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# Case and client management in the early stages of mass torts

Early on, even before a case is filed, you need to define your plaintiffs and communicate effectively with them

While there exists today a wide spectrum of different types of mass-tort cases we litigate in our daily practices, several fundamental themes involving effective case and client management exist with the group as a whole.

One key to effectively litigating a mass-tort claim requires efficient case management from the outset – usually long before the first complaint is filed in a case. This article provides a few important considerations for attorneys working to manage and litigate a mass-tort claim, from initial interaction with potential clients to day-to-day administration of the case in the early stages of litigation. Regardless of how many plaintiffs are involved or the specific nature of the tort, several common considerations at the early stages can aid in the effective management of a mass-tort case.

Clearly, every mass-tort case will present its own unique set of factual and legal issues that require individualized attention and “problem-solving.” This article merely attempts to provide some suggestions counsel may find universally applicable to certain case management issues involved in many mass tort claims, citing prior case examples where appropriate.

## Defining the plaintiff, defining the case

Prior to even contemplating the filing of your mass tort complaint, it is first necessary (assuming you’ve preliminarily identified the tortious actor and act) to define your plaintiff. Who will the potential plaintiffs be in the case? What are the plaintiff’s injuries? Is there a signature injury that is consistent within the group or class of injured potential claimants?

How expansive (or limited) is the current medical literature supporting a causative link between the injury and the alleged tortious act/product/exposure? Can those injuries find support in the medical evidence? Has the government (e.g., FDA) weighed in on the matter?

If you are considering a pharmaceutical (“bad-drug”) case, you may need to ask yourself the following: How prominent are the common health-risk factors of this potential plaintiff pool in terms of affirmative defenses that will inevitably be argued by the other side? Should I eliminate certain high-risk factor individuals from my plaintiff pool? Do I want to include individuals with injuries that have not yet been affirmatively linked to this drug’s use? Asking these tough questions on the front-end, with the assistance of some form of medical guidance (i.e., doctor or nurse familiar with the ailments at issue) will assist tremendously in shaping and defining your best plaintiff pool to move forward with.

Determining or defining the identity of potential clients will also affect other trial issues that may become critical in the work-up and management of the case once it is filed. This defined group of potential clients may factor into considerations such as where to file the case and whether the case should be deemed complex pursuant to the applicable California Rules of Court if filed in state court in Los Angeles, for example.

After you have identified the hot-button questions to initially ask of the plaintiff pool, obtaining answers efficiently can be accomplished through carefully crafted intake forms or health questionnaires. Requiring potential claimants to provide written responses to intake forms

ultimately provides a more complete, honest response than simply taking information over the phone. I believe this stems in part from the reality that a written response necessarily asks more from the potential client. For example, having to confirm in writing that you suffered from a heart attack on a certain date while taking a certain drug seems to create more “accurate” responses from potential clients than simply confirming the same information over the phone in an interview with a response of “yeah.” Additionally, those potential clients who take the time to fill out the questionnaire thoroughly are often the ones that turn out to be a bit more serious about pursuing their claims.

The use of intake forms serves an additional purpose: identifying and weeding out “non-responders” at an early stage. If you ultimately sign these claimants up, you will have them on your radar from the outset to give them a little extra attention and follow-up in order to timely accomplish time-sensitive tasks as the case progresses. Utilizing properly tailored questionnaires and intake forms for medical injury review prior to filing a claim on behalf of an individual can eliminate dismissals and reduce costs early on. However, counsel should also be aware that discovery further down the road may unearth additional theories and mechanisms of injury that may not have been initially contemplated on the front-end of the case.

## Early client communications with a mass tort claimant

In an ideal world, the very best potential clients would simply show up at

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our office, holding their relevant injury-confirming documents in one hand, and a pen to sign the retainer with you in the other. Wishful, indeed. But in today's world of mass tort, the sources of your potential cases are as wide-ranging and varied as the clients themselves.

For example, in a mass-tort claim involving a particular geographic region (e.g., toxic exposure to a localized area/plume of contamination), you might take advantage of a homeowners' association disseminating information regarding the potential matter that leads to potential claimants contacting you: locally affected neighbors will talk among themselves regarding the case; blogs and e-mail strings may identify and alert other potential claimants; and news and information can and will travel through the potential group of plaintiffs with minimal effort on the part of counsel. It is a good idea to take advantage of "Town Hall" meetings, which are also a common method to distribute information, and have a conversation with potential clients regarding the case, particularly in actions unique to a certain geographic region. Make sure to be conscious of establishing an attorney-client (or prospective client with the expectation of confidentiality regarding the discussion of their potential matter) privileged communication with clients and prospective clients. In this setting, all individuals involved in the conversation should have an understanding and expectation that they are engaged in a confidential, private and privileged communication with their attorneys regarding the matter or potential matter that will not be shared, discussed or divulged outside of the confidential setting. This will be important later in the case when you will likely be required to fight to keep all such communications confidential and privileged, not to be disclosed to the defendant in light of their confidential nature.

Early communication with potential clients is also had via referral service. Referral services have become commonplace, and for some, arguably, even necessary in today's mass-tort climate. You can work with these services to tailor your queries in identifying the plaintiff pool

you have defined. As most have come to find, our potential cases come from all kinds of referral sources, such as neighbors, other peers in the profession, "full-time" referral attorneys, referral services, and the Internet to name a few. So keep your options (and eyes) wide open in this regard.

Just as potential clients will seek information regarding the case and the firm representing them on the Internet, the Internet can be a useful tool allowing for potential clients to absorb information. A significant part of the equation here is making sure that information about a type of case that is currently evolving is out there for consumption.

No matter the circumstances, it is *critical* that counsel adhere to the California Rules of Professional Conduct and the American Bar Association ("ABA") Model Rules of Professional Conduct where applicable. Attorneys should pay particular attention to the rules of professional conduct with respect to solicitation to ensure that any dissemination of information regarding the case is proper and does not violate any rules of professional conduct. (See California Rule of Prof. Conduct, rule 1-400; ABA Model Rules 7.1-7.5.)

Counsel should also pay particular attention to the distinctions between a communication (Cal. Rules of Prof. Conduct, rule 1-400(A)) and solicitation (Cal. Rules of Prof. Conduct, rule 1-400(B)). Courts here have recently acknowledged on restricted facts that "[t]he state may not bar lawyers from sending truthful letters soliciting legal business for pecuniary gain." (See *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, 775.) Note, however, that attorneys must be extremely careful not to send or have communications that have a likelihood of misleading the public regarding the advertising or solicitation for legal services. (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 614-15.) In *Leoni*, a law firm practicing in bankruptcy court mailed 250,000 letters and informational enclosures regarding legal aspects of debt problems. The letters informed defendants of the procedural aspects of the cases pending against them, as well as legal rights and reme-

dies of debtors. The firm recommended that the recipient consult an attorney, either his or her own or the firm. Because "the letters ha[d] a likelihood of misleading the public and actually did mislead members of the public," the California Supreme Court found that this constituted misleading advertising in violation of the California Rules of Professional Conduct. Even though the letters and enclosures did *not* contain false or untrue statements, they were impermissible because they were misleading. The letters also failed to "clearly identify the message as a communication for employment[.]" To resolve this, the California Supreme Court indicated that the firm could have included a short and plain statement such as "This is an advertisement."

### **Managing clients' expectations, managing your own expectations**

As in any case, whether it is a simple slip-and-fall or a mass-tort action involving hundreds or thousands of plaintiffs, it is essential to build rapport with the court, opposing counsel, and often most importantly, the client. In this sense, early communication spelling out how often they might (or might not) expect to hear from you will be helpful. To be certain, many attorneys have their own perfectly acceptable style as to how and when they choose to interact and follow-up with their clients. The idea here is to attempt to manage client *expectations*, and spelling out early on in the litigation that the client will *not* be receiving weekly updates may be of significant benefit to you in the long run.

Early written or oral communications with clients providing a brief explanation of what they should expect as a plaintiff in a mass-tort action helps to set the stage. Oftentimes there are "lulls" in the litigation as far as a plaintiff is concerned. While the mass-tort lawyers may be busy for several months opposing a dispositive motion from a defendant medical device-maker, the client is sitting, waiting for the case to resolve or go to trial. An understanding from the client

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that idle plaintiff time doesn't necessarily translate into idle case work-up/lawyer time is important. Some other key information that counsel should consider spending extra time conveying to the client at the beginning of the litigation includes: the possibility of lengthy litigation (especially in a mass-tort action, as the case can be prolonged significantly even after "initial settlement"), the implications of multiple-plaintiff/global settlement fee-agreements, counsel's "expectations" of clients, as well as the amount of interaction and contact to be expected from counsel regarding the case.

Managing your clients' expectations will also require managing your own expectations. What amount of time needs to be devoted to this action given the complexity and volume of the case at hand? What range of resources, both in terms of staffing and costs, does counsel have at its disposal? What are the likely unavoidable costs that will be incurred in working up the expert analysis of the case? At the onset, what are the strengths and weaknesses of the case? How have the perceived strengths and weaknesses evolved as the case moves forward? Has my defined plaintiff changed at all or expanded? Many of these questions cannot be answered with any certainty at the preliminary outset of the filing of the complaint. However, consciously keeping these concerns in mind throughout the litigation and returning to them to assess and reassess the progress of the suit may assist in staying focused. Continual examination of counsel's expectations throughout the litigation process can help ensure that budgets do not run awry, that the essential legal issues are being addressed, and that the overall guiding goals of the suit remain intact.

### **Should the case be designated as complex?**

If you have filed your mass-tort complaint(s) in state court here in Southern California, there is a likelihood your case may be coordinated or deemed complex by the Court. California Rule of Court ("CRC") 3.400(a) states: "A 'complex case' is an action that requires exceptional judicial management to avoid placing unneces-

sary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel."

CRC 3.400(c)(5) specifically identifies "[c]laims involving mass torts" as an action which requires provisional designation as a complex case. However, counsel may be able to make a good faith argument under CRC 3.400(d) that under the court's discretion, a certain case need not be deemed complex "if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine." So what are some of the additional considerations to undertake in determining whether your case should be deemed complex?

In determining whether your case should be deemed complex, some additional factors include the time-sensitive nature of the case in connection with the severity of the injuries. For example, a pharmaceutical mass tort wherein the offending drug has already been pulled off the market from consumers may have different time concerns for the litigant versus the environmental toxic tort action in which the plaintiffs are currently suffering ongoing, worsening life-threatening injuries from continued exposure to a harmful pollutant or contaminant.

Local "fast-track" rules may also play a role in the ultimate designation of your case when it comes to litigating a mass-tort claim that requires imminent attention due to the nature of the injuries involved. For example, the Los Angeles Superior Court's Trial Court Delay Reduction program provides for case management plans that set "goals for disposition" for anywhere between 12 to 24 months from the date of filing. (See Super. Ct. LA County, Local Rule 7.6(c)(2).) Of course, whatever your position, defendants or the court may ultimately seek coordination and/or to designate the case complex and transfer the case to the complex branch of a superior court, such as LASC's CCW or Orange County Civil Complex Center. (See Super. Ct. Orange County, Local Rule 318) ("Those cases which involve causes of action for construction defect or toxic

pollution should be identified accordingly on the face of the complaint at the time of filing so that such cases may immediately be assigned to a judicial officer on the civil complex panel.")

### **Using the most of what you have**

Many firms do not have the same level of staffing resources as the largest firms out there. Not every counsel has the ability to hire full-time registered nurses to review potential cases, retain the services of high-end medical record review companies, and/or establish in-house data teams to process all the information that pours in on these mass-tort cases. For smaller law firms that may not have all the resources of a larger firm, managing a significant mass-tort action is far from an impossible task.

One way to reduce this financial burden is to seek "in-house" staff members with proficiency in medical review. These specialists can double as your pseudo-experts. An assistant or paralegal with a nursing background may be able to wear more than one hat and provide useful dual-duties for a smaller sized firm. Alternatively, hiring a temporary employee with the ability to perform nursing review of intake forms and health questionnaires can limit or eliminate costs normally incurred by large-scale mass-tort operations. Use of these specialists can be accomplished by the smaller firm on a cost-effective, as-needed basis at a fraction of the cost of hiring a full-time nursing staff.

Staffing is also important with respect to dealing with the inevitable large amount of paperwork, data maintenance and client communications. Like medical review staff, a Data Team can be a very important part of managing the day-to-day operations. A Data Team should have the ability to log communications with clients, maintain and organize client-retainer status, maintain authorization and HIPAA information, compile and update fact sheets, organize all client information, navigate client contact, organize all data related to medical records and injuries and claimant status, manage information collection,

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maintain all data on the case, and many other tasks. Of course, the particular circumstances of each case, including the number of claimants you have, will warrant having more, or less, help. Proficient “in-house” staff can go a long way in the initial stages of litigation.

For smaller firms in need of similar assistance and lacking a significant budget, hiring temporary workers with a strong database background can serve the same purpose on a smaller scale. Finding a temp with the right fit and temperament for your particular needs is sometimes as important as the qualifications on paper of the temporary worker themselves. Therefore, don’t be discouraged from trying this approach if the first or second temp worker simply doesn’t work out. Patience may indeed pay off in this scenario.

#### **Client follow-up, or the lack thereof**

It is inevitable that your mass-tort clients will call you throughout the course of the case with a great number of questions on any number of topics – perhaps to request case updates, ask questions about how to respond to various forms of discovery, update you on their medical condition, ask you whether “this case is going to settle,” etc., to name a scant few. In this regard, establishing and maintaining a client database is essential in attempting to log *each and every contact you ever have with the client*. If possible, each phone call should be logged into the database so that any individual speaking with a client may look up *all* information regarding the client’s previous interactions with a representative of the firm. This can be crucial down the line if you need to recount the contact history (or lack thereof) for a non-responsive client in your case. In the preliminary stages, for counsel that may not be able to hire a programmer to develop a database that is specifically tailored to

your case, a simple Excel spreadsheet may be more than enough to get you going.

As it has inevitably been the case in my experience, the level of follow-up from clients is truly all over the place. For example, some clients will be very proactive and diligently return requested time-sensitive documents such as completed plaintiff fact sheets (PFS) and occasionally request case updates. Other clients for that same case will sign the retainer agreement and be extremely difficult to *ever* get in touch with from that point forward. This is why logging a full accounting of all your efforts to contact the client is important.

For the ever non-responsive client, there is always the unfortunate potential for that claimant’s case to be dropped or dismissed for non-prosecution and/or a failure to respond. In that regard, your ability to accurately and completely lay out a “timeline” of attempted contacts (and failed responses on the part of the client) will depend on how well you have input and maintained your database of information. The sheer volume of clients should not be a deterrent to effectively litigating a case. Case management difficulty level should not be exponential relative to the number of plaintiffs in an action. No client should hold up the discovery process by failing to respond to pro-pounded discovery or neglecting to return appropriate medical authorizations or verification forms.

There will undoubtedly be “stragglers” who do not mail in their responses and/or who are unable to be reached via telephone or e-mail. To help combat this, counsel should set earlier internal deadlines to comply with all discovery and have a concrete plan for dealing with non-responsive clients. Requiring clients to return the PFS or other discovery days (or even

weeks) earlier than necessary will give attorneys and their offices sufficient time to prepare the responses for submission and round up the remaining non-responsive clients.

Also consider making personal calls from the office to remind those difficult clients of the impending deadline surrounding the document at issue, and stress the importance to *their* case in promptly returning the information. They should understand early on that any success in resolving their case will depend in good part on their ability to timely and completely respond to all information requests from them throughout the entirety of the case.

#### **Conclusion**

This article is a merely a collection of thoughts that might assist you in thinking about how you want to effectively manage your mass-tort action from the earliest of stages. These mass-tort claims always require a massive amount of attorney and staff time, dedication, and effort. However, with the ability to recognize potential time and cost-saving measures early-on that can eliminate unnecessary expenses, work and frustrations, counsel can effectively focus more on the important substantive matters of the case. Litigating a mass-tort claim is by no means an easy feat, but with the right type of early case management, counsel can devote a lot more attention to the essential elements of litigating the claim from the outset.

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