

## Trial Counsel's Role On A Mass Tort Virtual Law Team

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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. Since the early 1990s, when one of the first virtual law teams was created in response to the silicone gel breast implant litigation, the virtual law team has been a model for mass tort defense.



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As part of a series about virtual law teams in mass tort litigation, this article addresses the role of trial counsel in connection with the other key parts of any virtual law team.

The job of trial counsel is, in the simplest terms, one of translation. Trial counsel must be able to synthesize an extensive record in a mass tort litigation, which can involve millions of pages of documents and testimony; identify the key scientific and medical themes; develop and refine the story of the company's conduct and present the defense of the company in a comprehensible and persuasive fashion. Thus, throughout the life cycle of a mass tort litigation case, trial counsel must maintain a persistent focus on the end product: an effective courtroom presentation to the jury.



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However, a company's defense during trial is not developed by trial counsel in isolation. Rather, the ultimate courtroom presentation is a culmination of the work from the prior phases of the litigation. The strength of this presentation depends on the building blocks provided from these earlier stages. The value of the trial counsel in the virtual law team is to provide this unique perspective throughout the litigation to ensure that the end product is as complete, persuasive and digestible as possible.



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Each spoke in the proverbial wheel of a virtual law team plays a central role in the success of the client at trial, and good trial counsel understand their role in relation to the other functions that make up a virtual law team.

### National Coordinating Counsel

Trial counsel should work closely with national coordinating counsel throughout the life of the case to identify strategic decisions that will affect the client's defense during trial, and to ensure that the client is fully apprised of the impact of those decisions during trial. From identifying



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and explaining trial logistics to ensuring the client is fully informed of the risks and benefits of going to trial, trial counsel and national coordinating counsel should work closely together. National coordinating counsel and trial counsel should also consider and discuss with the client the available alternatives to trial, and both national and trial counsel play a key part in ensuring that the client is involved in developing the strategy for trial.

## **Settlement**

Trial counsel focuses on winning an individual case, rather than resolving the entire mass tort.

Trial counsel can, however, help position the client for a favorable settlement by identifying themes and strategies that will have a positive impact on the entire litigation. For example, if there is a clear statute of limitation argument, trial counsel can help develop that defense in an individual case through depositions, discovery and motions practice. Settlement counsel can then identify a larger group of cases that might be subject to that defense. After trial, trial counsel can work with settlement counsel to identify the themes that worked during trial so that those themes can be employed in discovery and motions practice outside the trial context, as well as in settlement negotiations.

## **Science/Experts**

Trial counsel, of course, must understand and fully embrace the specialized technical issues that arise in mass tort litigation. The science team is a vital resource for trial counsel in that role.

Trial counsel also should work closely with the science team to ensure that the best scientific experts can explain key trial themes and messages during deposition and at trial. While the science team identifies relevant scientific literature and testing that will become the science story at trial, trial counsel must ensure that the science is compelling to a jury and is communicated in a persuasive fashion. The science team members also play a critical role in helping to identify important documents and scientific issues that will influence the outcome of the trial, preparing expert witnesses for direct and cross examination, and ensuring experts are fully informed about key developments during the trial.

## **Discovery**

Discovery represents a pivotal phase in any mass tort litigation. During this stage, the raw materials of the trial themes and company story are discovered, tested and refined. Trial counsel's laser focus on the development of trial themes can provide a useful perspective to ensure that every important document and every key admission is secured with the jury presentation in mind.

There are several instances where trial counsel can provide value to the virtual law team in discovery. For example, trial counsel can provide strategic input identifying key records or documents that should be requested or pursued given previous trial experience. In every case, there are important witnesses who will be the key messengers to the jury for the plaintiff or defense themes at trial. The trial team can assist the discovery team to ensure that the testimony elicited at the depositions will support the defense trial themes in substance and be in a format that will be most effective for trial. Overall, the ultimate goal of trial counsel at the discovery stage is to ensure that there are no gaps in terms of documents or deposition testimony that will be needed for the trial presentation.

## **Company Story**

Trial counsel can play a key role in ensuring that the company story is consistent with and proactively advances the themes the company seeks to present at trial. The plaintiffs in mass tort litigation will use documents created by company witnesses and video of company witness depositions at trial to cast the company and its handling of the relevant product or incident in a negative light. Early involvement of trial counsel with company witness depositions can ensure that the testimony elicited, on both cross and direct examination, will be consistent with the company's trial themes.

Central to this role is ensuring that specific responses to the plaintiffs' claims do not drown out the broader affirmative story the company seeks to tell about its product and conduct. Trial counsel can offer a broad perspective on how the key documents and facts underlying the plaintiffs' allegations will relate to their expected trial themes and strategize about the best witnesses and documents to leverage in response. Involvement of the trial team at the company witness deposition stage can help ensure that the testimony elicited in response to the plaintiff's allegations complement and enhance the company's big-picture themes.

Further, it can be useful for trial counsel to provide input on the direct examinations of company witnesses to ensure that they are given an opportunity to squarely address any harmful testimony elicited by the plaintiffs at the deposition. This is a key opportunity to address any challenging issues, documents or admissions and to develop helpful testimony explaining the company's story from the employees' perspective. These examinations may be played by video at trial and can be an important component of the jury's understanding of the company's actions. Thorough direct examinations may obviate the need or lessen the burden on any live company witness presented at the trial to the jury.

## **Law**

In addition to the factual record and company story, trial counsel must always be attentive to the specific legal questions that the jury will answer in its verdict form. The earlier the virtual law team grasps a deep understanding of the legal questions that the jury must answer, the better for the trial team to be prepared for the key aspects of the trial presentation. Trial counsel can offer, at the earlier stages of the litigation, an understanding of the law that will be given to the jury through the court's instructions, which can be vital to developing the necessary facts to support the defense's legal arguments at trial and in pretrial motions. There are several examples of overlap between the law and trial counsel roles.

First, trial counsel's focus on the specific jurisdiction's requirements for admission of expert testimony can help the team identify strategic ways to narrow the plaintiffs' claims before trial. If a plaintiffs' expert cannot satisfy the standard for reliable testimony on a particular aspect of the plaintiffs' claim, counsel can elicit the necessary testimony from the plaintiffs' experts to support pretrial motions. Trial counsel's input on this issue can also help the defense shield its own experts from similar attacks by the plaintiffs.

Second, both trial and law counsel will be focused on the causation standards applicable in the trial jurisdiction to inform pretrial fact development. Zeroing in on the specific causation standard applicable in the trial jurisdiction can help the defense refine its own experts' case-specific causation opinions and prepare these experts for the causation questions they will face at their depositions and at trial. In the same vein, understanding the relevant standards for proximate cause can help the defense identify the right questions to ask the plaintiffs' prescribing physicians and to leverage this testimony in pretrial motions.

Finally, idiosyncrasies in the elements of the claims available to the plaintiffs in the trial jurisdiction can at times have a significant impact on the facts and arguments presented at trial. For example, a local product liability statute may heighten or relax the requirements for demonstrating a claim, or offer additional bases for a product liability claim. Trial counsel will be focused on these details and how they affect pretrial briefing, jury instructions and verdict form, and ultimately the entire presentation at trial.

## **Trial**

The ultimate product of the collaboration in the earlier stages of a mass tort litigation is the courtroom presentation at trial. This presentation entails every interaction between the defense and the jury including jury selection, opening statements, cross-examination of the plaintiff's fact and expert witnesses, direct examination of the defense fact and expert witnesses, and closing arguments. Each of these phases of the trial presentation provide unique opportunities for the trial team to communicate the defense themes developed throughout the litigation to the jury.

For example, the opening statement provides the jury an overview of the key company story and a concise outline of the scientific themes to be fully explained by the defense experts. The cross-examination of the plaintiff's witnesses can be built upon the key documents obtained and deposition testimony elicited in the discovery stage. The closing argument draws together the company story and scientific themes within the context of the legal framework of the plaintiff's claims and explains the central reasons for the jury to find in the defense's favor on the verdict form. None of these components will be complete and effective without careful consideration and strategic decision-making in the earliest stages of the mass tort litigation.

## **Conclusion**

In the context of mass tort litigation, trial counsel plays a significant role in making sure that the entire virtual law team stays focused on the ultimate courtroom presentation. Trial preparation should begin at the start of a mass tort case and trial counsel's contribution to the virtual law team rests in the key skill of viewing the case through the eyes of the ultimate audience for the defense: The jury. Every member of the virtual law team benefits from this perspective and the client's goals can be efficiently achieved by involving trial counsel at the earliest stages of a mass tort litigation.

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