



When The Stakes Are High

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I. Introduction.

In today's legal environment any accident which could potentially cause toxic exposure to a large group of people can result in litigation costing millions of dollars, even more significant damage to company image, and costly diversion of valuable personnel and assets. It has never been more important to develop reliable methods for evaluating cases early not just with respect to liability exposure, but also considering regulatory implications and public relations issues.

Evaluating and then managing a complex case is never an easy process. In the sections below I have provided

some guidelines in three phases to evaluate and manage a mass tort case: 1) Early Case Assessment; 2) Assembling a team to manage the litigation; and 3) Budgeting. In the last section I have provided some citations to published resources that can help in evaluating cases.

II. Perform a Systematic Early Case Assessment.

Many factors influence an evaluation of a case's value. I have included the checklist I use to evaluate cases.

(Continued on next page)

Early Case Assessment Form

Case Name:

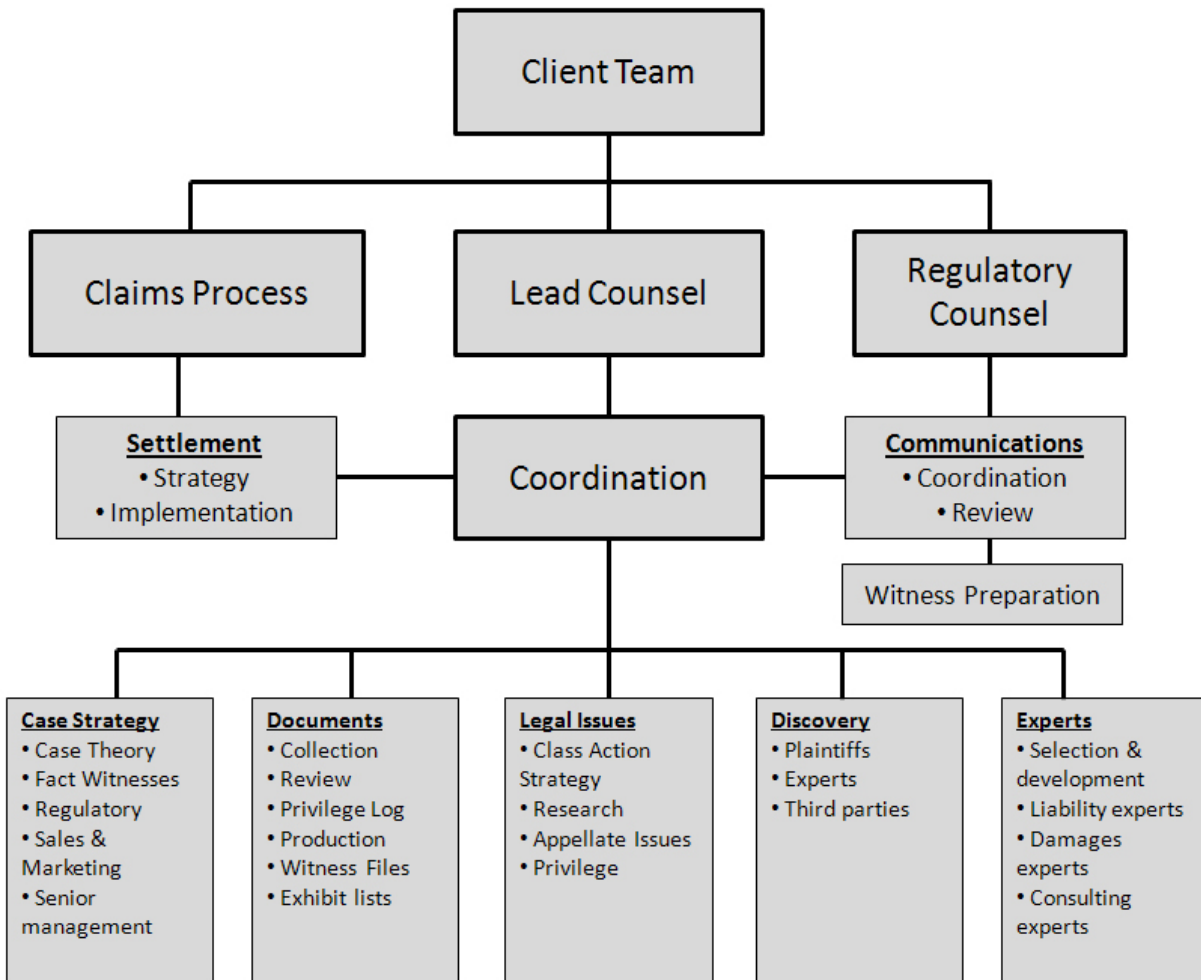
Matter Number:

Date:

- A. Parties**
- B. Related litigation**
- C. Factual Background**
- D. Allegations**
- E. Defenses**
- F. Damages Claimed**
- G. Venue Profile**
- H. Judge Profile**
- I. Opposing Counsel Profile**
- J. Key Client Witnesses**
- K. Key Third Party Witnesses**
- L. Key Documents**
- M. Key Dates**
- N. Plaintiffs' Trial Themes**
- O. Defense Trial Themes**
- P. Case Strengths**
- Q. Case Weaknesses**
- R. Liability Evaluation**
- S. Client Issues Related to Litigation**
- T. Settlement Value**
- U. Strategy**
- V. Budget**

III. Assemble the Right Team to Manage the Litigation.

I have included below a diagram that illustrates the type of coordination that can be necessary to manage complex litigation efficiently.



IV. Understand the Rules For Reporting Loss Contingencies.

Public companies have to be concerned with properly reporting loss contingencies. The accounting standard governing disclosure of loss contingencies is Financial Accounting Standards Board Accounting Standards Codification 450-20 (ASC 450). This has been the subject of considerable controversy in recent years. Under those standards when a loss is deemed to

be both “probable and estimable”, the company must record an accrual for the loss and disclose it. There was an effort in 2010 to amend these requirements to require reporting of possible losses unless they were remote. This effort was defeated but further refinement of the requirement is likely.

I have included below a very useful chart that shows when loss contingencies should be disclosed under the current rules.

		Ability to Reasonably Estimate the Potential Loss	
		Reasonable Estimate	No Reasonable Estimate
Likelihood That a Loss Will be Realized	Probable (Likely to occur)	Accrue. Disclose as necessary to avoid misleading financial statements.	No accrual. Disclose contingency and state that a reasonable estimate of possible loss or range of loss cannot be made.
	Reasonably Possible	No accrual. Disclose contingency and estimate of possible loss or range of loss.	No accrual. Disclose contingency and state that a reasonable estimate of possible loss or range of loss cannot be made.
	Remote (Likelihood is slight)	No accrual. No disclosure (limited exceptions, e.g., guarantees)	No accrual. No disclosure (limited exceptions, e.g., guarantees)

VI. Published References That Can Provide Guidance For Evaluating Cases.

There have been surprisingly few articles published providing guidance on how to predict case value. However, some are available. As early as 1966 Amjur Trials published some very detailed articles on case evaluation and settlement strategy. These articles were updated in May of 2012 and contain useful outlines and research material. The guidance article for plaintiffs can be found at 4 Am. Jur. Trials 289, and the article for defendants is at 4 A. Jur. Trials 379. A more recent article specifically addressing case evaluation can be found at 53 Am. Jur. Trials 1. In addition to listing factors similar to the ones I outlined above, this article cites some of the databases that are available for comparison in valuing cases.

Thomson Reuters collects and publishes jury verdict information organized from 21 states. These

publications are available at the Westlaw store at Westlaw.com. In addition, standard legal research tools can be used to find verdicts and settlements from other states that can be used as guidelines. Westlaw Next (www.next.westlaw.com) can be used to search jury verdicts and published settlements.

VII. You Need to Develop a Budget to Predict and Track Costs.

There is no good software on the market to budget legal costs. Many companies have developed templates using Microsoft Excel. Budgets done on that software are relatively easy to develop but can be cumbersome to adjust. We use a program called Microsoft Project. It is more cumbersome to develop a budget using Project but it provides more visibility of predicted work and is easier to adjust and track once it has been developed.

An example budget is attached.

Quarterly Projected Cash Flow
ABC Corporation Matter

	Qtr 1, 2010	Qtr 2, 2010	Qtr 3, 2010	Qtr 4, 2010	Qtr 1, 2011	Qtr 2, 2011	Qtr 3, 2011	Total
Case Management								
L100 Case Development								
L110 Fact Investigation								
Preliminary Plant Tour								
Preliminary Factual Investigation	\$20,702.70	\$18,761.82						\$39,464.52
Investigate Plant Processes	\$8,417.94	\$7,628.75						\$16,046.69
Interview Former Employee Witnesses	\$9,151.98	\$9,294.98	\$9,437.98	\$9,437.98	\$9,151.98	\$1,001.00		\$47,475.90
Investigate Environmental Compliance History	\$9,698.69	\$8,789.44						\$18,488.13
General Fact Investigation	\$21,188.38	\$21,519.44	\$21,850.51	\$21,850.51	\$21,188.38	\$2,317.48		\$109,914.70
L120 Analysis/Strategy								
Perform Early Case Assessment	\$3,996.67							\$3,996.67
Perform Risk Analysis								
Retain Experts	\$10,240.26	\$4,480.11						\$14,720.37
L130 Experts/Consultants								
Air Dispersion Expert				\$14,648.51	\$14,423.15	\$1,577.53		\$30,649.19
Toxicologist				\$19,753.78	\$19,449.88	\$2,127.33		\$41,330.99
Real Estate Expert		\$3,780.71	\$11,342.14	\$11,342.14	\$10,998.44	\$1,202.95		\$38,666.38
Landfill Management Expert	\$8,480.97	\$12,820.08	\$13,017.31	\$13,017.31	\$12,622.84	\$1,380.62		\$61,339.13
Surface & Groundwater Expert	\$10,508.64	\$15,885.15	\$16,129.54	\$16,129.54	\$15,640.77	\$1,710.71		\$76,004.35
Other Experts	\$15,203.44	\$22,981.94	\$23,335.51	\$23,335.51	\$22,628.38	\$2,474.98		\$109,959.76
L140 Documents/File Management								
Preliminary Document Collection	\$7,075.56	\$4,201.11						\$11,276.67
Manage Plant Documents	\$4,693.47	\$4,766.80	\$4,840.14	\$4,840.14	\$4,693.47	\$513.35		\$24,347.37
Gather ADEM Documents	\$4,364.24	\$2,591.27						\$6,955.51
Gather Plaintiff Documents	\$12,959.68	\$13,162.17	\$13,364.67	\$7,694.81				\$47,181.33
L150 Budgeting								
Prepare Budget								
Analyze Performance vs. Budget								
L160 Settlement/ADR								
Settlement Conferences				\$4,535.00	\$6,449.78	\$1,108.56		\$12,093.34
Mediation				\$8,285.00	\$11,783.11	\$2,025.22		\$22,093.33
L190 Other Assessment/Administrative								
General	\$17,339.42	\$17,610.35	\$17,881.27	\$17,881.27	\$16,526.63			\$87,238.94
Local Counsel Fees	\$21,619.51	\$21,957.32	\$22,295.12	\$22,295.12	\$20,606.10			\$108,773.17
L200 Pleadings								
L210 Pleadings	\$7,428.57	\$7,544.64	\$7,660.71	\$7,660.71	\$7,428.57	\$812.50		\$38,535.71
L220 Injunctions/Provisional Remedies								
L230 Court Conferences	\$4,586.67	\$9,316.67	\$9,460.00	\$9,460.00	\$9,173.33	\$1,003.33		\$43,000.00
L240 Dispositive Motions								
Frye Motions				\$14,577.78	\$14,577.78	\$1,594.44		\$30,750.00

About Johnny Johnson

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Mr. Johnson is a founding partner of Lightfoot, Franklin & White. He handles business litigation, intellectual property litigation, products liability litigation, and is widely recognized as one of the best and most experienced lawyers in the South handling environmental and toxic tort litigation. He advises clients on such matters as complex mass tort litigation, class actions, pesticide and chemical litigation and individual toxic tort claims in Alabama and throughout the Southeast. Through his mass tort practice, he became one of the pioneers in developing systems for the efficient management of complex litigation. He has lectured frequently on this subject. To see a sample of the system he helped develop for budgeting and tracking litigation costs, click on this link to view [Lawsuits as Manageable Projects, Systems for Controlling Costs in Litigation](#), presented in August of 2003.

Mr. Johnson is the author of a book on toxic torts litigation and speaks frequently at industry and legal seminars regarding environmental issues. Mr. Johnson is a member of the American Bar Association and the Birmingham Bar Association, and has been a member of the Environmental Law Section of the Alabama State Bar since 1989. He is admitted in all Alabama Courts as well as the Fifth Circuit Court of Appeals, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. The Best Lawyers of America publication has recognized Mr. Johnson for his work in commercial and environmental litigation since 2006 and for bet-the-company litigation since 2010. Mr. Johnson has been rated as AV Preeminent by Martindale-Hubbell for more than 20 years.

Mr. Johnson is the President of the Norma Livingston Ovarian Cancer Foundation. It raises funds to support ovarian cancer research and awareness of the risks, symptoms and treatments of the disease.

Education

- B.A., University of Virginia, 1979
- J.D., Vanderbilt University Law School, 1982