



**CUTTING-EDGE APPROACHES  
FOR MANAGING MASS TORT LITIGATION IN  
THE NEW MILLENNIUM**

**By**

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*Ken Petty and Bob Manlowe have defended dozens of clients in mass tort litigation since 1979. At Williams, Kastner & Gibbs, they have developed a unique team approach and organizational structure for handling extremely challenging matters for companies with litigation and crisis management issues in many states and regions. Both Ken and Bob have engineering degrees and gained several years industry experience prior to becoming lawyers. Their cutting-edge approach to medical and scientific litigation defenses and their creative and liberal use of technology have led to their appointment as National Coordinating Counsel for multiple clients handling tens of thousands of mass tort cases throughout the country.*

Mass tort products liability litigation has caused the demise of nearly one hundred U.S. manufacturers in the past two decades. Recent outbreaks of mass tort litigation can be seen in industries involving silica-based raw materials and products, welding worker industries, beryllium and other heavy metals, lead paint, mold, dietary supplements, contaminated meats and other food products, just to name a few. Current estimates are that asbestos litigation alone has led to bankruptcy filings by over 70 companies. In many instances, the failure to recognize the magnitude of the problem or to timely adopt a sound litigation management plan contributed to the company's demise.

Yet there are few articles and no authoritative texts to help U.S. companies and their insurance carriers recognize and respond to the unique problems caused by mass tort litigation. Regardless of the product, liability theory or scope of such litigation, a disciplined and coordinated approach can yield tremendous benefits. Indeed, the right approach can make the difference between bankruptcy and continued viability. This article provides a framework for such an approach especially well-suited to the 21<sup>st</sup> century and its technology tools.

### **When Centralized Management Becomes a Necessity Rather Than Just a Good Idea**

Manufacturers and their insurance carriers have long recognized the need to establish guidelines for the management of high volumes of litigation with various individual law firms spread around the country. In most instances, however, such guidelines are primarily an expression of philosophy or a common billing protocol. Though an important litigation management tool, the guidelines often do more to manage the attorneys than manage the litigation.

Most billing and litigation management guidelines will yield savings in defense costs. But in some mass tort situations something more is required to yield the far greater savings in indemnity necessary for a company to remain viable. In such situations a more precise recipe for litigation management is required to develop a successful, sustainable defense that returns dividends from one lawsuit to the next.

Recognition of the need for centralized management is key. Whenever one or more of the following situations exist, centralized litigation management may be essential to corporate survival:

- Widely-distributed products with an alleged common design defect found to be capable of causing similar injuries to hundreds or thousands of product users
- Industry-wide litigation where bankruptcies or limited resources of many industry members may put other industry members at risk of having to bear greatly disproportionate liability under joint and several liability
- Litigation potentially large enough to create a substantial risk that insurance may be insufficient to cover all current and projected future claims
- Large self-insured retentions and the possibility of claim volumes that could create an annual cash flow drain of the same order of magnitude as corporate net income

It is, of course, important to recognize those situations where the threat of litigation requires centralized litigation management. Equally important is that this recognition occurs as early as possible. The failure to timely implement centralized litigation management can allow an organized plaintiffs' bar and their experts to influence published medical studies that serve as the foundation for claims for years to come. It can produce inconsistent defense theories or discovery responses that will haunt a company for years. It can lead to early adverse results with resulting adverse publicity that causes filings to proliferate. It can allow the litigation to gain momentum that makes it virtually unstoppable.

Key tools in early recognition of the threat of mass tort litigation include a company's warranty claims, field service reports, accident reports, and Consumer Products Safety Commission recalls. Product sellers have varying degrees of liability for use of a product after it has been sold, and therefore varying degrees of responsibility to provide safety information to the purchaser post sale. As with most laws, "post-sale duty to warn" and "recall" are not completely homogenous across the nation. However, it is wise to assume that a product seller will be expected to provide "reasonable" warning about potential hazards that it knew, or should have known, about. Information compiled by government agencies and publicly available should fit into that which a company is expected to know.

The Federal Government provides significant access to information about recalls to consumers. A website, [www.recalls.gov](http://www.recalls.gov) is a one-stop site for all information available for many types of products. Additionally, publicly accessible data for product-related injuries is also available prior to any potential recall. For consumer products, the National Electronic Injury Surveillance System (NEISS) injury database may provide early warning about products that can be subject to recall or mass tort action. NEISS data comes from a sampling of 100 hospital emergency rooms and is extrapolated across the over 5,300 hospitals operating in the United States. This database is used by the Consumer Products Safety Commission (CPSC) to provide information to support product recalls. The data is then studied by the National Injury Information

Clearinghouse and compiled into reports that can offer product safety recommendations. NEISS is also a potential source for plaintiff's attorneys seeking evidence of product liability and is available online to any person seeking information.

Another potential database for injury-related information is compiled by the Centers for Disease Control (CDC). The CDC is not only concerned about infectious disease, but studies injury and death from a myriad of sources. This information is compiled in a database called WISQARS (Web-based Injury Statistics Query and Reporting System). While this system is not generally product-specific, it may provide information that can aid an attorney who is looking for specific injuries in a certain region that are outside the statistical norm.

Another indicator of potential mass-tort litigation that should be considered is where the lawsuits are being filed. Certain jurisdictions have discovery rules that allow plaintiffs much more latitude to "fish" for information directly from the product seller's own records. These jurisdictions need to have well thought out plans to defend not only the lawsuit, but the discovery process itself.

Perhaps the best warning of a product in danger is the attraction of one of a handful of national "deep pocket" plaintiff's firms. Some of the tactics apparently used by these firms includes using initial cases to develop information through discovery that will support later, more successful lawsuits. These firms can afford to try a losing case, and litigate again with another plaintiff another day. Indications that your product is drawing the attention of one of these firms should be taken very seriously, every case analyzed strategically, and discovery carefully managed to protect the company from future catastrophic liability.

Many companies don't recognize the threat of mass tort litigation soon enough because they fall into one or more traps. These include:

- Dismissing the litigation as a fad, thinking it will go away if you win the first few cases
- Entertaining the notion you can keep the litigation quiet by settling the first cases to avoid the publicity of a trial
- Believing the insurance carrier shares your interest and will take care of the litigation
- Underestimating plaintiffs' lawyers or their experts' ability to create a design flaw in what seems to be a perfectly fine product with widespread commercial acceptance

Don't fall into these traps. Better to err on the side of crying wolf than to risk your company becoming a corporate carcass distributed to various classes of debtors at a bankruptcy slaughtering.

### **Can You Manage Your Own Potential Mass Tort Problem?**

Once you become convinced that you need centralized litigation management tailored to mass tort litigation, you must decide if you can or should manage the litigation from within your company. In making that decision, several questions needed to be raised and answered:

- Do you have the expertise and staffing in-house to dedicate to the problem? Be realistic in assessing your internal expertise and how it stacks up against outside available expertise. Be just as realistic in assessing how much more capacity resides within your existing staff and how much more staff time it will take to properly manage the litigation internally. Saying you can do it and doing it are two entirely different things.
- If you currently lack the expertise and staffing, is it realistic to try to add that expertise and staffing in-house? Can you find the right people with the necessary skills and expertise? Can you afford to pay them what is necessary to successfully recruit them if they are being hired for a specific type of litigation that could go away? Are you willing to keep them on staff if the litigation goes away?
- Will your Board of Directors or upper management be more comfortable answering to shareholders (and will you be more comfortable answering to the Board or upper management if things start to go sideways) when you've tried to manage the problem internally as opposed to retaining the most qualified outside help?

### **Do you need National Coordinating Counsel?**

If you answer "yes" to one or more of the following questions, your company is a strong candidate for a National Coordinating Counsel (NCC) that uses state-of-the-art technologies to cost-effectively manage multi-state litigation.

- Are you involved in multi-state litigation?
- Are the lawsuits against you increasing on an annual basis?
- Are you facing lawsuits in problem jurisdictions like Mississippi, California, Illinois, Texas, Maryland or New York?
- Are amounts your company is asked to pay for settlements increasing?

- Are you concerned about inconsistent company discovery responses and potential sanctions that result from multiple local counsel handling discovery issues?
- Are you concerned about the potential of plaintiffs' attorneys attempting to pierce the corporate veil to reach the parent company's assets?
- Do you want to get prepared in front of the asbestos litigation crisis or wait for it to find you?

### **What to Look For In Outside National Coordinating Counsel**

You may conclude that your mass tort litigation can be effectively managed in-house. But suppose you reach the opposite conclusion. How do you then know what to look for in your national coordinating counsel (NCC)? Answering this question can be far more complicated than it might appear. Gut instincts can lead to an excessively expensive or ineffective choice. Consider the following traditional myths, each of which must be critically examined:

*Myth No. 1: This is big litigation so shouldn't I hire a big firm?*

Maybe yes, maybe no. What you really want is the most efficient lean-and-mean "high performance" team that allows you to play big. The largest firms can certainly devote the greatest amount of resources to your problem. But that can be not only far more expensive but also far less efficient than using a smaller, right-sized firm.

Having a large number of outside attorneys spending a small percentage of their time on your matters is far less efficient than having a smaller number of outside attorneys and paralegals spending a greater percentage of their time and functioning as a well-oiled team. Moreover, in a large firm with a lot of bodies the assigned attorneys are more apt to change over time and it is less likely that everyone on the team will develop the specialized knowledge and expertise needed to optimize the coordination of your defense. So if you feel the need for the large firm to handle your large problem then insist on a stable and well-defined lean-and-mean team. If the large firm cannot assure you of that, find a smaller one that can.

*Myth No. 2: Doesn't it make sense to use my outside counsel who are handling the largest volume of my cases and are thus most knowledgeable about the litigation?*

Maybe yes, maybe no. Many companies and their carriers have followed this line of reasoning to their detriment. The fact is, while it seems to make good sense, the sheer scope and growth of the litigation can essentially turn your valuable NCC resource into a group of local firefighters putting out today's fires in their woods rather than a group of problem solvers looking to prevent or control the spread of tomorrow's fires nationwide. You certainly should utilize the acquired

knowledge and expertise of the firm(s) handling the greatest volume of your mass tort litigation. But you also should consider having NCC with sufficient specialized knowledge and expertise from a jurisdiction where they are far less likely to become swallowed up fighting increasingly high volumes of local fires in a rapidly growing local caseload.

*Myth No. 3: Doesn't it make sense to hire a firm located close to corporate headquarters or located in one of the largest cities in the country? Maybe yes, maybe no. Sure, it is convenient to have your NCC nearby. But technology now enables counsel anywhere to be in touch with you anytime. Thanks to technology, counsel thousands of miles from corporate headquarters can be more responsive than counsel across the street.*

Not only does technology increase your chances of finding counsel responsive to your needs. It also can produce dramatic cost savings by allowing you to use equally competent counsel that practice in markets smaller than New York City, Los Angeles and Chicago where prevailing hourly rates can be \$100 an hour or more greater. In other words, technology may enable you to have your litigation managed by more distant attorneys who turn out to be the best for less.

So if you don't look to the biggest firms in the biggest cities or the firm handling the greatest volume of your mass tort cases, then what should you look for in choosing your NCC?

#### **Questions You Should Ask Candidates for National Coordinating Counsel**

- Are they currently serving as National Coordinating Counsel and successfully representing a “low dose” defendant?
- Are their national personnel available to service your national needs? Or are these individuals stretched too thin with large volumes of cases for other clients in their own local jurisdiction?
- Are they 24/7 accessible to the clients, to local counsel, and to the experts to handle emergency matters?
- Do they have close working relationships with the “5-star” regional/national science & medicine experts who will defend the client? Have they developed and successfully presented company witnesses to tell the company history with the use of juror-friendly interactive demonstrative exhibits?
- Have they developed and cost efficiently used e-technologies to manage company documents, client discovery, expert transcripts, case reporting, local counsel training, national motions, and demonstrative exhibits to provide instant access

and avoid duplication of effort?

- Have they developed and implemented client-specific secured extranet systems to manage national and local counsel tasks, high-profile case monitoring, case reporting & expert selection? Have they developed and implemented customized client-specific secured extranet systems for 24/7 instantaneous client executive summary case e-reports, on their cases and settlement trends and/or on cost trends nationally, by jurisdiction or plaintiffs' attorney?
- Have they successfully thwarted plaintiffs' attempts to pierce the corporate veil to reach the parent company? Have they brought, argued and prevailed on a motion to create an inactive case docket for unimpaired plaintiffs?
- Have they prevailed on a motion to create an inactive case docket for unimpaired plaintiffs?
- Do they have national trial counsel or access to regional trial counsel that have successfully tried multiple cases to verdict? Ask to review a summary of those trails.

Obviously, there are many more questions, but these are some of the more significant ones that will allow you to easily discern differences between National Coordinating Counsel capabilities

### **Teamwork and Organization – Define It and Require It**

Once you decide you need outside NCC and select the best firm, are you done? Not hardly. Now you have to build your team and work closely with your NCC to develop the framework for effective teamwork. To maximize each team member's contribution, all team members must feel part of the team and know their roles. This is where you and your NCC start to create the chemistry that makes teams perform to a level that exceeds the sum of the individual parts.

Begin by clearly defining the respective roles of the different parts of your team. Be sure everyone understands not only their role but also the roles of the other team members.

Define your role as the client. How much and what are you delegating to NCC? How closely do you want to be involved on a day-to-day basis? How will you involve your engineering, manufacturing, marketing, and research and development employees? Will you be the intermediary between them and your NCC? Or will there be direct access without you? How will you facilitate access to company documents? Define their territory and yours.

Work with your NCC to define their role and scope of services. Make sure you both understand it clearly so no important tasks fall into the cracks. Similarly, make sure there are no unnecessary overlaps where you and NCC are working the same tasks. At best that situation wastes time and money; at worst it has you and NCC proceeding down inconsistent paths.

Define what role NCC will play with local counsel. Will they be responsible for hiring local counsel and supervising their work or is that partly or entirely your duty? Will NCC closely oversee the work-up and expert retention on the client's highest profile cases? Or is it their role to provide the work product and training for local counsel to utilize with far less supervision? Will they be involved in reviewing and approving legal invoices from local counsel?

Define what role NCC will play in individual cases. Be sure you and NCC have a common understanding of the process for developing or retaining experts. Determine whether they will be involved in settlement negotiations in some, all or no instances. Clarify what role they will have as cases proceed to trial. Will they be expected to co-chair all trials? If not, will they be involved in helping local counsel prepare for trial? Finally, what interaction do you want NCC to have with your insurance carriers? Will you report to the carriers, or is that NCC's or local counsel's duty?

Meet with your NCC to assess the strengths and weaknesses of your team of local counsel and to define local counsel's role in the overall team. Are your products or the litigation issues so complex or specialized that it is impractical to expect all of your local counsel to develop the sophisticated expertise necessary to handle them? If so, define which issues local counsel will handle and which NCC will handle. What role will local counsel play in developing and retaining case-specific experts? Are there certain types of experts (defense medical examiners, local economists, etc.) that local counsel will be responsible for retaining and working with? Are there other highly-prized national "Five-Star" experts who are so valued and in such great demand that a single person from your NCC firm should serve as their exclusive point of contact?

Define what role local counsel will play in providing periodic, pre-trial and other reports to your insurance carrier and to NCC. Define whether your local counsel will be responsible for handling settlement negotiations, settlement conferences and mediations. Will local counsel be required to run all settlement issues past you and NCC, too? Be sure local counsel understand what you expect from them as far as trial. Don't allow them to be lulled into the belief that some out-of-town hotshot attorney will come in to try the case in such a way that local counsel can treat the case as somebody else's. When defining the role of local counsel, create an environment where they are viewed as an important part of the overall team. It is a mistake to create the perception that they are merely a necessary formality dictated by bar rules. They have much to offer to the team and must be treated as such.

Finally, if your mass tort litigation involves claim volumes so large that your NCC and your local counsel will need to use teams of lawyers, require them to provide you with an

organizational chart defining their chain of command and the roles of the members of their team.

### **The Role of Communications**

Effective communication is essential. As noted later in this article, secure emails and a properly designed Secured Extranet will go a long way in ensuring that communications are timely and efficient. Here are additional communications ideas or principles to make the management of your mass tort litigation more effective:

Require 24/7 responsiveness. The management of mass tort litigation is not a 9-to-5 proposition. Crises can and do arise at all hours of any day of the week. Successful crisis management depends on prompt response. You should expect as close to 24/7 responsiveness from your NCC as possible. The use of wireless Blackberry email devices, wireless Internet access, cell phones and pagers make that goal attainable. Be sure that a commitment to 24/7 responsiveness is part of your mass tort management vision and then be sure it becomes reality.

Set up “NCC Executive Committee” conference calls that include you, your NCC and any key carrier representatives. Do this on a periodic basis appropriate to the size, scope and pace of your litigation. This is the opportunity for you, carrier contacts and your chosen NCC to discuss the bigger issues and pending projects. It is also a chance to look back and learn from some of the matters just concluded. In addition, these calls provide a chance to look forward to identify problem cases well down the road and to identify projects that should be started now so they can be completed in time to benefit all local counsel on your team.

These calls are so important that they should be set at regularly scheduled times so that they can be planned around and conflicts avoided. Conducting such calls twice a month at 7:00 a.m. before the hectic day begins has proven effective in the management of tens of thousands of asbestos cases, but you need to decide what kind of schedule works best for you and your mass tort team. To ensure that these calls are conducted efficiently, insist on your NCC preparing an agenda for each call to be routed to you and the carriers for comments in advance of the meeting. That way, everyone will have input into what pressing issues need to be discussed, and the call will address everything that should be addressed.

Schedule face-to-face meetings. Do this quarterly or at least annually. These meetings provide an excellent opportunity to review NCC work product, present to upper level management or the Board, examine budgets and accomplish more than can be done in NCC Executive Committee conference calls, which might last only an hour every couple of weeks. These face-to-face meetings provide natural deadlines for the completion of NCC projects that might otherwise not get completed in the hectic pace of daily mass tort litigation management. A regular part of such meetings should be to critique the progress and performance of your NCC on their approved projects as well as their responsiveness to the daily issues presented by the litigation.

Communicate with Local Counsel. Occasional phone calls, email and correspondence between you and your local counsel are not enough to ensure that they contribute as much as possible to the overall defense team. You need an effective mechanism for sharing with local counsel new work product, defense themes, demonstrative exhibits, experts and other key developments. You need a more manageable means of staying abreast of individual case developments than a growing pile on your desk of periodic paper status reports from local counsel across the country. This can be accomplished if your mass tort defense employs technology support systems such as a well-conceived and designed Secured Extranet where such work product and developments can be regularly posted and updated and where all individual case reporting can occur on a real-time basis as developments occur.

However, even a well-designed Secured Extranet may not be sufficient without something more. Consequently, you should consider periodically providing local counsel with further training. It need not be the expensive and time-consuming training of years passed when companies, their carriers and NCC would invite all their local counsel to travel to an annual meeting that might last from one to three days. Thanks to technology, training can now be provided via CD-ROM or DVD, video conferences or online web-based presentations. By using all the technology at your disposal, you can keep local counsel trained and up to speed in a cost-effective manner.

### **The Role of Technology in Efficient and Effective Management**

Use of advanced technology systems are critical in achieving the goal of managing mass tort litigation in the most cost-efficient manner. The days of various local counsel around the country submitting multiple paper reports with varying styles are on the way to becoming the ice ages. E-summary files, case reports, case management and trends analysis are on the way to becoming common place and a result in greatly enhanced efficiencies in case work-up and resultant substantial savings in defense fees and costs. In addition, NCC should focus on systems that provide the client, carrier representatives and local counsel with 24/7 access and responsiveness. Technology can also be used to train local counsel and carrier representatives on the latest in case management and work-up strategies. The use of web cast meetings, videoconferencing or even DVD training sessions are a vital part of the mission of developing an integrated defense network for managing mass tort litigation with well skilled local counsel. One other area where substantial costs savings can be achieved by way of technology systems is document management. Systems exist to manage electronic and also digitized ancient (paper) documents in an online secured e-repository system. These systems can house documents used for document productions as well as trial exhibits. They can be set up so that local counsel can access trial exhibits by subject matter right in their hotel room or even the courtroom. The power of a digital environment is unmatched when compared to traditional manual labor protocols in handling paper documents. Depending on the volume of paper documents and the type of document, e-repositories can have significant up front set-up costs, however, it takes very few productions on an annual basis to recapture the costs within a very short time frame. Our "one-touch" document

management technique has been proven over and over to be the most cost-effective plan in long-term mass tort litigation.

Additional information regarding advance technology systems which we find most cost-efficient are laid out in the various Department subsections that follow.

### **Run Your Litigation Like You Run Your Business**

Your company's business operations are no doubt organized along business functions and product lines. The financial group doesn't handle engineering matters, the engineers don't handle sales or marketing. You don't have personnel with expertise on product line A providing engineering, sales or customer support on product line B. Instead, your operations are organized in a manner that allows the company to most effectively and efficiently serve the company and its customer base. Unfortunately, most lawyers lack the education or experience to effectively organize and manage a business. To overcome this deficiency insist that your mass tort litigation defense team be organized in the same way you organize your business operations.

Use an organizational chart. A sound organizational chart promotes "high performance" teamwork and a clear understanding of everyone's role on the team. Whether you put the chart together or, better yet, your NCC does, the chart is an important initial step in developing an effective and efficient mass torts defense team. Some of the functions may be reserved to you or your carriers, or you may end up outsourcing nearly all of them to your NCC. Either way, an organizational chart provides a playbook that is the first step to ensuring that everyone is running the same play.

Create departments. The defense of mass tort litigation can be broken down into a series of functions or departments. By doing this, specialized expertise and resources can be devoted to specific areas of the overall defense in a focused and coordinated manner. It's also much easier to develop realistic and accurate budgets.

What departments make the most sense? Managing client discovery responses and developing a consistent sustainable company presentation will be an essential department for any mass tort litigation team. Staying abreast of medical, scientific or technical literature will usually also be an essential function requiring a separate department. Depending on volume, document management may be so large and unwieldy that it is best handled by a separate department. The development of standardized briefing, motions, exhibit and witness lists may also be handled most efficiently by a specific department. As explained later in this article, those and many aspects of mass tort litigation management can be most effectively and efficiently handled by lodging responsibility for them within other departments.

While it's vitally important to organize your mass tort defense team, the organizational scheme need not be excessively elaborate. Though it is important to have an organizational chain of command so that the role of everyone on the team is defined and

understood by all, let the size and scope of your litigation dictate the size and structure of that chain of command. Similarly, let the size, scope and nature of your litigation dictate the number, size and function of departments.

But don't allow your mass tort defense team to roam the battlefield aimlessly. Insist on organization. That is how wars are won. That is how businesses become and stay successful. And that is how your mass tort defense team must function if it's going win the mass tort war your company must win to ensure its long-term viability.

### **An Effective Organizational Structure for Managing Mass Torts of Any Type**

A department structure for management of mass torts in the form described below will allow even the largest mass tort litigation to be managed effectively. The structure may appear at first to be exceedingly large. But many of the recommended departments can be handled by the department chair aided by a competent paralegal. In addition, the same attorney often can serve as chair of multiple departments particularly when they are in related areas such as the Company History Department, Product Use Department and Document Management Department, or the Science & Medicine Department and the Industrial Hygiene, Safety & Human Factors Departments.

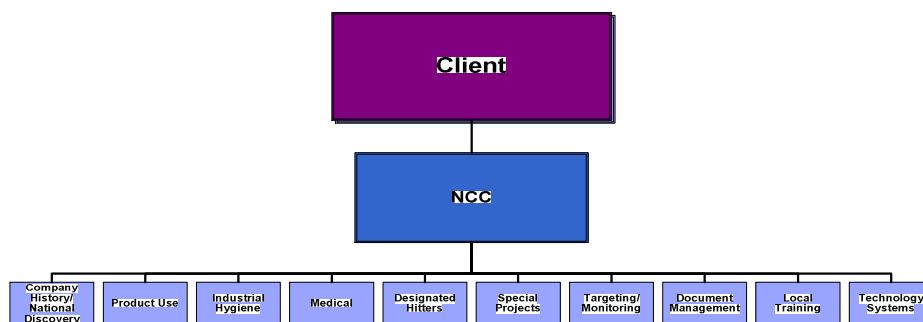


Figure 1 lays out a comprehensive and effective organizational chart for even the largest and most complex mass tort litigation. What follows are brief descriptions of the core functions and responsibilities of the departments shown in Figure 1.

### **Company History Department**

The defense of mass tort litigation should not be limited to being on the defensive in managing the adverse evidence regarding corporate liability. The jury must hear something more than what might be viewed as “excuses” or “positive spin” placed on

adverse corporate documents. Instead, they must be told a more complete story of the history, accomplishments and societal role played by the company. The purpose and responsibilities of the Company History Department include investigating, collecting and managing corporate evidence that can be used to tell an accurate, well-balanced and appealing story. You want the jury to identify with what the company is rather than buy into the arguments of plaintiffs' counsel, who will try to convince the jury that the company is a greedy group of corporate executives driven to maximize profits at the expense of injured product users.

Company History Department Responsibilities. The Company History Department must be responsible for preparing all discovery responses to ensure that they are accurate, consistent and support the historical story of the company. Equally important, the department must be responsible for working with management to identify, select and develop testifying corporate witnesses who can address much more than just the alleged product defects. These witnesses must exude the company's commitment to excellence in its field. They also must be able to discuss the various awards and commendations received by the company over time. Finally, these witnesses also must be able to educate the jury as to:

- How the product was designed
- Product safety features
- Function and utility of the product
- How the product makes the lives of product users and consumers more enjoyable, safe and productive
- Trade-offs that must be balanced when considering the addition of safety features that may compromise the product's function or may reduce one particular type of hazard while introducing others
- Evolution of the product's design over time to produce an ever-improving product

The Company History Department also must develop useful demonstrative aids for use at trial such as corporate history timelines. Technology enables a skilled attorney to develop a corporate history timeline so that a click of the mouse anywhere along the timeline will bring up a video clip or document of the noteworthy event or accomplishment of that era. These timelines not only help the jury understand the history and evolution of your company and its product; they also help present the historical state of the art by reminding the jury of the technology, transportation and other products of that era.

It can be difficult for younger jurors to fully appreciate the technological advances made in the past fifty or hundred years. An historical timeline can help the jury better understand the tools available to the company in the era when the product was first designed and developed.

The Company History Department must also collect appropriate company exhibits to be offered at trial and the authenticating evidence necessary to get them into evidence. This

responsibility requires the department to prepare an evolving list of corporate exhibits and summaries of trial witness testimony for use by local counsel in any pre-trial disclosures that may be required under local rules or case management orders. These lists and summaries must be regularly updated to include new exhibits and witness testimony as it is discovered or developed. The use of a Secured Extranet is again an optimal tool for sharing those evolving exhibit lists and witness disclosures and making them instantly available to local counsel.

If the Company History Department does its job well, its work will greatly aid the overall defense of the mass tort litigation by ensuring that adverse evidence can be dealt with not in a vacuum but in the context of the history of your company and the evolution of its product design and development. The importance of the department's role in humanizing the company to the jury cannot be overstated.

### **Product Use/Construction Sequence/Industrial Processes Department**

It is common, especially in toxic tort litigation, for plaintiffs' counsel to overstate the use of and exposure to a company's products. The frequency, duration and proximity to such product usage can be effectively minimized if defense counsel puts on evidence showing how the product fits into the trade, workplace or usage in question. The Product Use Department is responsible for developing evidence and demonstrative aids that will fully and accurately inform the jury how your company's product is used in conjunction with other trades and other products. Although this department could be part of the Company History Department, it relies on witnesses and evidence outside of the company. For that reason, it is best segregated and managed separately, though often by the same person chairing the Company History Department.

Unless the actual and intended conditions of product usage can be established, it is easy for a jury to be misled into a much more extensive use of and exposure to a product. For example, carpenters, electricians and plumbers in asbestos litigation often will testify about extensive heavy exposures to joint compounds and other building materials used in residential and commercial construction. Left alone, that testimony will create the impression that these tradesmen suffered daily heavy exposures from joint compound mixing and sanding on their job sites. The reality of building construction, however, is that each of these trades perform most of their work before the drywall workers come to the job site.

The wood framing, walls, floors and roof must be built by the carpenters before the wallboard sheets can be hung on the interior walls and ceilings. Carpenters thus perform most of their work without being anywhere near drywall workers.

Similarly, the electrical wiring and plumbing must be run through the two-by-four framed walls and plywood sub floors before the drywall hangars come in to install their sheets of wallboard and the finishing crew comes in to tape and sand the joints smooth. The rough-in work of the electricians and plumbers must be inspected and approved by

county or city building department inspectors before the sheets of wallboard can be hung. Otherwise, the building inspectors would be unable to assess whether the wire and plumbing runs comply with building codes. For mass tort litigation involving the construction trades, the Product Use Department is often called the Construction Sequence Department because that name more accurately describes the manner in which the product usage is minimized in terms of frequency, duration and proximity to use.

Asbestos litigation in industrial settings involves similar product usage issues. For example, left unchallenged, plaintiffs' counsel will create the impression that products like pumps, valves, gaskets and packing regularly release asbestos fibers on an ongoing basis. Yet the truth is that such products are used only infrequently and irregularly on most industrial job sites. Gaskets and valve stem packing get replaced only as necessitated by system failures or in regular plant maintenance cycles that can occur as infrequently as once every five or ten years. Periodic preventive maintenance, of course, is an important component of keeping a plant operating without system failures. But on a daily basis the adage "if it ain't broke, don't fix it" applies to most industrial plant systems. Consequently, the only industrial trades likely to work with or around gaskets, packing, valves or pumps on anything other than an infrequent basis would be the plumbers, machinists and maintenance personnel who rotate from area to area to attend to the demands of the machinery and the systems that run it. Most of the other workers will work around active gasket, packing, valve repair or pump work on only an episodic and infrequent basis.

For mass tort litigation involving industrial trades, the Product Use Department is often called the Industrial Processes Department because that name more accurately describes the manner in which the product usage is minimized in terms of frequency, duration and proximity to use.

**Product Use Department Responsibilities.** Whatever name is used, the Product Use Department is responsible for developing evidence and witnesses that will convincingly show the jury how the company's product fits into the workplace or other place of usage. This objective can be readily accomplished at modest expense from training videotapes and other materials that are readily available from the various trade unions. Finding a local general contractor or local tradesmen willing to testify on their trade and their use of products, and the use of products around them by other trades, is not difficult.

Developing demonstrative exhibits such as construction timelines or union training videotapes is another responsibility of the Product Use Department. Such materials can be instructive as well as entertaining to most jurors, who love to learn how a house is constructed or how a large industrial plant is run. A well-balanced and coordinated defense of mass tort litigation greatly benefits from a department that challenges plaintiffs' counsel and denies them the opportunity to overstate product usage and exposure.

### **Industrial Hygiene, Safety or Human Factors Department**

Most contemporary mass tort litigation involves workplace exposures to various toxic substances. Whether it is exposure to asbestos, benzene, chlorine, silica, beryllium, manganese or one of dozens of other toxic substances commonly found in workplaces, the understanding of perceived or actual workplace hazards has always been about dose. In mass tort litigation of this type, industrial hygiene is perhaps the most important discipline and certified industrial hygienists are among the most important expert witnesses. Although the role of warnings in workplace safety is something hygienists can address, the use of more specialized human factors experts can be an added weapon in responding to failure to warn claims.

Industrial Hygiene, Safety or Human Factors Department Responsibilities. For products responsible for toxic exposures in the workplace, this department will typically be called the Industrial Hygiene Department. Regardless of department name and type of litigation, this department will be responsible for developing evidence and witnesses capable of convincingly showing the jury in a simple, understandable fashion:

- How the dose of exposure associated with your company's product can be estimated
- How that dose compares to the doses of exposures from other sources
- How these doses compare to the historical knowledge of safe exposure levels over the exposure dates in question

For other types of mass tort litigation not involving allegedly toxic workplace exposures, this department might be called the Safety Department. It will be responsible for developing evidence showing how the product can and has been used safely over hundreds of thousands or millions of hours by following product use instructions and using common sense. This evidence can place the likelihood of harm from the normal use of the product in context by comparing it to the likelihood of other harms associated with the workplace in question and with other hazards commonly accepted in our daily lives such as driving to work.

Where plaintiffs' claims are focused on the alleged failure or inadequacy of warnings, human factors experts may play a dominant role. When the focus of plaintiffs' claims is on the absence or inadequacy of warnings, this department may be called the Human Factors Department. Its responsibilities include developing expert witnesses and evidence regarding:

- The acceptable role and utility of warnings
- The feasibility of warnings and likelihood they will be read
- The positive and negative impact of warnings on the product's users or consumers and
- An assessment of how the plaintiffs would likely have responded to a warning

Whatever this department is called, it can develop effective and entertaining demonstrative exhibits to help jurors comprehend important concepts. These concepts

include dose, the roles of the employer, regulatory agencies like OSHA or EPA or state industrial safety departments, unions and workers in workplace safety and the relative risks associated with the company's product as compared to other risks more commonly appreciated by jurors. A well-balanced and coordinated defense of mass tort litigation can greatly benefit from a department that places the risks associated with the company's product in the context of safety regulations, safety principles and the everyday hazards of life.

### **Science & Medicine Department**

Mass tort litigation almost always involves issues relating to the diagnosis of each plaintiff's disease, and the extent to which use of or exposure to a product was a proximate cause of the disease or injury the plaintiff claims to suffer from. To minimize the plaintiff's damage claims, it is important to show the diagnosis and impact of unrelated diseases or conditions.

Furthermore, in some types of mass tort litigation, the primary issue will be "general causation," that is, whether a causal connection has been generally established and is not a contentious issue in your litigation between the exposure substance and the medical condition at issue. Even if general causation is established, there will usually be an issue of "specific causation," that is, whether the alleged exposure to the substance from the company's product was a substantial factor in causing the plaintiff's medical condition. To prevail in this type of litigation, you must be able to effectively deal with those and the myriad of other medical issues that are bound to arise. That's the job of the Science & Medicine Department.

Science & Medicine Department Responsibilities. This department is responsible for identifying and developing the various types of medical and scientific experts needed to address the medical issues relating to the plaintiff's diagnosis, general causation, specific causation and damage-reducing unrelated medical conditions. Depending on the nature of the exposures and the disease in question, epidemiologists, pathologists, pulmonologists, neurologists, specialized radiologists, oncologists, toxicologists and other medical specialists may be required. One of these disciplines will almost certainly be needed to assess whether the "dose" of the plaintiff's exposure from your company's product as determined by your industrial hygiene expert was a substantial factor in causing the disease at issue.

Finding and developing the best experts, marshalling the key medical and scientific literature and building medical defenses that are consistent and sustainable from one case to another is best accomplished by centralizing responsibility for those tasks in the Science & Medicine Department. Another benefit of this centralization is the development of advanced medical and scientific knowledge in the department chair and the chair's supporting staff. Rather than having a lot of people on the team each learn enough to get by, a few people become specialists able to impart their understanding of complex medical and scientific issues to jurors, judges and other team members.

Yet another benefit of centralization is enhanced communication with the key “Five-Star” medical experts needed to defend the litigation. Attorneys and medical paralegals in the Science & Medicine Department can develop one-on-one relationships with experts and become the exclusive source of contact with a particular expert. Busy experts are more likely to find the time you need if they are contacted by someone with whom they have developed a relationship of trust and mutual respect. They are less likely to make the time where contacted by different local counsel each time.

The Science & Medicine Department also is responsible for designing and producing effective and entertaining demonstrative exhibits that will help jurors comprehend the complexities of medical science, how causation is established epidemiologically and why the plaintiff’s disease was not caused by your company’s product. A wide variety of materials are available at local medical libraries or from medical education catalogs and videotapes. These materials can be made into effective demonstrative exhibits. If close relationships can be built with key medical experts, they often will find the time to take an active role in the development of demonstrative aids to help in the presentation of their testimony.

### **Document Management Department**

If large volumes of documents are not well managed, the toll on the cost and effectiveness of the defense can be huge. Having documents culled over on multiple occasions by different people, each creating a supposedly useful index, does little more than run up costs. On the other hand, the ability to counter plaintiff’s expert at a trial by immediately locating a document halfway across the country, then having it scanned and sent by email to the trial lawyers can provide the margin of victory at trial.

Effective electronic document management systems can be expensive. Therefore you and your insurers need to do a cost-benefit analysis to determine what type of document management system is most appropriate to your mass tort litigation. Factors to consider include:

- Volume and nature of the documents involved
- Whether the quality of the documents is conducive to conversion to electronic form
- Costs to convert them to electronic images
- Costs to further convert them into a format searchable by an optical character reader (OCR) weighed against the benefits of searchability
- Extent to which the documents require privilege review
- Issues, scope and anticipated duration of the litigation

Document Management Department Responsibilities. Whatever document management system you choose, the Document Management Department is responsible for ensuring that it is implemented and maintained in an efficient and cost-effective manner. When a company is required to produce documents in discovery, the document productions must

be handled efficiently and in a manner that carefully tracks what was produced and what was copied. Also, document productions must be handled consistently or you risk having to explain to a judge at a sanctions hearing, or to a jury at a trial, why certain documents produced elsewhere were not produced in the case at hand. The credibility and humanization established by the efforts of the Company History Department can be jeopardized by inconsistent document productions.

### **Designated Hitters Department**

Most mass tort litigation involves a relatively small core group of key plaintiffs' experts who testify in case after case and sustain the litigation's momentum. They do so by conducting their own product use simulations to measure the emission of toxic substances, then write an article that they have published in some journal on the findings and the significance of what they found in their simulations. By designing or videotaping their simulations in unrealistic ways, they can effectively overstate the exposures and hazards at issue and make them seem harmful. And by overstating those exposures and the medical significance of them, these experts can effectively create the hazard recognition that sustains the litigation.

This core group of key plaintiffs' experts must be dealt with effectively. The best way to accomplish this goal is by making a single attorney responsible for a specific expert. This "designated hitter" can continually develop and refine the strategies, resources and testimony needed to effectively control the assigned expert. This approach is also cost effective because the designated hitter needs only a minimum of time to prepare for the next deposition or trial cross-examination of the expert.

Designated Hitters Department Responsibilities. The number of plaintiffs' experts dealt with by the Designated Hitter Department can be as few or as many as your litigation strategy requires. The department chair is responsible for managing the overall expert assignments. Multiple plaintiffs' experts in related areas who rely heavily on one another can be assigned to the same "designated hitter." This strategy will enhance the efficiency and effectiveness of the handling of those interrelated experts. Certain "designated hitters" will develop specialized knowledge and expertise about issues and literature involving highly technical or scientific subject matter and become increasingly effective in dealing with assigned experts in those subject areas.

Managing plaintiffs' key experts in a specialized and centralized manner should be an essential component of your mass tort management plan. The alternative, letting local counsel take on these experts in individual local cases, will be costly because each new local counsel will have to gear up to tackle the experts. What's more, local counsel are far less likely to be able to develop the kind of effective deposition and trial testimony that a "designated hitter" can develop. You must do everything in your power to neutralize plaintiffs' core group of key experts. The designated hitters approach can do that for you.

### **Special Projects Department**

All mass tort litigation involves legal issues and procedures common across the country. Favorable case management orders are entered in jurisdictions that you would benefit from “exporting” to other jurisdictions if possible. A myriad of issues get briefed and ruled on. They may include:

- Consolidation of trials
- Reverse bifurcation of trials
- Federal removal remand motions
- Whether punitive damage claims can be pursued
- Federal pre-emption
- Government contractor defense
- Learned intermediary or sophisticated user defenses
- Daubert motions
- Motions in limine regarding key evidence repeatedly offered in the litigation
- Partial and full summary judgment motions on certain of plaintiffs’ claims

These legal issues need to be managed. The Special Projects Department can focus on all the key legal issues, collect and continually upgrade pleadings and document submissions to be shared with local counsel for motions on those issues and track the rulings for future motions. Again, a Secured Extranet can serve as an effective repository for those pleadings and supporting documents readily accessible to your local counsel on a 24/7 basis.

Special Projects Department Responsibilities. Besides centralizing the management and development of key case-specific legal resources, the Special Projects Department should be empowered to think outside the box. For example, if achieving substantial reduction of defense costs through the use of early mediation makes sense as part of your case management plan, have the Special Projects Department develop a motion to establish case management orders that require an early exchange of key documents and discovery information followed by mandatory mediation. Is there benefit to using neutral court-appointed experts to screen claims or serve some other function to provide better control of plaintiffs’ slanted stable of experts? If so, have a motion developed for a case management order that uses court-appointed experts to help you manage the litigation.

Is your mass tort litigation being driven or sustained by mass screenings of workers through unions or plaintiffs’ law firms? Do you want to attempt to control that flow of what are often dubious cases supported only by plaintiffs’ well-paid stable of screening experts? If so, the Special Projects Department can develop deposition testimony on the screening programs, and their shortcomings in terms of compliance with state or local licensing requirements on their equipment or personnel. And the department can develop the factual record to become part of a motion to exclude the screening program findings as insufficiently reliable to be relevant or at all helpful to a jury.

Do you want to seek to limit punitive damage claims on due process grounds? Doesn't the sheer volume and expense of the litigation provide enough punishment and deterrence? Do punitive damage claims do anything more than overcompensate some individuals at the risk of bankrupting mass tort defendants and depriving future plaintiffs of legal redress? Issues like these are best identified and managed by a creative Special Projects Department committed to enhancing the legal resources available to local counsel.

### **Targeting & Monitoring Department**

Not all mass tort cases are identical. Some involve far more serious damage claims than others. The role of your company's products can vary widely from one case to another leaving you anywhere from a "target" to a "peripheral" defendant. Attempting to closely manage every case can be prohibitively expensive. Allocating your time and resources to the more problematic cases allows you to dedicate your limited and best resources to the cases where they will yield the greatest payoff. The less serious cases can be left for more routine management by properly trained local counsel and assigned insurance or in-house claims specialists.

Targeting & Monitoring Department Responsibilities. Prioritizing or categorizing your cases for varying levels of management is best accomplished by you and your insurance carrier representatives consulting with the chair of the Targeting & Monitoring Department. While any variety of other prioritization schemes could be developed, our firm has effectively employed an A/B/C classification system in working with clients and their insurers to manage tens of thousands of cases.

- Highest priority A cases include all malignancies and all other cases where the plaintiff or decedent was a tradesman working with the type of products made by our client.
- Lowest priority C cases are non-malignancies with minimal damage claims and/or minimal alleged involvement with the types of products made by our client.
- Middle priority B cases tend to be non-malignancies where there is some meaningful direct involvement with those products.

The extent to which depositions are taken, extensive records obtained or experts retained decreases as you move from A to B to C-level case work-up. For each category local counsel are provided instructions for specific levels of work-up.

Besides having local counsel conduct varying degrees of case work-up depending on case classification, you also should consider having your NCC play a monitoring role in working directly with your company, its carrier and local counsel to coordinate the retention of experts and work-up of the most serious cases. That could include all A cases or a selected subset of the most problematic A cases that present the greatest risk to the company in terms of damages exposure and the likelihood of being forced through trial.

The chair of the Targeting & Monitoring Department should work closely with your company and carrier representatives to:

- Develop the case classification system and associated case handling guidelines
- Select cases to be targeted and more closely monitored
- Ensure that for each such targeted case an assigned NCC attorney or paralegal monitor is working closely with local counsel to retain the best experts and otherwise marshal your best resources

Monitors and local counsel will quickly learn how to take a consistent and coordinated approach to different types of cases using knowledge, expertise and resources gained in similar prior cases and following the established case work up guidelines.

### **Training Department**

One of the biggest challenges of any mass tort litigation is developing a large enough team of counsel with sufficient depth of knowledge and clear guidance across a multiplicity of jurisdictions. Furthermore, with mass tort litigation it often is difficult or impossible for any single lawyer to handle all the work in his or her own jurisdiction without help from other attorneys and paralegals. So the challenge can be as large as having to share your defense plan, resources and expertise with a team of perhaps a hundred or more defense lawyers who are at various firms in dozens of jurisdictions across the country. Such a scenario can place you in the unenviable position of needing to train a whole army of attorneys and paralegals across the country. This is why a Training Department is invaluable.

Training Department Responsibilities. The Training Department chair is responsible for marshaling the work product resources available from the other departments and working with your company and carrier representatives to develop a comprehensive user-friendly training program. Confidential work product CDs or DVDs can be created that provide local counsel with handy training on discrete issues and available resources for their use. In addition, where face-to-face training is required, web cast technologies can be used. The training can be divided into different chapters by subject area so that local counsel can easily find the training and resources needed for their cases. Much of the material can be effectively presented using already available demonstrative exhibits developed by other departments. As developments in the litigation or changes in your approach occur, the chair of the Training Department can promptly distribute updates to local counsel.

Training local counsel through confidential work product CDs or DVDs is far superior and less expensive than training through periodic national or regional meetings. That's because this training is available year-round on an as-needed basis rather than only periodically and only for those who can make the scheduled meetings. It is also available to everyone at local counsel firms rather than just the one or two individuals from each firm that your budget allows you to bring to a meeting. Plus, training materials can be

updated as key developments occur, and they can be posted on a Secured Extranet so as to be available on a real-time basis.

You will need a trained platoon if not a trained battalion of legal defenders for most mass tort litigation. They can be trained effectively and quickly in a cost-effective manner. Technology can greatly enhance the utility of your training program. Don't underestimate the value of training. Empower your Training Department to make all your troops battle-ready.

### **Technology Systems Department**

Technology can be a powerful weapon which results in substantial cost savings for the defense in mass tort litigation. Often, however, it is not deployed as creatively or thoroughly as it could be to effectively manage the huge amount of information involved in the mass tort setting. Companies and their coordinating counsel think they are effectively utilizing technology when they maintain various databases of information to track case names, results, costs and case-specific information across hundreds, thousands or even hundreds of thousands of cases. But rarely do you find a mass tort defense take technology to the next level by developing a master database or customized Secured Extranet software able to manage all case-specific data of potential interest to lawyers, insurance representatives, accountants, auditors and others in a single database that can run diverse database searches and produce instant reports.

Developing case management software capable of handling all the data and functions you might need can be an expensive process. However, this is money well spent if your litigation involves thousands of cases or potentially could grow that large or could last many years.

Working with client and carrier representatives and software developers, our firm has proven the value of a customized Secured Extranet to multiple clients and carriers. Having a Secured Extranet has allowed them to manage tens of thousands of claims on a real-time basis and generate reports from a single database. With such a tool, case reporting is standardized and available to the company and carrier representatives, local counsel and NCC on a secured 24/7 online access basis.

With a Secured Extranet, neither a company nor its carriers have to pour through periodic written reports from different defense counsel that vary in format and amount of detail. Instead the information is available in a standardized format on a real-time basis as current information is obtained. An added benefit is that the content and structure of the Secured Extranet database can be tailored to the defense with drop-down menus and fields that guide local counsel to collect the type and detail of information most important to you and your defense. Plus, the database can be searched to identify prior cases involving the same workplaces or experts that are at issue in current cases, thereby allowing you to utilize the resources and experience from the prior cases.

An additional benefit of Secured Extranet is its power to generate trends analysis and e-reports tailored to the user's preferences. Specifically, if your system is set up properly in accordance with our field-based recommendations, the user in evaluating active cases can run instantaneous reports on past settlement history with the plaintiff's firm based on any one or more of the following criteria: age, disease type, occupation, status (living or dead). Further, you could then run a search and pull up a subset of the past resolved cases with the particular plaintiff's firm and go in and research the comparable cases. Filing trends, trial calendars, resolution averages, dismissal rates and settlement averages can also be pulled up with the touch of a button. Just as quickly, you can search for plaintiff expert witness key testimony on critical issues to look for inconsistencies for impeachment purposes. The cost of doing the type of research described above manually in the "old school" way would be astronomical in comparison with what a well-designed Secured Extranet system would run.

### **Trial Teams and Techniques for Mass Torts**

Some mass tort litigation is defended only in the courtroom. The vast majority of cases, however, are resolved by dismissals or settlements. But in most mass tort litigation the cost of preparing and trying hundreds or even thousands of cases is such to warrant consideration of negotiated settlements as an important vehicle to manage overall litigation costs and control risk. In those situations an approach must be developed to effectively resolve as many cases as possible as early as possible by way of dismissal or reasonable settlement. But an effective settlement strategy will invariably require demonstrating the willingness and capability to fiercely and successfully wage a few key battles to convince your adversaries that they too share an interest in resolving the vast majority of other cases. Just as fighting every case through trial can drain your resources through defense costs, being ill-prepared to try cases or too desperate to settle every case will invite excessive demands and increased claim volumes that will drain your resources from the indemnity side of the ledger. Consequently, it is essential that a company take charge of settlement decisions and maintain a consistent approach over time and across jurisdictions.

Possible Approaches. A company must decide how it wants to approach resolving its cases. One approach is to collect cases early and negotiate group deals with plaintiffs' counsel before incurring substantial defense costs. Another approach is to wait until cases are more fully developed and have trial dates and then use the trial docket to limit the cash flow associated with resolution. Decisions on approach may vary from jurisdiction to jurisdiction depending on the case management and trial docketing rules in effect.

If early case evaluation and negotiation is part of your case resolution strategy, encourage your local counsel to have their courts include mandatory mediation early or mid-stage of the court's case management timeline. Consider the approaches likely to be most aligned with your company's objectives in each jurisdiction and with each different plaintiffs' firm. Assess your trial risks and early case resolution potential with each different

plaintiffs' firm in each jurisdiction to determine what balance of war and peace is the most sensible and cost-effective approach.

If your case resolution plan either globally or selectively encourages early resolution to minimize case-specific defense costs, consider negotiating administrative or global settlement agreements with the major plaintiffs' firms. Agreements can specify payment schedules for different types of cases. More creative and equitable forms of agreements can provide more flexibility in arriving at settlement amounts that are dictated by a variety of factors that affect damages including:

- Disease type
- Demonstrated level of disability
- Age
- Marital status
- Trade/occupation
- Whether it is a wrongful death case or one for a living plaintiff who is dying
- Whether plaintiff or decedent smoked

Obtaining Predictability and Control. The goal of any administrative settlement agreement is to ensure predictability and control from the earliest stage possible of the outlay of funds for both settlement and defense costs. An important but often overlooked aspect of achieving that goal is to incorporate provisions into the administrative agreements that limit the cash flow for resolving existing cases and do not encourage a proliferation of new filings. This objective can be achieved by negotiating a limit on the number of cases or the amount of settlement money that can be processed under the agreement in a given year. It can also be achieved by including provisions in the administrative settlement agreement that limit claimants who qualify for payments to those who are in specified trades or meet other limiting criteria.

In some jurisdictions or with some plaintiffs' firms, administrative settlement agreements will not be attainable or desirable. In these situations, a company might prefer to let the trial docket take the cases to a specified point in time X months in advance of trial when they will be negotiated in a group with other cases of similar trial docket vintage. Where a favorable global agreement cannot be voluntarily obtained, consider advocating that the court's standard case management order include a mandatory mediation provision at a proper time in the life of the cases. Judges invariably favor ADR to control their dockets. That is especially so in mass tort settings where the volume of cases is a serious threat not only to your company but also to the court's resources. The services of a professional mediator can often help you get plaintiffs' counsel where he or she might otherwise be reluctant to go. Depending on the jurisdiction and volume of cases regularly coming up on the trial docket, it may make sense to establish a settlement process model with plaintiffs' counsel that includes quarterly or other periodic face-to-face group negotiation sessions after an agreed-upon exchange of case-specific documents. Armed with a laptop with wireless Internet service, your local counsel can negotiate with the benefit of detailed case-specific information available at the click of a mouse from the Secured

Extranet. Prior settlements can be found to use in negotiations to keep your adversary as honest and contained as possible. When model negotiations involve larger groups of more serious cases, personal involvement in the face-to-face negotiations by a company or carrier representative, or even direct handling of the negotiations by NCC, may be warranted.

Advantages of Early Group Negotiations. The advantages of early group negotiations are many:

- Plaintiffs' counsel often will not have had the time to fully develop a case against your company.
- Larger numbers of cases allow you to overcome large differences in a handful of the more difficult cases by obtaining compromises in many other cases.
- The willingness and ability to resolve your more serious cases early can often induce plaintiffs' counsel to agree to provide a number of zero dollar voluntary dismissals in other weaker cases.

Resolving as many cases as early as possible drastically reduces your defense costs by resolving the majority of cases without costly full-blown discovery. Another less obvious but important benefit is that you can better identify the real problem cases at an early stage and redirect your freed-up resources to them. The ability to focus your resources on a more manageable number of cases improves results on the problem cases and while yielding substantial defense cost savings in the non-problem cases.

In mass tort litigation, you will find yourself negotiating with the same plaintiffs' firms on many cases and groups of cases over long periods of time. Successful settlement strategies require controlling the timing and approach for negotiations on a consistent basis. Once trial starts you should do everything to avoid increasing your offers. Exchange "going to trial numbers" and live by them absent extraordinary circumstances. Most mass tort plaintiffs' lawyers believe that companies are willing to pay more once in trial to avoid the verdict and publicity risk to the company's overall stock value. If during trial you offer more than your "going to trial number," you give plaintiffs' lawyers grounds for this belief. Worse, you provide them with an incentive to drag you through the expenses and risk of trial after trial to get your top dollar. Adopt a sound and consistent approach to negotiations to avoid that costly result.

### **Trial Teams and Resources for Mass Torts**

It is not practical to expect, and too expensive to get, all your local counsel to Five-Star trial readiness. But unless you have a very manageable number of cases, it is both impractical and unwise to expect that you can develop one super trial lawyer who you fly around the country to try all your cases. That is why it makes better sense to develop a coordinated trial team approach.

One effective approach is to use an experienced trial lawyer from one of your defense firms with specialized knowledge on product, medical and causation issues who comes to the trial jurisdiction to co-chair the trial with the top trial lawyer on your local counsel defense team. This specialized lawyer handles your key company witnesses, your key trial experts and cross-examines plaintiffs' key science and medicine experts. These are all people that this lawyer probably has dealt with in prior trials in other jurisdictions. Local counsel then handles all damages witnesses including plaintiff and family members, other local witnesses, jury instructions and other trial tasks for which local counsel has greater insight and experience than the specialized outside lawyer.

Using your most knowledgeable trial counsel for technical and scientific issues is a key element in your overall case management approach. Unless you plan to settle at any cost to avoid trial, you will need a team of top-notch, knowledgeable trial lawyers that have the background, knowledge and expertise to tackle what are often highly technical and sophisticated areas of science and medicine such as epidemiology, toxicology and a host of other disciplines. Depending on the volume of your litigation, you may need these specialized trial lawyers to handle the prospect of multiple overlapping trials. If you are going to use NCC to help manage your litigation and your NCC can offer you several skilled and experienced trial lawyers who have tried the same types of cases, this may provide the best trial staffing option since you will be assured of always having trial resources available with the broadest knowledge and most direct access to the NCC firm's extensive resources you have invested in building.

Local defense counsel need to be empowered as part of your trial team. You should demand that local counsel's best trial lawyer be familiar with your litigation. This lawyer should understand that he or she is an essential part of the overall team who will play an important role at trial. This lawyer needs to know he or she is just as responsible for the conduct of the trial as the specialized trial co-chair you have flown in for the trial. Be sure your specialized trial co-chair shares your vision and treats the local counsel co-chair as an equal partner in the trial mission.

Matching up your national/regional trial counsel with your local trial counsel is a sophisticated process that should go far beyond who is available to try the case. As an overview of our process, we first examine the venue and demographics of a typical jury along with the case-specific facts and the potential credibility hits against both the plaintiff and the client and how those will impact a typical lay jury in the specific venue. We then attempt to match up our national trial counsel and local counsel to best present the message to the typical jury for that venue. Matching up with the trial judge is important as well, but matching up with the jury is the critical component. Age gender and race of the trial team when matched with the anticipated jury all play into the mix to ensuring you have the greatest chance of prevailing.

### **Developing Expert Witness Teams**

Your litigation will almost certainly require an active role by medical and other types of expert witnesses. Most plaintiffs' firms you face will have their own team of experts who have testified in dozens of similar trials. How do you confront that?

For starters, look within your company or your industry for leads on highly qualified industry experts. Your company or one of your competitors may employ highly personable and knowledgeable witnesses who can be groomed to effectively testify on technical industry and product issues. Once these candidates are identified, funnel them to your NCC, or better yet, to the Company History Department chair, who will want to develop company witnesses who can testify about the company, its customers and products and the steps the company took to reduce known hazards to product users.

But company witnesses will never have the depth and breadth of knowledge and experience required to address every issue that will arise at trial. There always will be important medical and scientific issues for which you need the best outside experts you can find. Developing working relationships with the most accomplished experts in their fields can be an important element of your overall defense strategy. These experts often will be so busy with their own scientific work as to be disinclined to get involved in litigation. But if you show a sincere interest in and respect for their work, many experts will be willing to devote some time to assist you on at least a consulting basis. Since world-class scientists are passionate believers in scientific discipline and integrity, they will show an increasing interest in your litigation if they learn that plaintiffs' experts are practicing bad science with poorly conducted studies, experiments and videotaped demonstrations that are designed not to further science, but to further litigation profits at the expense of scientific integrity.

In dealing with the leading experts it is always advisable to have for each expert a designated contact who handles most contacts with the expert. Busy experts are much more likely to say yes to someone they've worked with many times before than to one of your local counsel whom they've never met or talked with. And if the volume of your litigation keeps them as busy as they care to be on legal consulting work, you may find that they will testify only for your company. That can be a nice benefit when you have a plaintiffs' lawyer who is motivated to keep your expert out of the courtroom and to do so will dismiss or take less in settlement from your company.

If you use NCC, working closely with top experts will be second nature to the top lawyers in NCC's Science & Medicine, Industrial Hygiene and other departments. So you should normally expect this job of dealing with the top experts will be handled by NCC. If you are not using NCC, you will need to assign the top experts to those local counsel lawyers best suited to this role. Either way, it is important that you develop mutually respectful working relationships with some of the top experts that can have the greatest influence on success at trial. Having the best experts is just as important as having the best lawyers.

### **Is It Worth It?**

How comprehensive your mass tort litigation program needs to be is a function of the litigation's volume and anticipated duration. But whether it is big litigation, really big litigation or just plain old massive litigation, it is likely to be big enough to warrant some investment in coordination. If your company is big enough and the litigation manageable enough, you may be able to develop and manage the litigation defense in-house. If the litigation involves a large number of potential cases or is likely to last for a long time, managing it effectively may be beyond your internal budget or resources. In that case, you should seriously consider adding qualified NCC. Work with NCC to collaboratively build a team committed to developing and managing a cost-effective, consistent and sustainable defense of the litigation using specialized skills and technology to handle it as efficiently as possible.

But can you afford a serious mass tort defense coordination program? Can you afford to retain outside NCC? To answer those questions, ask yourself if you are comfortable assuming the risks of proceeding without making a serious investment in an organized and coordinated mass tort defense program.

- Well, clearly your company cannot afford greater risk of bad early results from a lack of preparation, which in turn increases the number of claims or the amounts demanded from your company in all future cases?
- Nor can your company afford the possibility that poorly coordinated and inconsistent company discovery responses or company witness testimony could compromise your defense in all future cases causing an increase in the average dollars you will pay on every present and future claim?
- Similarly, it is untenable to risk poorly prepared company witnesses giving inconsistent or other unfavorable testimony that creates unnecessary risk of punitive damage awards for which you likely have no insurance coverage?
- With current pressures on the bottom line, why risk all your local counsel defense bills being higher because each local counsel has to figure out everything without support or resources from you or your NCC?
- With your Board and management committed to excellence in your industry, why would you accept less than a cutting-edge coordinated mass tort defense program?

When you face mass tort litigation, your company's future viability may be at stake. You need a case management plan that can successfully defend that litigation. You will need a coordinated litigation management plan and an effective, efficient and committed team to put it into action. With that in place, your company's future will be brighter. And you will sleep better at night.