

The Art Of The 'Science And Expert Team' In Mass Torts

By **Adrienne Busby, Victoria Calhoon, Colleen Hennessey and Jennise Stubbs**
(July 8, 2019, 5:40 PM EDT)

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 best practices for the science and expert team working in collaboration with other virtual law team members in drug and device mass tort litigation.

"Science is the process that takes us from confusion to understanding."

—Brian Greene, professor of theoretical physics at Columbia University

Science is at the heart of every lawsuit involving drugs or medical devices. Fundamentally, drug and device companies are scientific companies pursuing scientific solutions to complex medical problems. The claims that plaintiffs assert in litigation — challenging product design, manufacturing, and warnings — are scientific claims. And because these issues rest outside of the knowledge of the lay juror, expert testimony is required by both sides to advance the case.

In short, science is fundamental to every aspect of mass torts in drug and device litigation, and so too is the science and expert team.

In the virtual law team context, the science and expert team is a critical component of the collaborative approach to defending drug and device litigation. The science and expert team does more than get into the weeds of scientific issues, know key journal articles inside and out, or identify, retain and prepare experts for a case.

Members of the science and expert team work with both company and external experts to develop defense trial themes, formulate plans to address and challenge opposing experts' opinions, and arm other members of the virtual law team with the information needed to execute on other key strategic aspects of the litigation as described in the articles on the trial team[1] and law team.[2]

The science and expert team also plays a critical role at trial.



Adrienne
Busby



Victoria
Calhoon



Colleen
Hennessey



Jennise
Stubbs

The virtual law team is most effective and efficient when science is well integrated into the case strategy at an early stage and there is open collaboration among members of the science and expert team and other virtual law team members. In this article we highlight best practices for the science and expert team in drug and device mass tort litigation.

The Benefits of an Organized and Experienced Science and Expert Team

To some degree, the science and expert bench will form organically as a case evolves and matures. In the mass tort context, however, it is important to build a science and expert team early and intentionally. One natural way to organize the team is by the key scientific disciplines that will need to be represented to mount a successful scientific defense. This allows individual team members to become subject matter experts, focusing on plaintiff and defense experts of the same discipline as well as relevant company evidence and witnesses to get a 360-degree view of critical scientific issues and evidence.

Over the life of a mass tort, these members of the science and expert team play a vital role in sharing their hard-won knowledge with other virtual law team members. Among other things, the science and expert team can prepare science day presentations to educate the broader team, create teaching outlines for particular topics or key fact witness depositions, and compile lists of key evidence or literature that can be used throughout the life of the case.

When a science and expert team is formed early with experienced members at the helm, it can provide insight on various matters better tackled sooner than later in a mass tort. In the early stages when case management orders are being negotiated, the science and expert team can provide insight about realistic time frames to complete expert reports, which may need to be longer for the earliest cases where common issue reports need to be developed.

The science and expert team is uniquely positioned to consider whether a consulting expert should be retained to evaluate records or data before they are given to a testifying expert. Further, an experienced science and expert team can develop communication strategies with expert witnesses at the outset, which serves to protect work product, foster efficient lines of communication and information sharing with experts, and provide a clear framework for tracking producible correspondence. A well-oiled science and expert team also can provide resources and guidance as fact discovery develops to ensure that individual cases are worked up and ready for expert review when that time comes. In sum, the early and intentional creation of an experienced science and expert team has a positive impact on all aspects of mass tort litigation.

Integrate Science Across the Case

The science and expert team does not just handle expert reports and depositions, particularly in drug and device mass tort litigation where scientific issues and allegations permeate all aspects of a case. Science and expert team members should examine the plaintiff's claims and a company's defenses to identify litigation themes and vulnerabilities, as well as to begin the process of identifying the types of subject matter experts needed for the litigation.

The science and expert team also should assist with deposition preparation for corporate witnesses who are themselves technical experts. In our collective experience, it is a best practice to have a liaison from the science and expert team on the company case team to foster communications about themes,

evidence, and internal expert witnesses. Similarly, it is critical for a science and expert team liaison to work with the trial team on strategy decisions and the offensive and defensive roles of expert witnesses at trial. Having a science and expert team liaison on a trial team also fosters open communication about report deadlines and trial schedules.

Virtual law teams face a constant challenge of ensuring consistency across cases where multidistrict litigation runs in parallel to state court cases. From the science perspective, the teams must navigate different discovery and admissibility rules, as well as the reality that internal and external experts simply cannot be in two places — or cases — at the same time. These issues require a deep bench of experts.

The science and expert team must thoughtfully coordinate expert resources across the various cases not only logistically, but also substantively. Experts in the same or similar disciplines must be independent, but consistent with one another to advance key litigation themes. The science and expert team is able to coordinate between and among experts and stay one step ahead of any conflicts, while making sure each expert maintains his or her independence. This protects not only key litigation themes, but also the investment made in a particular expert's time, which can be a significant in mass torts.

The science and expert team provides critical support for the law team as well. Subject matter experts on the science and expert team can identify the strongest sources of support in key evidence and expert reports for motions for summary judgment. Moreover, their input can be invaluable for Daubert or Frye motions to highlight substantive bases to exclude the opinions of an opposing expert in whole or in part and to insure that, in attacking the opposition, positions are not taken that will jeopardize the team's own experts.

Motions in limine are another key area for collaboration to ensure that the motions are narrowly tailored to preserve an expert's ability to rely on a certain piece of evidence while excluding evidence that may be prejudicial. Here, familiarity with the expert opinions is critical. The law team can more efficiently focus on their critical tasks if they can collaborate and rely on the science and expert teams for their knowledge. Where the science is carefully integrated across mass tort litigation, this kind of collaboration maximizes efficiencies and yields the best results for our clients.

Consistent Management of Experts is Key to Success

Expert witnesses are people. They have busy day jobs and high-level careers outside of litigation, and, more often than not, the fast-moving world of mass tort litigation with adversaries and deadlines is completely foreign to expert witnesses. When we ask expert witnesses to step outside of their world and enter ours, we owe them the courtesy of a guide.

Regardless of which attorney defends the expert's deposition or presents her testimony at trial, it is a best practice to assign a science and expert team member to be the constant point of contact for the expert throughout the litigation and across multiple cases. There are multiple benefits to this approach. When science and expert teams are organized by subject matter, those team members can work with experts in similar specialties across the litigation. This allows the team to ensure consistency across the litigation and across experts within the same specialty, to safeguard key themes, and to avoid scenarios where one defense expert may be pitted against another.

Based on our experience over multiple mass torts, we recommend at least one dedicated primary contact or, if possible, two primary contacts be assigned to each expert for the life of the litigation so that a strong working relationship with the expert can grow over time. These primary expert contacts

help coordinate the expert's time commitments and schedule and manage the tasks assigned to the expert to make sure that it is substantively and strategically appropriate. Further, the primary expert contact is uniquely positioned to review the expert's time and billing with an eye toward the client's budget, maximizing efficiency, and minimizing duplication.

Case and trial teams may change, but expert contacts should remain constant whenever possible. Making an expert's primary contacts the same across cases also makes it easier to have honest discussions with the trial team about an expert's availability, and the limits of an expert's expertise and to provide recommendations on the best way to prepare each expert for testimony.

These contact persons not only facilitate communication within the virtual law team, but they also build rapport and trust with the expert herself. An expert who is handed off from case team to case team, trial lawyer to trial lawyer, may quickly tire of the shuffle.

On the other hand, an expert who has a consistent, trusting relationship with her primary contacts is more likely to stick around for the marathon that is mass tort litigation. To that end, it is vital to have primary expert contacts who have the soft skill of diplomatically communicating the demands of the trial schedule to the expert and balancing that need with continually supporting the relationship between the expert and the science and expert team.

The Science and Expert Team Has a Place at Trial

When trial arrives, science and expert team members are instrumental, both behind the scenes and at counsel table. Science and expert team liaisons help the trial team identify how to carry science themes through the trial. As the internal subject matter experts, science and expert team members can help translate the science to a jury. Indeed, sometimes it takes understanding the finer points to know how to give lay jurors an accurate 10,000-foot view of a highly technical topic.

Primary expert contacts should serve as the gatekeepers for each testifying expert. They can refine trial outlines and prepare the witness before she takes the stand, but also protect the expert from topic creep. That is, there can be a strong temptation at trial to ask an expert to veer outside her lane of expertise to fill a hole in a case or eliminate calling an additional witness, but the expert's primary contact can advise the trial team about the risks and benefits of that approach. Among other things, allowing an expert to wander into other subjects undermines that expert's credibility, and at its worst, could impair that expert's ability to testify in later cases.

Science and expert team members need not be relegated to the war room. As members of the trial team, science team members can help navigate shifting themes and real-time surprises at counsel table and these internal subject matter experts can be nimble litigators who can help pivot the defense accordingly and may be in the best position to handle the questioning of opposing experts based on their deep understanding of the science behind the litigation. In jurisdictions where expert discovery is nonexistent or very limited before trial, having science and expert team members on the trial team can be critical to the defense.

Conclusion

Science drives the defense of mass torts, from our clients' business to the plaintiffs' claims to the evidence presented at trial. Thus, an experienced science and expert team is a critical component of a well-functioning virtual law team. Blending deep knowledge of the scientific themes, creating and

cultivating relationships with key expert witnesses, and supporting and collaborating with the various members of the virtual law team to advance the client's defense — that is the art of the science and expert team.

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

Adrienne Franco Busby and Victoria R. Calhoon are partners at FaegreBD.

Colleen M. Hennessey is a partner at Peabody & Arnold LLP.

Jennise W. Stubbs is managing partner at Shook Hardy & Bacon LLP.

FaegreBD partner Jessica Benson Cox also participated in drafting this article.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firms, their clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.law360.com/articles/1141175/trial-counsel-s-role-on-a-mass-tort-virtual-law-team->

[2] <https://www.law360.com/articles/1151795/in-virtual-teams-for-mass-torts-the-law-team-is-critical>