

## Consultants Corner



THE MONTHLY OUTLOOK

### Toxic Tort Claims Review Strategy

By Ronald E. Gots, MD, PhD

Using the following steps, corporate counsel may effectively and efficiently evaluate and manage medical and toxicological-based health claims arising from toxicological exposures. This approach permits counsel to minimize overuse and misuse of expert and outside counsel services.

Money is wasted in case preparation when work is performed that does not elicit information designed to move the case to conclusion. The overwhelming cause of this inefficiency is random, unfocused activity. Excessive costs often are caused by: failure to plan, duplication of effort, separation of the medical from the environmental, unfocused discovery, reactive response (i.e., with new experts) to plaintiff counsel's every action, and premature selection of independent medical examiners.

It may seem counterintuitive, but the best way to minimize waste is to begin with the end in mind. Asking "What are the likely defenses in a case like this?" allows the reviewer to identify goals that lead to useful actions and work products. Conversely, failing to consider review products leads reviewers and attorneys to grope blindly through masses of records and volumes of discovery, and only later try to put it together. This leads to wasted effort and, not infrequently, to a review that is poorly targeted and omits key elements.

Identifying goals means determining likely elements to emphasize in defense of the claim. These elements vary from case to case, but they are **finite in number** and **rather constant for similar kinds of claims**. For example: cancer claims have similar elements, as do sick building claims, multiple chemical sensitivity claims, lead poisoning claims, solvent neurotoxicity claims, and so on. Each type of claim has its own set of common and relatively constant elements.

With this understanding, one can begin to develop goals, as the first step in review strategy. What goals to apply vary from case to case, but, in general, they can be delineated before work begins. Goal modification may occur later, but only in response to specific findings or changes in plaintiff's strategy, and for explicitly determined reasons. Once the strategy has been determined, the reviewer knows what needs to be accomplished. He or she is also able to communicate effectively with defense counsel, corporate counsel or claims professionals so that all participants are working towards common and mutually understood goals. Once these goals have been identified, certain standard approaches may be used to implement them. These represent the tactical activities which serve the strategic plan.

Possible review activities include determining if: the patient has no defined illness; the patient's illness has alternate causes; the chemical(s) in the claim do not cause the claimed reaction; the dosage is too low; the risk is minimal or nonexistent (risk assessment); the condition(s) are preexisting; the temporal relationship is wrong; the clinical pattern is wrong; the product is not inherently harmful; the product was used incorrectly; the claimant's experts rely on junk science, or the group is not an epidemiological cohort. Rarely are all of these assessments necessary. Other types of data may be indicated in selected cases.

Developing defense strategies by beginning with the end in mind prepares defense counsel to combat opposing experts and to develop affirmative defenses. Plaintiff experts in toxic tort claims commonly fall into categories of treating physicians, specialty experts using standard approaches in casual assessment, and junk science experts.

Understanding what categories experts fulfill enables scientific consultants to focus defense counsel on the best counter-strategies. Such strategies may include an **assessment** of what experts will use to "prove" their allegations; **targeted depositions** that uncover the weaknesses in the expert's positions or expertise; **motions to exclude testimony** using Daubert or Daubert-like arguments; and **impeachment** using prior testimony.

When defending toxic tort claims, minimizing waste is an achievable goal, if counsel's approach is strategic and thoughtful. Beginning at the end, while focusing on likely defenses, is the key first step. This is best followed by a careful assessment of experts for the right skill set and relevant experience to review the technical and medical documents and advise counsel, so that defenses will be well-supported through discovery and record review. Such experts will be in the position to perform the most focused review, and will be able to provide support for arguments that counter those of opposing experts. These two steps together greatly increase the probability of dismissal of the claim, or quicker settlement of the case.

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## Litigation

### Roundtable – Litigation Management: Doing More With Less

The Editor interviews **Jim Barry**, Chief Counsel, Business and Employment Litigation, International Paper Company; **Brackett B. Denniston, III**, Vice President – Senior Counsel for Litigation and Legal Affairs, General Electric Company; and **John Sabine DeGroot**, Vice President and Chief Litigation Counsel, BearingPoint, Inc.

**Editor: What types of litigation get most of your attention today? What future trends do you see?**

**DeGroot:** Like most companies, we face a smattering of employment and commercial cases and the occasional personal injury matter. In addition, we deal with the types of cases that you might expect for a consulting firm specializing in systems integration and managed services, such as intellectual property disputes. Occasionally, our company is asked to respond to a subpoena from one of our customers asking for help in litigation against a software supplier. Often the subpoena asks us, as the integrator, about what representations may have been made by the supplier.

One trend I have seen is the use of in-house trial lawyers for portions of a company's docket. BearingPoint has found this strategy particularly effective – from both a cost and a results standpoint – in complex technology litigation and other specialized matters.

**Barry:** We, too, have a little bit of everything, including business, commercial, personal injury, property damage and employment litigation. One trend that I have noted is that law firms are becoming more responsive to the need to keep costs down. Recognizing that management is a two-way street, they are checking with us before incurring costs on a case and in other ways making sure that they are in sync with in-house counsel's strategy for the case.

**Denniston:** Class actions are getting a lot of my attention. I see two varieties. The first I call "plaintiffs du jour," which focus on the cause of action fashionable at the time. Others are of a more commercial nature. On the plaintiff's side, we are pursuing our claims more proactively than in the past.

Although the volume of our litigation has remained flat, even as our company has grown, the judicial system in recent years has seen an exponential increase in the number of cases and size of judgments. Until there is civil justice reform, I suspect the growth in litigation externally will continue.

One of the areas in which I anticipate an increase in litigation is intellectual property because it is so critical to modern business. I think that we will also see more arbitration of international disputes as the economy continues its global expansion.

**Editor: Where do you see the greatest need for civil justice reform?**

**Denniston:** A root problem is elected judges. I would like to see all judges selected by the systems used in states like Missouri where the governor appoints

judges until a specified retirement age or for life. In addition, the judges must be reasonably compensated. Appointed judges with reasonable compensation tend to be the most independent and least affected by fashion and fad.

Since it is not likely that the states that elect judges will change their selection process any time soon, more practical areas for reform include class actions. Among a variety of other things, I would change the standard "opt in" to "opt out" procedures. The current "opt out" procedures result in such big numbers of plaintiffs that they create a disproportionately great threat. I would also like to see caps on punitive damages and venue reform.

**Editor: What litigation-management techniques do you find most useful?**

**Denniston:** Early case analysis is a key. Where are the areas of strengths and weaknesses in the documents, witnesses and defenses? The tendency is to find the answers as the case goes along. In most cases, it makes sense to try to resolve the dispute quickly. With an early resolution, relationships are less frayed and burdens on management are fewer.

**Barry:** We use mediation as a primary litigation management tool. Mediation works both as a method of resolution as well as an opportunity to understand your opponent's case. Through the process you not only gather information about the opposition's view of the facts, but also mediation helps you understand both where the other side is coming from and their theory of the case. Even if mediation does not resolve the case, it may be able to help you to narrow the scope somewhat.

**DeGroot:** I agree with Brackett that getting to the heart of the case as soon as possible is the key. In addition, we usually meet very early in the case with opposing counsel to determine whether the case can be narrowed, and whether something short of full-blown litigation can be used to bring the parties together before unnecessary costs are expended.

**Editor: How has technology impacted litigation management?**

**DeGroot:** We find programs that allow a live feed of deposition transcripts over the Internet to be exceedingly helpful, as they have enabled our in-house lawyers to attend non-critical depositions remotely, which reduces travel costs and lawyer downtime. Technology also has enabled litigators to do more document production electronically but, while it may sound old-fashioned, it is important to keep in mind that there are still many instances where there is no substitute for reviewing hard copies of the documents and looking your witnesses in the eye.

**Denniston:** Like John, I think that technology is less of a panacea than people might suppose. For example, searching documents electronically for key words can be very helpful in discovery. The electronic search, however, is limited by

## Project: *Corporate Counsel*

# Capturing And Reporting Trading Information Efficiently And Effectively

The Editor interviews **Allen R. Tubb**, Vice President, General Counsel and Secretary, SWS Group, Inc.

### Editor: What challenges do corporate counsel face implementing the mandates of the Sarbanes-Oxley Act?

**Tubb:** The Sarbanes-Oxley Act has not changed what we need to do as much as it requires us to do more of it. This means more duties requiring more physical work, but performed with the same staff.

For example, we have always had an active audit committee working with our internal and external auditors. Now, they not only have additional responsibilities for financial matters, but also in a lot of other areas as well. Someone on the audit committee now has to be tied into our anonymous whistleblower procedures. Someone on the audit committee now also has to look more closely at all outside activities of our executives.

Our audit, corporate governance/ nominating and compensation committees each now have more responsibilities. Rather than providing general oversight focused on shareholder value as in the past, the committees are now working more at a management level.

The challenge is that there is now a lot more ongoing interaction with our board and its committees that used to be done through executive reports at a board meeting. Every quarter I now put together a report with a calendar of when reviews will be done. I also communicate in writing with our board and committee members on a regular basis. All the compliance activities are instigated by my office to make sure that the board accomplishes them.

### Editor: What has been the impact of the new rule under the Sarbanes-Oxley Act that requires information about insider transactions to be reported electronically to the SEC within two business days and posted on the corporation's website?

**Tubb:** Although we initially cringed at the timing requirements, the compression has worked out well for us. Previously, reports had to be filed manually by the 10th day of the month following the transaction. This required a lot of coordination and follow up. Now I am authorized to tell the board members that reporting must be done immediately. Compiling the data has become much easier because of the hCue system.

### Editor: Please tell our readers about the hCue system.

**Tubb:** The hCue system is CT's online corporate governance product. It captures the information about insider transactions from central records stored in our company's hCue account. Using hCue, SEC forms 3, 4 and 5 are automatically populated. Once a Section 16 form is complete, it is SEC EDGAR-ready, allowing it to be filed with the SEC with just a click of a button. The populated SEC forms can also be downloaded in an HTML format for posting on our corporate website. Within 30-45 seconds, the SEC has the file, it has been posted on our website and the information is stored in the hCue database where I can later retrieve it instantly on a subsidiary-by-

subsidiary basis.

### Editor: What are the advantages of a web-based system?

**Tubb:** As a technologically sophisticated company, we do as much of our work online as we can. While we have highly sophisticated systems in-house, it was important to me to have a corporate governance system that did not reside on our internal servers. If the system resided internally, every time there was an update or upgrade, new software would have to be installed, which would take time away from other, more important things. The hCue system provides all the features and functionality we wanted without the tech support required on an internally maintained system.

### Editor: Are your board members satisfied that the security features of the hCue system adequately safeguard their trading information from premature release?

**Tubb:** At first our board members were very concerned about the security issues. Because the hCue system passed our internal security standards, I was able to assure our board members that their trading information would not be prematurely released.

One of the tremendous benefits of the hCue system is that I can give different people different types of permissions to access our database. For example, outside counsel and tax accountants may have different needs to access different information. I can tailor their permissions so that they can access only the information they need to do their authorized function.

### Editor: What are some of the other benefits of maintaining corporate records online?

**Tubb:** The hCue system enables our brokers, dealers and banking subsidiaries to access the relevant portions of our database to retrieve information they need for licensing and registration purposes. This saves my staff the time that they used to spend on capturing and transmitting the information in response to frequent requests.

### Editor: What corporate governance challenges do you see on the horizon?

**Tubb:** Our in-house personnel, executives, board and committee members are all committed to full compliance with the letter of the law as well as its spirit. The technical challenge is how to submit filings quickly and transparently. The psychological challenge is to embrace the disclosure requirements, but avoid going overboard. One example is the havoc that would result from premature release of information about intended activities.

We have years to go before government and business come to the right balance in reporting and oversight. With the shifts we have already seen, the immediate future promises to be a very interesting time for the boards of publicly traded companies.

### Editor: Where can our readers find out more information about the hCue system?

**Tubb:** They can visit [www.hCue.com](http://www.hCue.com).

## Roundtable

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the key words you choose. A manual search may reveal terms being used that were not included in your key words.

Perhaps the biggest advantage contributed by technology has been in communications. Information can now be shared any time and anywhere in less than three minutes. Another huge advantage is storage and retrieval of documents, and their display at trial.

**Barry:** For those of us who travel a lot, International Paper's web-based matter management system is a real advantage. It enables us to access our whole litigation file without having to carry around our paper files. We can search our electronic library from anywhere to pull down briefs, pleadings and other documents. The system also enables us to collaborate with outside counsel. International Paper's matter management system was designed by Tymatrix, and they keep improving it every couple months with new tools that make it even better.

### Editor: How is your litigation team organized?

**DeGroot:** We are akin to a boutique firm specializing in information technology litigation. Our model is to assign an in-house trial lawyer to every matter. Even where outside counsel is retained, the in-house lawyer handles the bulk of the work in most instances. Depending on what the matter is, the role of outside counsel runs the gamut from providing periodic advice all the way to serving as the first chair.

**Denniston:** Our legal department is organized like the rest of our company with each business unit having a team of assigned attorneys. The litigators have a dotted line reporting relationship to our centralized group in Fairfield. Our in-house litigators are highly experienced. Many had been partners in law firms and/or state or federal prosecutors.

**Barry:** We recently reorganized our litigation group, with the main litigation group reporting to me here in Memphis. My group is responsible for business, commercial, personal injury, property damage and employment litigation. We have litigators assigned to business units to facilitate understanding of the business goals and creating a team approach.

As part of the reorganization and in an effort to cut our outside fees, we are bringing our single plaintiff employment litigation in house as well as a good bit of the discovery in our other cases. Our main philosophy is to do a case assessment as early as possible to decide whether the case should be settled or defended and therefore avoid incurring unnecessary attorneys' fees.

To develop metrics to validate what we are doing, we are relying heavily on our Tymatrix e-billing system. Using this tool we can demonstrate what we are saving by doing the work internally.

### Editor: Do you encourage the attorneys on your team to do pro bono work?

**Barry:** Yes. It gives corporate counsel the opportunity to do something that is a little out of the ordinary and helps them to be more innovative. It keeps their skill

set sharp, as well as being a good thing for the community. There is a huge need and more corporations have been joining the pro bono effort. It is a trend that I hope will continue to grow.

I am on the Board of Directors for the Memphis Area Legal Services. We started a program for in-house lawyers training them to do no contest divorce work. Organizations such as Corporate Pro Bono.org and the Pro Bono Partnership in the New York area make it easy for corporate counsel to become involved. They offer opportunities outside the traditional pro bono options in areas that are comfortable for in-house counsel. There is a lot of pro bono work that can be done for nonprofits that is within the normal in-house lawyer's skill set.

### Editor: Do you look for law firms that do pro bono work and have a diverse workforce?

**Barry:** When we send an RFP to law firms, we are very interested in their diversity programs and we want a diverse team representing International Paper. While we have not extended our formal requirements to pro bono, I think the day is coming when it will play a part. All the law firms we do business with keep me informed about what they are doing in the pro bono arena.

**Denniston:** As well as looking closely at a law firm's diversity programs, we look at how our work is being handled. We expect diversity not only in the firms but also in the staffing assigned to our cases.

**DeGroot:** Diversity is important to us, as it should be to any company. I can't imagine working with a firm that does not share that view.

### Editor: What is the key for successful relationships between in-house counsel and their law firms?

**DeGroot:** The right mindset is critical to success. This means working as a partnership and taking a long-term view. Three examples come to mind: McKool Smith in Dallas, McGuireWoods here in Virginia and Skadden Arps in Washington, DC.

**Denniston:** The key is to work in close collaboration. The in-house lawyer should not just pitch a file to the law firm. A successful relationship requires working together in drafting pleadings, preparing arguments, appearing in court and all other aspects of the case.

To control costs, in-house counsel must understand how the case is being staffed. I recommend looking closely at paralegal costs because I think they do not have to be as expensive as they have been.

It is also important to drive deals with your firms. We use preferred firms and legal service providers. They are the best in the business, and we negotiate economic incentives with them to achieve cost efficiencies.

**Barry:** We require a budget from our outside counsel and monitor it very closely as the case progresses. We also require that outside counsel do an early case assessment to guarantee that the strategy is aligned with our company's business goals. We strive to have a collaborative relationship with the outside firms we use to ensure that the litigation progresses as we intend and that it proceeds in an economical fashion.