In with the Old and in with the New:

*Perspectives from In-House Counsel on Existing and Emerging Challenges in Toxic Tort Litigation*

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Albert Einstein once said “... the distinction between past, present and future is only a stubbornly persistent illusion.” This quote resonates true in the area of toxic tort litigation, in which counsel are challenged to stand both in the future and the past simultaneously. This article addresses three areas that in-house and outside counsel must master in order to keep up with contemporary practices and technology while maintaining a firm grasp on the history of the substances and products upon which toxic tort litigation is centered.

I. Working with In-House Counsel to Develop New Corporate Witnesses

Corporations involved in toxic tort litigation face unique challenges when it comes to producing corporate witnesses. Pursuant to Federal Rule of Civil Procedure 30(b)(6), a corporation is required to produce one or more witnesses who can testify to all relevant information known by or reasonably available to the entity regarding the matters described with reasonable particularity in the deposition notice. As a result of lengthy latency periods, many toxic tort claims are often brought long after the corporation's best witnesses, those with firsthand knowledge or experience with the product, are available. Additionally, through complex and/or multiple acquisitions or divestitures, many corporations have liability for products they did not create or through businesses they no longer run; thus, information and documentation regarding those products is often lacking or even non-existent.

Developing a corporate witness is often a significant undertaking and should not be taken lightly. The process of developing a new corporate witness can take up to a year and requires significant efforts from in-house and outside counsel. An inadequately prepared witness can result in sanctions against the corporation, adverse inferences and/or damaging testimony, all of which may forever bind the corporation.

The process of preparing a new corporate witness consists of three main components: conducting a factual investigation of the information that will form the basis of the witness testimony, selecting a witness, and preparing that witness.

A. Conducting an Investigation

Early preparation is key to success. Once a corporation has notice of any potential litigation regarding a product or substance, it should begin an investigation to ascertain what evidence the corporation has regarding the potential claim and to identify individual(s) who may be qualified to testify as a corporate witness. Waiting until the service of deposition notice will invariably result in poor preparation and disappointing testimony.

If replacing a prior corporate witness in a long-standing litigation, the corporation should assemble all documents that have been produced in discovery, all interrogatory responses, and prior deposition transcripts of all witnesses previously deposed on behalf of the corporation in all jurisdictions. It is also an opportune time to look back at litigation holds that were put in place at the onset of the litigation (if available), to see what documents the corporation was required to preserve, then use that as a map for the search.

Whether preparing for new litigation or long-standing litigation, interviews should be conducted of current and former employees with personal knowledge regarding the substance or product associated with the litigation or information regarding the corporation’s document archive.
Many corporations struggle as to whether they should undertake a search for documents in the public realm. Advancements in technology have exponentially expanded the universe of documents that are publicly available. The United States National Archives is frequently relied upon as a source of historical documents. Auction sites such as eBay list old catalogues, products, and instruction manuals for products dating back to the 1800’s. Some products and their association with adverse events are listed in the database maintained by, for example, FDA or CPSC. It must be assumed that plaintiffs’ counsel will be conducting an extensive Google search for anything regarding your products. Whether the results of those searches are used as part of corporate witness preparation is a separate decision not addressed in this article.

B. Selecting a Witness

Selection of the appropriate witness is essential. A corporate witness serves as the personification, “the face” of the corporation and its documents, and is key to the support of the corporation’s defense strategy. As a threshold matter, there are certain characteristics that comprise a good witness. The witness should possess an excellent memory, be presentable, be a clear communicator, appear credible and trustworthy, remain calm under pressure, and be likeable. The witness must also be available for the volume of cases in the litigation and be available for travel nationwide (if necessary) for the defense of the corporation. Often, full-time employees’ schedules and responsibilities prevent them from being available to serve as the primary witness in a high-volume nationwide litigation. In many instances, corporations rely upon retired employees with knowledge of facts and circumstances of the underlying litigation. Often times, the retired employee may have been employed during the time in question. Above all, the individual must be committed to the corporation for the reasonably foreseeable future.

In some instances, one witness is insufficient and the corporation should consider producing multiple witnesses in defense of a particular matter. For example, the defense may require one witness capable of describing the design, research, and warnings associated with a product or substance and another witness to testify to the health and industrial hygiene issues in the case.

Finally, there is no need to be wed to a particular corporate witness; if the initial individual selected does not stand up to the preparation, or if an existing witness is no longer capable of acting in that capacity, replace that witness. Corporate witnesses can and should be changed if circumstances require it. If a current or potential corporate witness is not as dedicated or effective as anticipated, select someone else. Many corporations that engage in this process will select more than one individual to prepare in the event that one witness is unavailable or ineffective.

C. Preparing the Witness

The witnesses are required to be knowledgeable about all matters indicated in the deposition notice and all information necessary for the corporation’s defense. If the witness does not know the answer to a question, the corporation may be precluded from introducing evidence on the topic. As such, review and understanding of all information and documents collected during the investigation is required.

The witness should be ready to respond to all documents presented at the deposition, including documents found though publically-available sources during the investigation, but not used to prepare the witness because they were deemed unreliable. If presented with such a document, the witness should be able to explain the rationale for not relying upon that document.

Although this should go without saying, make sure the witness understands the basics of the deposition. Go over the types of objections with the witness and “tricks” that plaintiffs’ counsel could use to rattle
them or elicit damaging testimony against the corporation. Similarly, the corporate witness should be prepared to refrain from answering questions that are outside the scope of the deposition notice served.

Finally, while outside the scope of this article, it is imperative that a Rule 30(b)(6) witness also be able to answer questions pertaining to electronic preservation and production matters. Failure to prepare the corporate witness on these issues or failure to expressly limit this issue from the deposition could result in confusing or contradictory testimony, which may prompt allegations of spoliation, requests for sanctions, and the service of unnecessary document demands.

II. Alternative Fee Arrangements

According to a recent American Lawyer article, about 80% of corporate law departments stated that one of their goals in 2017 was to increase the use of alternative fee arrangements (“AFAs”). With a continuing focus on the use of AFAs, both outside counsel and in-house counsel should be well-versed in the various types of AFAs that can be considered for different types of matters. The right AFA, of course, takes a good amount of upfront discussion between the client and the firm, so that the scope of work – and expectations – are clear and known. The end goal should be an AFA that is considered a “win-win” for both sides – the client receives certainty for its budget and sufficient value and efficiency from the firm, and the firm receives fair compensation for the work performed and an incentive that aligns with the client’s needs. In the end, though, law firms are not selling widgets and their clients know that. In-house counsel is paying for sophisticated legal advice and both parties are typically relying on the trust, mutual respect, and loyalty that is inherent in the attorney-client relationship. As such, any AFA should be based on, and evaluated in light of, that foundation.

Any fee arrangement that is not exclusively dependent on the hourly rate can be considered an AFA. Below is a list of AFA structures that can be applied depending on the matter. This is not meant to be an exhaustive list and many of these structures can be used in tandem.

1. **Capped Fee** – Limits the total cost of an agreed-upon amount of work.
2. **Collared Fee** – An agreed-upon fee is established with a percentage collar. If the value of the fees is above or below the collar, the law firm and client agree on a percentage (typically, 50%) of overage/underage to be credited or paid.
3. **Contingency Fee** – Specifies that the firm will be paid only if it achieves a financial recovery or other agreed-upon result for the client. Typically, the firm will receive a percentage of the recovery.
4. **Defense Contingency** – Establishes an expected outcome for a defendant and specifies that if the firm obtains a more favorable result, it will receive a portion of the savings or a multiplier of the time already worked.
5. **Flat Fee** – Sets an agreed-upon sum of money for a discrete amount of work.
6. **Flat Fee with Shared Savings** – Sets a flat fee while allowing the firm to track the work on an hourly basis. If, at the conclusion of the matter, the hourly fee is lower than the flat fee, the client and firm share the difference.
7. **Holdback** – Specifies that the client will withhold an agreed-upon portion of the total fee unless the firm obtains a particular result.
8. **Partial Contingency (Success Fee)** – Sets a bonus the firm will receive in addition to its hourly, flat, or capped-fee arrangement if the result meets agreed-upon criteria.
9. **Phased Fee** – Sets agreed-upon fees, perhaps using different structures, for discrete phases of a matter.
Toxic tort matters, depending on their complexity, are typically amenable to flat fee arrangements through summary judgment. When possible, internal firm expenses, such as copies, travel, and meals, should also be included in any AFA.

Of course, firms should be mindful of their ethical considerations related to billing and fee arrangements when structuring an AFA with a client. Also, the terms of any AFA, no matter how simple, should be memorialized into a written agreement so that both parties are clear on scope and expectations. Litigated matters tend to last over extended periods of time, memories fade, and parties involved with the engagement from either the client or the law firm can change. Neglecting to memorialize the terms of the AFA at the outset can lead to uncomfortable discussions between firm and client during the representation or at the end of a matter.

III. E-Discovery: A View from the GC’s Office

To make it onto a corporation’s legal counsel panel and then remain there, outside counsel must become familiar with technology. While the senior partner may survive a few years longer without speaking techno-babble, he or she will only do so if surrounded by junior lawyers and IT staff that are fluent in the language. This is especially true in the realm of discovery, where the legal profession has undergone radical changes in less than a decade to keep up with the ever-accelerating reliance on technology. To maintain value and avoid obsolescence, firms must embrace this change.

A. Rules of Civil Procedure

The old era of “relevance” often resulted in lengthy, budget-busting discovery forays yielding reams of useless material. While associates celebrated their billable hours at bonus time, exasperated CFOs fumed at the cost of even routine litigation. In the new era of “proportionality,” CFOs are gaining the leverage needed to rein in costs.

Under the amended Federal Rules of Civil Procedure, judges have discretion to restrict overbroad discovery using factors that include (1) the importance of the material in resolving the issues at stake, (2) the amount in controversy, and (3) whether the burden or expense of discovery outweighs its benefits. As a result, rather than allowing parties to accumulate information of the broadest sort, courts now expect litigants to tailor their requests based on proportionality and reasonableness.

Even with the narrowed scope of discovery, collecting, and parsing the terabytes of electronic data generated by most corporations requires sophisticated tools.

B. Data Analytics

While engineers and scientists may have had a head start, lawyers are working to narrow that gap and keep pace with technology. Employed in numerous industries, data analytics is the science of examining raw data with the purpose of deriving conclusions about that information. A recent study by the Coalition of Technology Resources for Lawyers resulted in noteworthy findings regarding the use of analytics by in-house legal departments across a range of industries.

A majority of departments (56%) reported that they rely upon data analytics to carry out their eDiscovery programs. Respondents identified document culling, early case assessment and relevancy review as primary tasks for data analytics. Nearly one third of respondents used data analytics in the administration of their legal matter management, billing, and budgeting. Similarly, one third used analytics for information governance, including data migration, content characterization, and records compliance.
Not only did the study reveal widespread use of analytics by corporate law departments, many respondents projected near-term budget increases for this work.

C. Tiered Discovery

By utilizing data analytics in a phased or tiered manner, the modern practitioner can simultaneously churn through massive data sets and drive down the cost of discovery at the same time. For example, a case involving 30 custodians might divide naturally into three tiers: five key people possessing relevant data, ten with a less significant relationship to the matter, and fifteen ancillary individuals. Through targeted search terms, a party can test for responsiveness, thereby identifying the richest data sets and reducing the scope of data for collection, processing, and review. If opposing counsel pushes for a fishing expedition from all 30 custodians, the party can defensibly point to a much smaller universe of responsive data.

Regardless of technological capabilities, some may wonder whether this methodology passes legal muster. According to Judge Andrew J. Peck, Southern District of New York, the recent amendments to the FRCP were intended to avoid the collection of all data, instead focusing on data necessary to the disposition of the matter at hand. A well-considered, tiered discovery approach satisfies that goal by ensuring both reasonableness and proportionality.

D. The Siemens Experience

Siemens U.S. has significant in-house analytic capabilities and a proactive team dedicated to eDiscovery. Its goals are to control data volumes, cull materials in-house, standardize ESI workflow, and identify key documents early, thereby minimizing costs. The in-house team has successfully reduced by more than 80% the total volume of data for review by outside counsel. Through automated legal hold management software, it also has achieved an 80% reduction in man hours once necessary to the litigation hold process. The utilization of contract attorneys to staff initial phases of document review further enhances Siemens’ discovery efficiency.

The following figures from recent cases illustrate the power of this methodology.

<table>
<thead>
<tr>
<th>Document Volumes</th>
<th>Case A</th>
<th>Case B</th>
<th>Case C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Filtered</td>
<td>13,200,000</td>
<td>6,000,000</td>
<td>3,500,000</td>
</tr>
<tr>
<td>Collected</td>
<td>4,000,000</td>
<td>1,800,000</td>
<td>1,050,000</td>
</tr>
<tr>
<td>After De-Duplication</td>
<td>2,600,000</td>
<td>1,450,000</td>
<td>870,000</td>
</tr>
<tr>
<td>Suggested for Export</td>
<td>360,000</td>
<td>71,000</td>
<td>122,000</td>
</tr>
<tr>
<td>Reviewed</td>
<td>125,000</td>
<td>33,500</td>
<td>43,000</td>
</tr>
<tr>
<td>Responsive</td>
<td>40,000</td>
<td>23,500</td>
<td>10,000</td>
</tr>
</tbody>
</table>

Although we do not release cost savings to the public, through the use of technology, Siemens tracks these sums internally – and they are significant.

Siemens expects its panel law firms to partner with the company throughout the discovery process. Outside counsel must be comfortable assisting in-house during the initial phase of eDiscovery. Once documents are exported, counsel must be capable of taking the reins, working with external vendors, supervising contract reviewers, and employing analytics to achieve proportionality and drive down costs. Some of Siemens’ cases require that counsel possess the technical “chops” to coordinate eDiscovery across continents. Firms that can do so seamlessly, not only earn Siemens’ business, but keep it.
E. The Sunoco Experience

Sunoco implemented a 90-day email retention policy in order to further reduce the retention of non-litigation hold email traffic. For litigation and legal investigation matters, preliminary searches are run using keywords and date ranges against the email boxes of the custodians via Microsoft Outlook 365. From there, an initial data set is extracted to outside counsel to further cull the information. Sunoco and its outside counsel typically partner with various eDiscovery vendors to further filter the information for eventual upload into a document review repository. Sunoco relies more heavily than Siemens does on outside counsel and third-party vendor assistance as it reduces the size of its in-house legal department.

In addition, Sunoco and its parent company are in the process of launching Legal Hold Pro to automate and track active litigation holds and litigation hold custodians across its family of companies.