especially well-defined roles and responsibilities and constant and clear communication.

Managing the External Noise

External noise (from co-counsel, joint defense counsel, experts, jury consultants, the media, etc.) can also be effectively managed through organization, using the same basic management structure, as shown below. As is the case with managing internal noise,

proper organization translates to clear lines of communication with all involved and distinct roles and responsibilities.

When you have co-counsel or joint counsel, it is important to treat them as part of your team, without distinction. Think of all involved as one joint “virtual law firm.” Successfully litigating a case with co-counsel or joint counsel requires establishing a seamless, collaborative relationship—merely “playing nice in the sandbox” is not sufficient. To create this seamless relationship, some practices should be implemented from the outset of the case (or co-litigating relationship):

- **Emails.** Set up listservs that include all the relevant team members that need to communicate with all counsel, tell all counsel to copy that listserv, and be sure to use that listserv yourself—rather than individually copying the members of your team—when sending emails to all counsel.
- **All-counsel calls.** You also should schedule calls with a scheduled cadence so that all counsel are on the same page about all issues and deadlines in the case. It is helpful to establish one person (or team) who will send proposed agendas in advance of these calls; no one likes directionless, 50-plus-person joint counsel calls.
- **Briefing.** For briefs, establish the basics before the drafting even begins, such as what declarations are required and from what parties; deadlines for drafts and final sign-off; and who is going to compile, cite-check, and file the brief. Begin collaborating on substance well in advance of the filing deadline by having one case team send a proposed outline of the brief’s main sections to all counsel. That serves as a jumping-off point for discussions about the brief’s substance, as well as which individual teams are going to handle which sections.
- **Discovery.** During discovery, it may be helpful to coordinate strategy for productions and to flag particularly bad (or good) documents you produced for all counsel as you become aware of them. It may also be feasible to divide the work of reviewing incoming productions and pursuing written offensive discovery.
- **Depositions and trial.** When it comes to depositions and trial, the essential organization resembles that required to address internal noise. Counsel should early and often discuss responsibilities (such as which teams are going to depose which of the other side’s witnesses), as well as how witness testimony or documents fit into the larger case themes.

And when it comes to co-counsel jointly representing your client with you, it is especially important to create and foster an environment of trust and cooperation with co-counsel so that any differences of opinion can be discussed and resolved without the client having to be the constant arbiter. Clients rightly expect

their outside counsel teams to function seamlessly. It is best to set aside any feelings of competition and to instead create a “one team” environment where, despite being from different firms, the team members function and, most importantly, communicate as a single team. This minimizes the noise that can be created when co-counsel act at cross-purposes or pursue conflicting strategies that need to be reconciled later.

To have successful and effective expert engagements, it is important to set clear guidelines and expectations from the outset. Once an expert is retained, set up a call with the expert and the expert’s support team to discuss important dates and deadlines, the process through which you plan to provide the expert with documents and testimony for the expert’s review, and the amount of preparation you expect (and the expert requires) for depositions and trial testimony. And of course, don’t forget about the budget and the time both you and the expert expect to spend on the matter in order for the expert to draft a report, sit for a deposition, and, if it comes to it, testify at trial. You may benefit from semiregular calls (e.g., once a month) with the expert support team to discuss the team’s findings, additional discovery and data they may need, and their prioritization of work—and your client may benefit from attending some or all of these calls. An effective expert report requires frequent communication with the expert team and clear deadlines for drafts.

How to most effectively use jury consultants varies from case to case. But in every case, it is important to set clear guidelines on what is expected (both from your team and the consultants) in jury exercises. A formal mock jury exercise can be a lot of work to prepare for and requires your team to have a mastery of the evidence in the case and what you (and the other side) will argue from that evidence. But before the case is developed to a point where a formal mock jury exercise is feasible, you may find it helpful to engage jury consultants to conduct focus groups on certain themes or topics. The results of these exercises may provide some direction as you steer your case toward themes for trial. And they can help give you—and your client—a sense of how the case may play out. But it is important to keep in mind that the conclusions drawn from jury exercises are based on a limited sample size; your actual jury—and the way they vote—may differ entirely. When preparing to pick a jury at trial, you should communicate what support you expect from your jury consultants, including the information you want about the potential jurors, when you want that information, and whether you have specific weighting preferences for the factors that the jury consultants consider when suggesting jurors. You also may consider engaging jury consultants for other ancillary projects, such as monitoring the social media accounts of your jurors throughout the trial.

Client calls on a regular cadence can be an effective way to ensure that you are litigating in alignment with the client’s goals and preferences, as well as to discuss any questions or asks you

may have for the client. Before these calls, it can be helpful to send written case updates and a proposed agenda, and to include a copy of the case schedule for reference. These emails not only serve as a reference for the client on what has been happening in the case and what’s to come, but also will be a guide for you during the call itself. It is best practice for this pre-call email to be sent by one person consistently (such as your managing senior associate or junior partner) so that the client can easily find prior pre-call emails. When preparing employees of the client to give testimony at trial, you can help the client set the tone with these witnesses about how the litigation may affect the company and their role there and how they should manage their time to account for the required preparation, as well as more generally to put witnesses at ease about testifying and its implications. And when in trial, try to understand the client’s preferences for debriefing sessions; it is helpful to have a formalized plan for such sessions so that team members don’t leave court for the day and immediately disappear into preparing for the events of the next day.

When engaging with the media, first and foremost you should have a clear understanding of your client’s expectations. If media attention is expected or the client expects to issue press releases at any point during the litigation, it may be helpful to assign a team member to be responsible for media-related tasks such as monitoring the traditional and social media and reviewing the client’s public statements. Some cases may benefit from a dedicated outside counsel public relations (PR) team made up of lawyers at your firm. They can be read into the case sufficiently to engage with its substance, but their job is solely to handle PR-related issues. They can work with the litigation team to understand the cadence and substance of coming key events during the case or trial, such as when the client’s chief executive officer is called to the stand. A dedicated outside counsel PR team generally provides faster service for the client when it comes to the PR issues that the client would like your team’s input on, while allowing the team litigating the case to continue doing just that.

Conclusion

Litigating a high-stakes complex case requiring a large case team does not need to be overwhelming. Ensuring proper organization of teams with clear lines of communication and other authority from the outset will allow you to manage the noise level and channel it into a winning strategy. ■

*Sam Liversidge can be reached at sliversidge@gibsondunn.com.
Courtney Spears can be reached at cspears@gibsondunn.com.*