

5 Steps to Successful Mass Tort Management

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Update on November 10, 2021: For a more in-depth discussion with the authors of this article, listen to the latest Carlton Fields podcast: [Tips and Strategies for Successful Mass Tort Management](#).

Whether you've just been called by a client in a first-of-its-kind or potential mass tort - think [3M Co.](#)'s ear plugs,[1] [Tesla Inc.](#)'s autopilot[2] or [Peloton Interactive Inc.](#)'s treadmills[3] - or you're diving into mature mass tort litigation like asbestos or tobacco, the time will come when you're asked to handle hundreds of pending lawsuits, or you suspect your handful of lawsuits is about to multiply.

So here's the scenario: It's 3 p.m. on a Friday, and it happens. The handful of lawsuits filed against your client over that hot-button product grew exponentially overnight. Suddenly, complaints are flooding in.

Your instinct is to immediately triage the filings, assess your defenses and identify the silver bullet that wins the case. But you know your client wants answers to immediate questions: "How do we manage this influx of cases, how do we do it efficiently, and, most importantly, what's our plan?"

Because you're a good lawyer who is attuned to your client's business, you knew this day would come, and you have ready responses to each of these questions. But before you hit send on your email recommending a particular course of action, consider whether it takes into account the following strategic tips to make your mass tort management plan a success.

1. Learn your client's goals.

Learning your client's mass tort litigation goals is an obvious must. You're reading this and thinking, "Of course I do this. I listen and hear my client say things such as, 'Try every case, win at all costs'; 'I want you to find a quick resolution'; or 'we need to manage this efficiently and try cases when we have to but also look for good value resolutions along the way.'"

Resist the urge to hear those statements and charge off to take the hill. Each statement is full of assumptions - some of which may differ, or even conflict.

For example, in discussing the strategies you might employ to effectuate a "quick resolution" goal, you may later learn that the client's goal is more accurately described as "targeted discovery plus motion practice equals quick resolution."

Likewise, having in-depth discussions that question and outline how to achieve your client's goals will likely reveal unshared client expectations. And, of course, having a frank discussion about the cost of achieving such goals will serve to stress-test your client's initial assumptions.

One essential component in this process is a threat assessment. Goals may shift depending on several factors, including the potential for large damage awards; the business risk of engaging in protracted litigation versus resolving quickly; the potential lifetime of the litigation; and the plaintiffs bar's appetite for the mass tort.

Finally, once you are comfortable with your client's goals, make sure they are at the top of your mind before each strategic decision. Again, you may be thinking this is obvious. It is - but it is also easily forgotten.

Any mass tort litigator, by nature, is a fierce competitor who wants to defeat the opponent and win the case. Just make sure you stay true to your client's definition of "win."

2. Know your role.

Whether you are trial, national or local counsel, or advising the client on a discrete set of legal or scientific issues, it is critical to know your role - and how it fits into the client's goals.

Your role may be informed by the scope of the litigation, geography, courts or issue specialization. But whatever it is, modern mass tort litigation invariably involves multiple law firms working together as a virtual firm.

This makes knowing your role - and what you're accountable for - more important than ever. You should also understand the roles of others, so that you can properly manage or support them as needed.

Build your relationship with, and earn the trust of, your virtual firm partners. Treat these partners as your office colleagues. This is no time to compete or jockey for business. Clients hate it.

Worse still, it hurts your defense and leads to bad client service. The seamless flow of multiple firms working together toward a client's goals is a powerful force - and it begins and ends with knowing and fulfilling your role.

3. Choose your team wisely.

When assessing a growing mass tort, you need the right people at the beginning. Examine the volume of cases, your technical expertise and the expected jurisdictions in which you'll be defending.

Be honest with yourself about your capabilities. We all want to - and think we can - handle everything. But that is not always best for your client. So make sure to look beyond your firm.

More than ever before, the reality of the virtual present allows for a creative approach to team building. Don't overlook it. Importantly, make sure you're bringing in team members - both in and outside your firm - who contribute to the diverse perspectives that are critical to modern-day litigation success.

Determine at the outset who are your best litigation manager, strategic thinker, document and ESI lead, trial lawyer, science and expert witness guru, and legal issues and appellate specialist. Don't wait to enlist them until the issue you need their help with pops up. Have them ready and waiting, so that they have the right mindset and availability when needed.

Do this even if the work doesn't immediately call for their involvement. Keep them up to speed on case development, even if you need to do it on your own dime. Once you're knee-deep in managing dozens or hundreds of cases, team integration is much more challenging.

Define your team member's roles and accountability. Establish the chain of command and a central strategic coordinator to ensure consistency. Mandate regular team communications, either through a distribution list or through regular meetings. Implementing these practices early will ensure consistency in client service, legal positions and results.

And while you're busy identifying lawyers, don't forget one of the most important members of any mass tort team: your paralegals. They are the engine of your mass tort team. So wisely choose individuals with the organizational skills and speed to handle the case volume and complexity that is invariably mass tort litigation.

Finally, make sure your client's goals are shared with the entire team, including the most junior members. It is all too easy to assign junior team members discrete tasks without taking the time to explain the pieces of the puzzle.

This is often overlooked especially when litigation is new, but taking the time to do so will pay long-term dividends. Before long, you'll have junior team members who can advise and issue-spot within the context of the long game and the client's goals.

4. Find the documents and master them.

In any civil litigation, but especially mass torts, company documents can make or break your case. Until you find, analyze and discuss them with your client, your threat assessment is incomplete at best, and your client's ability to identify its goals may be delayed. So jump on it.

Immediately put your document and ESI manager to work; scope out the search; identify the custodians; and start your collection and analysis. Nothing derails litigation into a painful sideshow more easily than missed custodians and documents. The client is counting on you to ask the right questions of the right people.

Once you feel confident you have identified the document universe (yes, there will always be surprises later), master it. Review the documents carefully, noting key facts and themes. Think like a plaintiffs lawyer: Imagine how they will be characterized and taken out of context, so that you are giving your client a candid assessment of risks they may present.

Following this review, revise your threat assessment and reevaluate the client's goals in light of what you've learned. Should you change your tactics to be more bullish on maintaining a hard-line defense? Or are smart, targeted resolutions in your client's best interest? The documents play a critical role in making these decisions.

5. Establish efficiencies at the outset.

Ideally, you will identify a defense strategy that concludes the litigation before it mushrooms into a large and recurring client problem.

For example, is there an early surgical strike you can take on the plaintiff's shaky causation science? Do the cases merit an immediate case management or Lone Pine order that winnows the cases and discourages opportunistic plaintiff's lawyers from filing speculative cases? Or is there a resolution strategy that makes sense for the client, brings certainty and eliminates future defense costs?

But when early solutions don't exist, you must plan for protracted litigation. Yes, of course, you are planning the legal, discovery and trial strategy - that's a given. But don't miss this opportunity to establish the structure and processes to manage your client's mass tort portfolio efficiently.

Some initial steps you should consider include:

- Identify the best software program to manage your cases. Will Excel and your firm's stock document system suffice? Or is a specialized program needed? Does the volume require an outside vendor's assistance? What facts and issues must you track regularly?
- Build templates. Even if the litigation is new, you will quickly learn what issues lend themselves to templates and what can be standardized. Not only does this lower defense costs, but it also improves consistency across jurisdictions and minimizes errors.
- Determine whether you need a repository to track court orders and expert and corporate witness testimony. If so, build it with purpose, so you can summon information on demand. Mobilizing this information quickly will be critical to strategic decisions down the road.
- Set up alerts and monitor dockets, so you can identify new filings and trends. Getting a few days or weeks ahead of a growing problem is invaluable to crafting your defense and managing your team's bandwidth.
- Keep a roster of your team along with their responsibilities, whether by issue, jurisdiction or skill set. Share it with your client, so they know their roles and responsibilities.

There's no easier time to set up this system than at the beginning. It's infinitely easier to build the structure early, and revise or cut parts you don't use later, than it is to attempt to build a structure after you're already swimming in an ocean of data.

Ultimately, while there is no magic formula for managing a mass tort docket, implementing these tips into your management plan will help you maximize efficiency and direct resources toward winning - not just defending - your next mass tort engagement.

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