KNOWING JUST ENOUGH TO BE DANGEROUS: A PRIMER FOR COMPLEX TOXIC TORT AND ENVIRONMENTAL CASES

By Richard O. Faulk*

(Part I)

"Complexity" is a hallmark of toxic tort and environmental litigation. To be sure, these cases present complex factual, medical and scientific issues. The extent of the "complexity," however, depends largely upon the trial lawyer's ability to recognize the issues that actually require extensive attention.

Without a sense for the "big picture," cases may disintegrate into meandering and expensive investigations—investigations that consume valuable time and resources to acquire information for information's sake. In such a broad-based inquiry, the concerns of the jury may be lost and winning themes may be missed, neglected, or inadequately developed.

To prepare a winning case, defense trial lawyers must avoid these pitfalls by understanding what is necessary to win the cases, developing winning themes, and concentrating energies on projects that will generate information necessary to support those themes.

They must also recognize that winning these cases requires more than rebutting the plaintiffs' claims: it requires an affirmative showing of care, responsibility, and product stewardship, together with a persuasive presentation of expert issues. This reverses all of the time-honored axioms of trial practice. Simply stated, it means that answering questions is more important than asking them. It means that direct examination is more important than cross-examination. It transforms the defense case into an exercise in persuasion, rather than rebuttal of plaintiffs' allegations. Most importantly for counsel, it transforms the defense trial lawyer into an advocate for an affirmative position, rather than a naysayer.

This article deals with a number of practical problems facing trial lawyers in complex toxic tort and environmental cases. In many respects, it is written for persons without substantial experience in these types of litigation and, to some extent, it focuses on problems arising in cases pending in Texas. Some problems, however, particularly those of substantive law, are unique to Texas, but others, such as trial formats, computer litigation support, and case management issues, apply in any jurisdiction.

Since most persons who find themselves involved in toxic tort and environmental litigation inevitably are sued in Texas, the unique problems of substantive law raised in this paper may find interest beyond the Texas bar. Moreover, the ideas underlying some of the arguments expressed in this paper, most notably those against class certification, may apply in jurisdictions that have similar statutory frameworks.
The first step in approaching a toxic tort or environmental case is understanding the attitudes and expectations of the only audience that matters—the jury.

Jury research in toxic tort and environmental cases often shows skepticism regarding any “excuses” presented by the defendants, especially scientific and technical defenses. The importance of these defenses cannot be denied, but juries are generally more interested in personal stories about people with whom they can identify, rather than complicated explanations by experts who are far removed from human issues.

The challenge for the defense trial lawyer, therefore, is to develop an accurate and intriguing case that counterbalances the jury’s natural sympathy for the injured party and possible bias against “impersonal” corporations. Of course, science matters—but it is seldom persuasive unless it is linked to human concerns.

Like everyone else, juries are intrigued by stories, and to persuade them, you must tell a truthful story that shows your client as a responsible, reasonable citizen. In truth, the client’s story is your best “affirmative defense.”

Juries have high expectations of defendants in these cases. They expect defendants with significant resources to act responsibly and reasonably. They expect defendants who take pride in their products and who market them aggressively to take reasonable care to protect customers from unknown dangers.

From the beginning of the case, the affirmative presentation of the client’s story should be recognized as the most important part of the controversy.

**Winning Themes**

With this perspective firmly in mind, the themes of a winning case should be clear. The most persuasive theme is an affirmative presentation that the client acted reasonably and responsibly in discharging its duties to the plaintiffs. Depending on the case, this may include an affirmative showing that the client:

- Took reasonable care to identify and to comply with regulations concerning its product or activities;

- Undertook appropriate research to identify the dangers of its products or activities and the precautions necessary to avoid those dangers;

- Took care to inform itself about scientific literature regarding its products or activities and to consider conforming its business practices to deal with those dangers; and,

- Acted reasonably in communicating dangers and precautionary instructions to persons who need the information to protect themselves, their employees or other persons for whose health and safety they are responsible.

Scientific concerns should not take a “back seat” to these issues, but they should ride on the passenger side. Without a story of concern and responsibility, the persuasiveness of the following themes may be diminished:

- The plaintiffs’ injuries were caused by an alternative source, substance or activity;

- The client’s product or activity is scientifically and medically incapable of causing the plaintiffs’ injuries under any circumstances;

- The plaintiffs were not exposed to sufficient amounts of the client’s product to cause their injuries;

- The client did not know and had no reason to know that the product was capable of
causing the plaintiffs’ injuries at the time the product was sold; and,

- The client did not know and had no reason to know what precautions were appropriate for protecting plaintiffs from injuries at the time the product was sold.

The potential for victory becomes even more attenuated when one must fall back on the following themes:

- The plaintiffs’ injuries were caused by the conduct of other persons, such as an employer, over whom the client had no control. Some party other than the defendant is at fault.

- The plaintiff caused his own injuries by smoking, drinking alcoholic beverages, or an otherwise unhealthy lifestyle.

This “big picture” approach allows the defense trial lawyer to project priorities, plan discovery, and provide important advice on case management decisions.

It focuses on developing a winning case by recognizing the jury’s expectations and planning a winning presentation, rather than merely responding to arguments advanced by plaintiffs.

Additionally, it permits early case evaluations by motivating clients to determine their risks by investigations before responding to plaintiffs’ discovery. Finally, it allows for more predictable and meaningful budgeting of counsel fees and costs.

Planning The Defense Affirmatively

The key to presenting an effective defense affirmatively is obtaining and maintaining the initiative in trial preparation. This means that defendants must be organized to deal with plaintiffs’ claims in a coordinated manner.

It also means that discovery should be undertaken promptly on all fronts, including internally in the clients’ records, independently of the plaintiffs’ discovery demands.

Due to the complexity of toxic tort litigation, counsel’s primary goal should be an organized, informed, and expeditious response. Plaintiffs commonly sue multiple defendants, generating an atmosphere of confusion.

Lack of cooperation among defendants often results in cross-actions and uncoordinated discovery. This antagonism may actually aid the plaintiffs’ case. Nominal settlements by some defendants may enable a plaintiff to finance an otherwise unaffordable case. This scenario, however, is not inevitable.

Creative joint defense efforts may reduce confusion, provide strategic opportunities, and greatly reduce litigation costs. There is a distinct industry trend toward a shared counsel concept.


Joint Defense Forms

Joint defenses take two basic forms. The first involves retention of a single outside counsel to represent all named defendants. This group counsel decision is normally made at the outset of the litigation, before answers are filed.
After counsel is retained, a "coordinating committee" of in-house attorneys is selected to direct the litigation and act as a liaison for information. Defendants share defense costs, but reserve the right to seek contribution or indemnity from each other at a later time.

The second joint defense form involves the appointment of several defense committees to coordinate discovery and interaction among several outside counsel. This form is appropriate when separate trial counsel are preferred by defendants with special interests. The liaison relationship is established and used in the same manner as discussed above. These defense cells can still promote cost-efficient cooperation.

Joint defense efforts need not continue throughout the course of the action. A company may choose to participate only in neutral discovery areas, such as development of the plaintiff’s medical and employment information, exploration of scientific data, and evaluation of the exposure area. The extent of participation can be negotiated; even limited involvement will promote efficiency.

The success of a multi-counsel joint defense depends upon aggressive and cooperative defense committees. Commonly, defense committees will coordinate projects by delegating tasks to specific defendants. These might include discovery or research on issues of common interest. The committees may also poll parties regarding tactical decisions and cost-allocation and may serve as an information source regarding litigation status. In this manner, unnecessary or repetitive communications with outside counsel can be reduced.

Unlike other forms of litigation, which often can be managed by in-house counsel without litigation experience, these cases merit management by experienced attorneys.

To the extent available, in-house counsel should remain actively involved throughout the litigation and be prepared to assume first-chair responsibility if problems necessitate withdrawal.

In-house counsel can also reduce outside counsel fees by performing customized work in-house. Legal research is a prime example of such a customized function. Other examples include coordination of document production, preparation of witnesses for depositions and trial, and preparation of pretrial orders.

**Drawbacks Of Joint Defense Arrangements**

The drawbacks of joint defense arrangements have been exaggerated. One of the most common concerns is whether the attorney-client privilege is forfeited when privileged information is shared with other group members.

This problem has been addressed in the antitrust arena, however, where courts have recognized a "joint defense" exception to the general rule that communications made in the presence of third parties are unprivileged.

Under this exception, an attorney’s disclosure of privileged information to actual or potential co-defendants in the course of a joint does not waive the attorney-client privilege. See, e.g., Wilson P. Constr. Corp. v. Armaco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977); Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964); In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981); In re Grand Jury Subpoena Ducas Tecum Dated Nov. 16, 1984, 406 F. Supp. 381, 386 (S.D. N.Y. 1975) (the privilege attaches whether the disclosure is made by house counsel or outside counsel). See Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding that house and outside counsel communications are protected by the attorney-client privilege when they are acting as attorneys).

So long as the defendants have shared confidential information for the limited purpose of facilitating their defense, such matters remain immune from the plaintiff’s discovery. See, e.g., Abraham Constr. Corp., 559 F.2d at 253 (parties must not have exchanged
information “for the purpose of allowing unlimited publication and use, but rather . . . for the limited purpose of assisting in their common cause”); cf. Hundyee, 355 F.2d at 185 (joint defense privilege protects communications “to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings”).

Another drawback of joint defense concerns potential conflicts of interests. See generally Moore, Conflicts of Interests in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex. L. Rev. 211 (1982).

Even if all parties waive conflict arguments at the outset, later developments may require reconsideration. This is particularly true if members raise issues of contribution or indemnity, or if facts support imposition of punitive damages against selected defendants, rather than the group. Each of these problems may justify withdrawal. Inhouse counsel must monitor the action carefully in order to deal with these problems effectively.

**Joint Defense Procedures**

Certain standard procedures and agreements are needed for a joint defense effort. Immediately upon receipt of service of process, in-house counsel must contact in-house attorneys for other defendants.

Early communication between house counsel minimizes the changes of outside counsel involvement before a joint defense can be negotiated. This communication can be established through telex. The telex should invite other counsel to share in a joint defense.

The suggested outside counsel should be identified before the invitation is extended, and their identities should be disclosed in the telex. Assertiveness in this area will minimize disputes among defendants on this delicate issue. A telephone conference call may be set for discussion of the telexed proposal.

At the telephone conference, counsel should secure consent to the joint defense from as many codefendants as possible. If a single outside attorney is not in the best interests of a particular group, the alternative “cell” arrangement should be explored. If counsel agree on a form of joint defense, the following agreements should also be concluded:

- To divide fees of outside counsel;
- Not to settle without advising co-defendants of the decision;
- To permit withdrawal from the joint defense effort if a conflict of interests develops;
- To forbear cross-actions;
- Not to oppose the dismissal of the action against a particular co-defendant;
- Not to use the same outside counsel in any subsequent action for contribution or indemnity against a co-defendant; and,
- To appoint certain counsel to serve on the defense committee.

The in-house counsel who proposes the arrangement should confirm these agreements by letter before retaining outside counsel. If the parties desire, a more formal sharing agreement may be used. However, the press of litigation schedules often precludes negotiation of such a detailed arrangement.
Formal Engagement Letter

After a joint defense agreement is concluded, the organizing in-house counsel should retain outside counsel for the group. The retention should be accomplished by a formal engagement letter. The following terms should be included in the letter:

- Identities of all companies included in the joint defense arrangement;
- Identities of the contact persons for each company;
- Identities of the persons on the defense committee, if such a committee exists;
- Insurance information, if relevant;
- Fee agreements and billing instructions;
- Specialized litigation policies arising from the joint defense effort, such as settlement, regular written status reports, conflicts of interest, choice of experts, and discovery; and,
- Copies of pertinent joint defense agreements, including the initial telex and confirming letter.

Since arranging the joint defense may consume much of the time allotted for answering the action, in-house counsel may need to secure an answer date extension from the court or plaintiffs’ counsel. Once outside counsel is retained, the defense effort can proceed in a relatively traditional fashion.

Throughout this action, in-house counsel should be fully informed. In particular, they should personally review all communications with outside counsel and other group participants to monitor potential conflicts of interest.

Joint defenses are extremely effective tools in the defense and management of complex tort litigation. Discovery can be streamlined, and most facts can be developed before considerations of confidentiality or conflicts need be addressed. With cooperation, trial preparation can be expedited, and costly courtroom time can be reduced.

Selected Discovery Problems

Although discovery in toxic tort and environmental litigation generally involves the same methods used in other actions, expanded and innovative uses of those devices are often required.

The mass of information needed to develop these actions may encompass years of scientific study and thousands of documents generated by each defendant. Commonly, toxic tort cases involve several defendants, and if a joint defense arrangement is not concluded, uncoordinated discovery may result in paper proliferation. These piles of duplicitous data present genuine obstacles to case evaluation and trial preparation.

To the extent possible, all defense counsel should agree upon a coordinated approach to discovery. This should be accomplished at a conference held soon after all parties have answered the action. At that conference, certain discovery responsibilities may be delegated in neutral areas, such as product identification, the plaintiffs’ personal and medical backgrounds, applicable medical records, and employment information.

These responsibilities may be discharged by one or two counsel and the resulting information shared among the group. Ideally, these matters should be concluded before “adversarial” discovery commences, when each defendant’s individual interests may dictate different strategies.
Early Case Management Orders

The first step in managing discovery in any complex toxic tort or environmental injury case should be a motion for meaningful case management orders.

Such orders can be divided into two separate types. The first sets the framework for the progress of the case by identifying stages of discovery, authorizing special discovery tools, such as "master" sets of discovery, and giving the court a mechanism for managing the complexities of the case.

The second, and more controversial, type of case management order may require plaintiffs to disclose the scientific basis of their claims before they proceed into the costly process of plenary discovery. This procedure is discussed below.

When a multi-party toxic tort or environmental injury action is served, one of the most basic problems is understanding the scientific or medical basis of plaintiffs' claims. In most other types of cases, defendants commonly wait until expert witness depositions are taken, usually at the end of a case, before the expert issues are fully explained.

In these cases, however, the extraordinary costs and burdens imposed by plaintiffs' discovery suggest that an early disclosure of the scientific underpinnings of plaintiffs' claims is appropriate.

Although these orders have not been widely granted, neither have they been widely pursued. Such orders have achieved salutary results in many cases, and some appellate courts have strongly urged their application. In Texas, the Supreme Court has strongly endorsed the early disclosure of basic information regarding plaintiffs' claims. See Able Supply Co. v. Moyle, 898 S.W.2d 766, 771 (Tex. 1995)(mandamus issued to compel disclosure of product identification information where such discovery would "simplify the case, streamline costs to both plaintiffs and defendants, conserve judicial resources, and aid the trial court in preparing a plan for the trial.")

An effective case management order should typically require plaintiffs to submit a report from experts that includes the facts of each plaintiff's exposure to toxic substance, including the:

- Nature and form of the exposure;
- Specific toxic substance involved;
- Dates of the exposures;
- Amount (dose) of toxic substances involved; and,
- Nexus between the injuries and exposures.

The orders also typically require reports from treating physicians or other experts supporting each plaintiff's claims of injury, including the nature of the injury and the causal relationship between the injury, the exposures, and the substances involved in the case.

Litigation involving alleged injuries from exposure to toxic substances can be tremendously expensive for the judicial system and the parties. Requiring plaintiffs to demonstrate that they have some minimum level of support for their claims conserves those resources by providing early opportunities for case evaluation, settlements, or dismissals.

Neutral Discovery

As a general rule, the first objective of discovery in a toxic tort action should concern
product identification. An early determination regarding the involvement of each defendant’s product is essential. If the presence of a particular defendant’s product cannot be confirmed, the defendant may be voluntarily dismissed from the suit, or alternatively, obtain summary judgment.

At this early stage, the employer is often the focal point for case evaluation. Since most manufacturers have little knowledge of the customers serviced by their distributors, it is extremely difficult to trace the line of distribution from the manufacturer to the employer.

If the search begins with the employer’s records, however, the presence of a particular manufacturer’s product can be readily confirmed. Although it might seem that this procedure aids the plaintiff in identifying potentially culpable defendants, this criticism does not justify failing to pursue product identification discovery.

Without such information, a nonculpable defendant may remain in the case indefinitely, incurring extraordinary legal expenses even though the plaintiff was not exposed to its product.

On the other hand, if the involvement of a particular defendant’s product is confirmed, risk may be assessed more realistically. Thus, since both plaintiff’s and defendant’s interests are served by early product identification discovery, there is no justification for remaining ignorant of these matters.

Injury Evaluation

As in any personal injury case, a thorough evaluation of the plaintiff’s injuries is essential to an informed defense. Since all defendants share a common interest in this evaluation, it is an ideal subject for cooperation.

The most effective formal discovery devices in this area are written interrogatories. They should be used to develop information regarding the plaintiff’s personal and work history, the location and extent of exposure, the particular substances to which the plaintiff was exposed, witnesses (including experts), identities of treating physicians, medical expenses, and other areas of common interest.

Usually, only one set of interrogatories is necessary. At this point, detailed inquiries regarding specific products should be omitted. This information may be developed later by counsel for each defendant.

Another neutral discovery area concerns social security information. When a plaintiff alleges a cumulative exposure over many years, it is usually important to identify each location where exposure may have occurred. Depending on a plaintiff’s memory for this information is, at best, a risk.

To avoid this problem, counsel may contact the Social Security Administration to obtain plaintiff’s life employment history. Under normal circumstances, authorization can be obtained from a plaintiff directly, but if the plaintiff refuses to cooperate, a court order may be necessary.

Other areas of common interest concern documentation needed from the plaintiff’s treating physicians and employers. A plaintiff will usually furnish a medical authorization permitting informal discovery of medical documentation. If this cooperation is refused, however, the documents may be obtained through a deposition on written questions, accompanied by a subpoena duces tecum. Employment records may also be obtained through the deposition and subpoena procedure.

The final neutral discovery area concerns court ordered mental and physical examinations. At some point after medical data have been produced and examined, the defendants will probably request such an evaluation.

In cases involving multiple defendants, the plaintiff will probably object to repetitive
examinations by each defendant’s chosen physician. Thus, counsel should, to the extent possible, agree upon a common physician to conduct exams and share the data generated by the physician.

**Internal Discovery**

While the neutral discovery process is proceeding, counsel should seek internal information from their respective clients. Early pursuit of these data will aid in liability evaluation and facilitate response to later discovery requests. Counsel should avoid being placed in the position of learning the facts through the plaintiff’s discovery.

After reviewing the complaint to ascertain the types of substances involved, the dates of exposure, and the geographic area where exposure occurred, the client should be advised of this information and certain data requested. These data include:

- Material Safety Data Sheets, technical bulletins and other product information sources for the products involved;
- Labels and labeling information; and,
- Identities of distributors of the product. The request should be limited to the pertinent periods of exposure and the geographic areas where the alleged exposure occurred.

To the extent possible, counsel should avoid a case-by-case approach to developing the client’s defensive data. To avoid duplication of effort, counsel should request information regarding prior or pending cases involving the client’s products and consult with counsel in those actions regarding information developed in discovery or trial. Without such information, the same or similar facts may be developed many times.

In-house counsel may take a major role in coordinating basic information for outside counsel by collecting and maintaining independent files regarding commonly requested information. In addition to records of prior claims, these files may include data regarding the company’s research and development activities, governmental or industrial standards, and trade association memberships.

Finally, counsel should make an early effort to meet with the client’s internal toxicological staff, or alternatively, an independent toxicological consultant. Usually, such a meeting should occur after the toxicologist has reviewed the plaintiff’s medical records, but before adversarial discovery begins.

From the records, the toxicologist may be able to evaluate the plaintiff’s symptoms and determine whether the injuries may have resulted from toxic exposure. If counsel is not already familiar with the basic scientific literature on the particular product and its toxic effects, a bibliography may be furnished and selected reading suggested.

**Adversarial Discovery**

To this point, we have considered neutral and internal discovery procedures that can be accomplished without reducing cooperation among defendants. After such matters are concluded, however, the situation becomes more adversarial.

The defendants must now discover the extent of the plaintiff’s exposure to their particular product and begin the complicated process of collecting facts unique to their defenses.

Proliferation of duplicitious written discovery is often an unfortunate consequence of multi-party cases. This wasteful process usually begins with each defendant serving customized interrogatories on the plaintiff.

In general, the interrogatories request information regarding the product attributed to each defendant, the use made of the particular product, the work environment in which
the product was used, periods of exposure, container and labeling information, and knowledge of risks concerning the product. Each defendant may also request documents related to the information generated by these interrogatories.

This problem is not restricted to defendants’ discovery. Plaintiffs may serve numerous sets of discovery on defendants based upon their perception that the Texas Rules of Civil Procedure allow separate sets of discovery to be issued by each plaintiff to each defendant. The potential for abuse in these circumstances is obvious. Although a protective order may guard against oppressive discovery tactics, protective orders are no substitute for necessary information. Accordingly, there is currently a trend toward the use of “master” sets of discovery in multi-party cases.

Master sets of discovery are available only through agreement of counsel or court order. They are designed to obtain the maximum amount of information possible about the plaintiffs’ claims and damages and the defendants’ liability. As a result, they typically include more than the 60 interrogatories permitted under the Texas Rules.

To be truly effective, the master set should be the product of a negotiated agreement between counsel, with all objections (except for privilege and related issues) presented to the court before the set is actually served.

This ensures that the responses to the sets are meaningful and complete, rather than riddled with objections. Some commendable master sets have been negotiated in this manner, and illustrative examples are more helpful here than “how to” discussions. Sets used in some recent cases are available from the author.

**Lay Depositions**

Depositions generally serve the same purposes in toxic substance litigation as they do in other actions. There are, however, certain unique issues that need to be addressed when deposing toxic substance witnesses.

When a cumulative injury is alleged, it is important to explore the nature and extent of the exposure, as well as symptoms and treatment of the resulting disease. This may develop defenses, such as limitations, which depend on the plaintiff’s knowledge of injury. The plaintiff’s use of tobacco, alcohol, or drugs may have contributed to the injury, and this information may prove valuable in mitigating or eliminating liability.

Plaintiff’s knowledge of risks inherent in product use is usually crucial to the defense effort. Commonly, the central allegation concerns the lack of an adequate warning. In recent years, product information has proliferated beyond mere labels and technical bulletins.

Employers, as well as unions and other trade organizations, often furnish detailed safety and health information to employees. The plaintiff’s knowledge of this information may justify a defense based upon contributory fault.

Individuals may be exposed to toxic substances in several ways, and different plaintiff categories present specialized problems. Typically, the primary action alleges exposure before sale in the formulating process or after sale upon product usage.

In a workplace exposure, the employee may have a worker’s compensation file, which may contain valuable information. The work environment must be examined and the employer’s safety procedures explored. Co-workers may be deposed, particularly those with designated safety responsibilities. Workplace conversations are a common means of communicating product dangers. Despite a possible predisposition towards the plaintiff, safety representatives may be reluctant to admit that they failed to communicate risks properly.

In consumer actions, where the plaintiff alleges exposure during use of the end product, the plaintiff’s sole warning may be the product label. Here, the examination must
concentrate on the communication and comprehension of the warning. Although whether the label was read is important, whether it was understood is equally crucial. In some circumstances, a plaintiff may have knowledge from sources other than the label. Such sources should be identified and explored.

Claims asserted by spouses and family members, as well as those advanced by casually exposed community members, present extreme difficulties. Aside from the usual loss of consortium claims, family members may have independent claims based upon nonoccupational exposure.

A worker may, for example, carry toxic materials into his home on his clothing, thus exposing family members directly. Persons exposed in such a fashion obviously receive no formal warnings or safety information and learn of the dangers solely through hearsay, if at all.

Community members are an even more remote group of plaintiffs. Typically, they include persons living in the manufacturing area who allege exposure by atmospheric discharge or groundwater pollution.

In this area, plaintiffs often have absolutely no information regarding the precise exposure circumstances, and symptoms may be extraordinarily varied and widespread. Here, more than any other situation, the focus must shift to scientific investigation and medical testimony. If more than one defendant is involved, identifying the responsible party may be difficult. Accordingly, it is extremely important that the plaintiff be forced to identify the precise substance connected with the disease or injury.

If such an identification cannot be made, or if the plaintiff cannot establish a positive casual connection between the designated product and the injury, the action should be challenged by motion for summary judgment.

Computer Document Management

The vast volume of documents and records commonly involved in toxic tort and environmental injury cases creates serious information management problems. As a result, many counsel turn to computer litigation support to assist them in case evaluation and preparation.

Although this may seem a natural reaction, it must be stressed that computer databases are not a panacea for overstressed attorneys. The most sophisticated database is no substitute for attorney review.

This is the most common myth associated with databases, and is the reason why so many attorneys and clients are frustrated after the completion of a sophisticated database.

Databases are designed to facilitate document retrieval and management. In that manner, they assist attorneys in case preparation. They do not, however, avoid the necessity of looking at the documents before they are databased to determine an appropriate database design and scope.

Neither do they avoid the need to evaluate the documents after they are databased. Unless these reviews are conducted, the database is useless as a litigation tool.

Computer litigation support professionals, however sophisticated, should rarely be totally entrusted with the design of a database. The design of a database should reflect the needs of the case, not the abilities of the system.

Accordingly, the trial attorney and the client must participate in the design to ensure that it meets the case’s requirements and that it will function in a predictable and useful manner.
Moreover, unless counsel is a part of the design process, there are questions regarding whether the database reflects the "mental processes" of the attorney’s work product and privileged "attorney-client" communications.

**Components Of Support Databases**

There are generally three components to modern litigation support databases: objective fields, subjective fields, and images.

"Objective" fields are codes that allow the databased documents to be searched for information that appears either on the face of the document or by a cursory review. Such fields may include, for example:

- Names of the author and recipient of the document;
- Type of document involved, such as a memorandum, letter or report;
- Title of the document;
- Date of the document;
- The Bates ranges of the document and its attachments, if any, and;
- Important characteristics of the document, such as marginalia or illegibility.

"Objective" fields are made useful through "objective coding" of the documents by teams of persons who examine the documents and enter data that correspond to the fields' requirements.

Often, these persons are not attorneys, so a substantial amount of supervision and training is required, as well as strong quality control. To ensure quality, the attorney must be involved in defining the precise meaning of the fields, and must be available to answer questions about their application to particular documents.

**Subjective Fields**

"Subjective" fields are codes that allow the database to be searched for information that is derived from a subjective interpretation of the document. This requires several exercises of legal judgment.

First, the attorney must determine the types of subjective information that will assist in case evaluation and trial preparation. Typically, these consist of "key words" and "issues."

"Key words" are terms that appear in the document that suggest the document's relevance to problems in the case. In an environmental litigation database, for example, the terms "upset," "exceedance," "violation," or "remediation" suggest concepts that may prove relevant to a generic case. Similarly, in a toxic tort case, the names of the chemicals involved in the action, and terms relating to the type of injury alleged, such as "cancer," "carcinogen," or "neurotoxin" may be appropriate.

The selection of key words should be made by the trial attorney and the client according to their judgment of the needs of the case. As a result, they go to the very heart of counsel's mental processes and client communications, and are clearly privileged information.

Similarly, "issues" fields should be specified by the attorney and client to reflect the factual and legal issues to which the databased documents relate. The type of issues varies according to the facts of the case, but may include concepts such as "regulatory enforcement," "water," "air," "employee exposures," or other relevant concerns. The
purpose of "issue" fields is to allow broad searching and sorting of documents in a fashion that assists in discovery and trial preparation.

"Subjective" fields are made useful through "subjective coding"—a process that involves a more analytical review of the documents than "objective" coding requires. Persons involved in this process must read the documents more carefully to ascertain the proper "key words" and must make subjective judgments regarding the relevance of the documents to specified issues.

For this reason, experienced legal personnel, such as legal assistants, are typically used on these projects. Even then, however, trial attorneys are commonly besieged with questions regarding interpretation and application of the fields. Commonly, fields are added, modified or omitted as the process continues and the coders and counsel become more familiar with the documents.

Images

Imaging of documents is commonly undertaken in modern databases. The best existing software allows the database operator to search for documents and then retrieve them for viewing on a monitor, rather than returning to the hard copies in a storeroom. Still, no truly reliable means exists, to this writer's knowledge, to dispense with the "objective" and "subjective" coding process.

Optical Character Recognition holds great promise in this regard, but the process still requires substantial and expensive cleanup because of its limitations with illegible and handwritten documents.

To date, there appears to be no reliable software that will allow a trial lawyer to simply scan documents and search them with LEXIS or WESTLAW type searches. Moreover, when such a system is perfected, it may raise serious problems regarding the loss of privilege by removing the mental processes of trial attorney from the database's design and operation.

Conclusion

Useful databases are expensive, sometimes extraordinarily so. They are seldom worth the effort and expense in isolated controversies. As a result, they are best justified as long-range investments to assist in evaluation and preparation of repetitive cases, such as disputes involving a single facility or product.

Most importantly, like any tool, their action and availability solves nothing. Rather, it is their use that justifies their existence. Merely databasing a client's records will not, standing alone, assist anyone in understanding their contents.

To be useful, the documents must still be sorted, read, analyzed, and used to build the affirmative defense necessary to win the case. The goal of databasing is not management for management's sake, or even management to respond to discovery, but management for victory.

* Richard O. Faulk is a partner in Gardere Wynne Sewell & Riggs, L.L.P., Houston.