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How To Streamline Virtual Law Team Mass Tort Defense

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(June 13, 2019, 5:08 PM EDT)

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A "virtual law team" is a collaborative and often technology-based team of lawyers, each selected for specific tasks, to defend a single client's litigation in the most efficient way. As part of a series about virtual law teams in mass tort litigation, this article addresses the importance of the collaborative approach in developing a cohesive "company case."

A collaborative approach to the company case amplifies opportunities for diversity and creativity. There are potential tensions with efficiency concerns, to be sure, but those concerns can be addressed via wise employment of technology and a commitment to the common project. Conducting early case assessment; developing offensive case themes; collecting, organizing and utilizing company documents, and identifying, interviewing, preparing and defending company witnesses are all essential to the discovery, motions, trials and appeals to follow.

In a virtual law team, however, various members of the team — science and experts, law, discovery, trial and settlement — must be able to emerge from, or at least gaze out over, their silos and understand the ultimate goals of their efforts. Everything is done for a purpose and must culminate in something specifically useful, such as a question asked at a deposition, winning a discovery dispute, prevailing on a dispositive motion, drawing up a compelling graphic for a trial opening statement, persuading the judge to use your proposed jury instruction, laying the basis for a strong appeal or authoring a settlement brief that actually moves the needle. Otherwise, the virtual law team threatens to become 11 issues, 2 million documents and 18,000 deposition pages in search of a narrative. The company case team is essential to breaking down the silos to ensure the collision of creative ideas — one of the primary benefits of the virtual law team — continues to happen.

Early Case Assessment

Perhaps the two words most despised by clients are "it depends." The early case assessment is three parts educated guess and one part reading the tea leaves, as counsel attempts to marshal important information with the goal of informing the client how much risk is involved. It may be impossible to give the client absolute certainty in what to

expect, but the early case assessment is a valuable tool, providing early insight into the strengths and weakness of the case.

Clients request early case assessments at various times to get a handle on what they may be facing should litigation ensue. At times it may be requested when there is a "triggering event" for litigation, such as a warning letter from the U.S. Food and Drug Administration or a label change, and other times it is requested before a new drug or device is about to be launched. Most commonly early case assessments are requested when the client strongly suspects litigation on the horizon and wants to know early on whether the company has robust defenses to the litigation or is vulnerable in certain areas that will surely be exploited by plaintiffs' counsel.

Early case assessments come in various shapes and sizes depending on the client's needs and time frame desired for the assessment, but they typically involve these steps in order for counsel to get an educated assessment of risk that will assist in shaping the defenses in the case:

- Key document review. Typically this review will involve analysis of the company's regulatory, safety and marketing documents to gain insight into communications with the FDA, the company's internal conclusions about any safety risks and strategy for promotion of the drug or device.

- Key employee interviews. Conducting interviews with the company's employees in regulatory, safety and marketing will provide valuable information before a case even begins, including context for some of the documents and also early assessment of witnesses for deposition and trial, which is especially useful when determining who may be called on to provide testimony on behalf of the company.

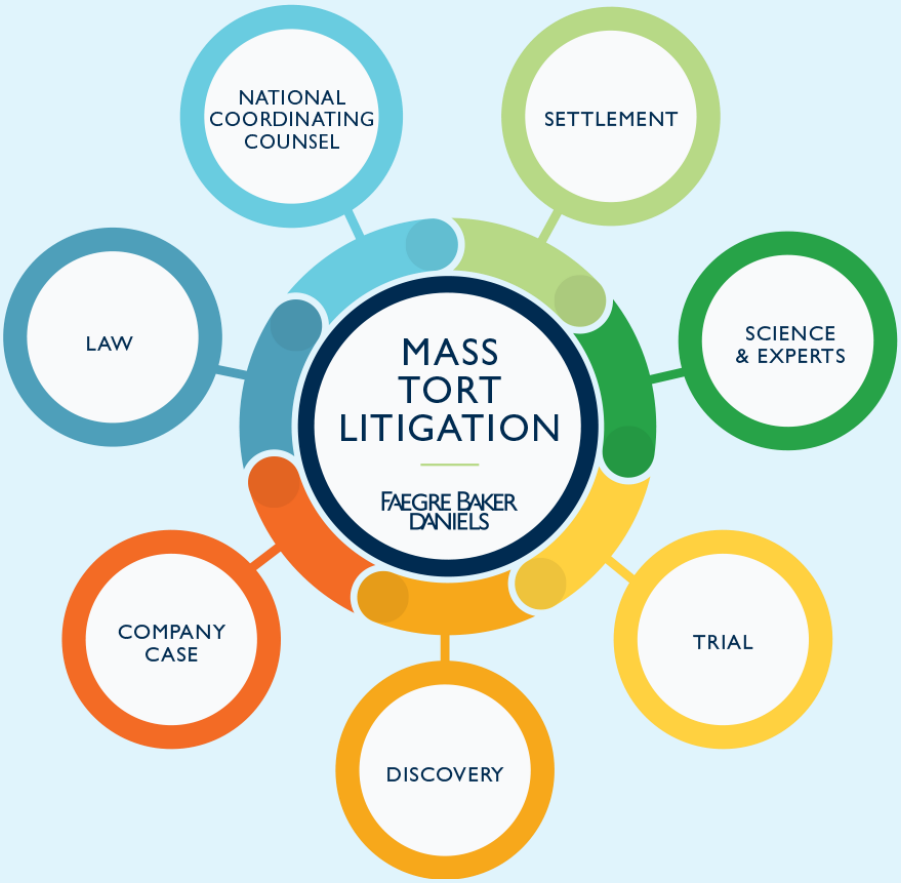
- Analysis of external factors. Cases are not won or lost based on only the company's documents and witness testimony, so a robust understanding of other factors and potential evidence impacting the case, including relevant scientific and medical literature and a review of recent jury verdicts for similar drugs or devices is critical.

Early case assessments are valuable tools as a first-step, early-look into a litigation. They provide the virtual law team advance insight into the case and help counsel begin to formulate case themes based on the information obtained during this early part of the investigation.

Development of Case Themes

It may seem obvious that presenting the company's case requires a consistent, cogent and compelling message. The challenge, however, is marshaling your evidence and arguments in a way that allows your message to ring loud and clear, and eventually persuade a judge and jury. In this regard, success depends on identifying case themes, testing them early and reinforcing them through factual investigation and legal research. It also depends on being flexible enough to adjust on the fly.

Components of a Mass Tort Virtual Law Team



Some themes will be obvious. Anyone suing a business will emphasize early and often that the defendant sought to earn a profit. That's a case theme. In the product liability space with which the authors are most familiar, the defense will likely revolve around the warnings that accompanied the product. The plaintiff could be alleging a risk or injury about which the company fully warned. That's a case theme. Maybe the defendant undertook extensive development efforts and a regulatory approval process addressing the safety and efficacy of the product. That's another case theme.

The possibilities are endless, but a jury's attention span is not, so you will have to select no more than a handful of your strongest themes and go with them. And that is where case themes become most useful. By identifying the two or three most compelling case themes and then developing evidence and arguments around them, you will focus your case and make it more understandable and more compelling. We were taught long ago that you never want your audience to think "Why do I care?" Organizing around solid themes protects against that pitfall. We usually start with the law — identify what each side has to prove and then develop the facts to match. And if the facts you need are different — or missing — then tweak your themes and sail on.

Document Discovery and Use at Trial

Handling documents in discovery and at trial requires meticulous organization, with a strong emphasis on meticulous. In addition, discovery often puts too much focus on electronically stored information,

which is no doubt important but well-beyond the word limit of this article. All too often lawyers find themselves scrambling to track down discrete documents they know exist, or worse, a document they aren't sure exists.

To avoid searching for the needle in a stack of needles, organization from the outset is key by (1) properly identifying, categorizing and cataloging essential discrete documents, such as the new drug application and FDA review memoranda, design history file, 510(k) submission, marketing launch packet, etc., (2) proactively analyzing these discrete documents to determine if anything is missing and (3) storing the documents in a centralized, accessible location that is curated with the same care as priceless art in a museum. Creating and maintaining an effective document discovery system will make everyone's life easier in the long run.

When it comes to effective document use at trial, the name of the game is “narrative.” From a defense perspective, you need to understand the key documents the plaintiff will use to tell their story so that you can effectively rebut them. Equally important, however, is the identification of documents for your own company-case story. Company documents are like individual threads to be woven together by the corporate witness — or witnesses, if you are so lucky — into a cohesive narrative that the jury can easily digest. Ideally, your documents will support and provide credibility to the witnesses’ testimony, serve as powerful demonstratives — like the 10 or more binders that make up the design history file — and ultimately provide the foundation for your closing argument. Accordingly, don’t think of a given document as a discrete, individual piece of evidence. Instead, think of it as a component of the larger company-case story and be mindful of how it fits within the plot.

Company Witness Depositions and Use at Trial

We often tell individual company witnesses that they cannot win the case, but they can certainly lose it. By saying something awful, or even by saying something fine but in an especially awful way, a company witness can convince a jury that liability is the only just result.

At trial, there is an added dimension — the company witness personifies the company before the jury. Because a so-called face of the company can significantly impact a jury’s perception of the company and the evidence as a whole, the company case team should think carefully about whether company witnesses are available — they often are not, especially when key facts occurred in the distant past — and who they ought to be.

At deposition, our goal in preparing company witnesses is to arm them with the four C’s: (1) competence, (2) caring, (3) confidence and (4) credibility. Witnesses so armed are in the best position to repel attacks, present a coherent story and place the company’s conduct in the best light. But even before preparation of a witness, sometimes one can play a role in selecting a witness. Do not be seduced by charisma or sheer volume. Sometimes the quiet but determined witnesses can end up being the most effective.

In any event, make sure that the witness will be available for preparation. Count on at least three meetings. The witness should be committed to putting in the work. Assuming that the witness is available, committed and sufficiently involved and knowledgeable, real preparation begins. As with an orchestra, intensive preparation is necessary for a good performance. Here are some harmonizing elements of a good deposition preparation:

- Demystify the deposition process and make clear that you will be a vigorous guide, advocate and protector.

- Instruct the witness on the three rules they must follow at a deposition: (1) be truthful — while self-evident, the truth is more consistent and much easier to remember than a carefully-knit story, (2) be careful — pause, listen, seek clarification, challenge (if necessary), be succinct and precise, don't volunteer and don't joke and (3) be stubborn — once a witness has testified truthfully, they should never back down from an answer because the questioner nags them to do so.

- Effectively use company documents, which are the essential tools in preparing the witness: They set out factual parameters for the testimony, counter faulty recollections and refresh recollection (which may make them discoverable — learn the law and conduct yourself accordingly).

- Conduct mock cross-examination to put the witness in "depo mode," getting them used to the pause-filled, reflective pace of depositions.

- Encourage the witness to let their authenticity emerge — a competent, caring, confident and credible human being. Thus, if the answer requires some sort of qualification or explanation, by all means offer such qualification or explanation, but it must all be responsive to the question. Challenges, qualifications and explanations that never actually answer the question will not reinforce the witness's credibility and authenticity.

At trial, there are two kinds of company witnesses — those who are essential and those who are not. The essential witness is the person who is so insinuated into the company story that his or her absence will be noticed — the company founder, the key product developer, the key analyst or manager who "was there" at every twist and turn, etc. In a perfect world, essential witnesses are both available and helpful. If they are available, the other side is likely to call them.

If essential witnesses are neither available nor helpful, you still have to take them into account when presenting the company case. Maybe they can be made available with travel or scheduling changes, or maybe you can easily explain their absences. Maybe you will need to develop helpful evidence to provide context and balance. Maybe you will decide that you can ignore the essential company witness and the let the jury draw its own inferences. It all depends on your circumstances and your case.

For the nonessential company witness, we can't help but think about the near-final scene from Indiana Jones and Temple of Doom, where the bad guys tried to select the genuine Holy Grail from a sea of vessels. They "chose poorly" and achieved a result they did not want — to put it mildly. Putting any witness on the stand poses risk, so choose wisely! A nonessential company witness should be articulate and likable, calm under cross and knowledgeable on the topics about which he or she will testify. Most important of all, the testimony of nonessential company witnesses must promote one of your case themes, otherwise what is the point of calling them? Regardless, any company witness — essential or otherwise — needs to be thoroughly prepared to testify with confidence, tell the truth and withstand vigorous cross-examination.

This article is part of a series spearheaded by Faegre Baker Daniels LLP on the virtual law team.

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