Managing Asbestos Litigation – Insights from a former In-House Counsel

For in-house counsel managing complex mass tort litigation, there are few truly inconsequential decisions. They engage a variety of outside experts to handle the many issues that face them. Virtually every company retains national coordinating counsel, local counsel and outside experts to handle the actual defense of the claims, and to advise them on various aspects of the litigation. Sometimes lost are somewhat less sexy but critical management issues that may seem simple, but are fraught with danger if not thoroughly analyzed. Ultimately, these are the basis for future decision making and as important to a company’s success as how the cases are defended. Information Management – what information are you going to gather and maintain to aid your decision making process and make the handling of the litigation as efficient as possible? This document will focus on three of these essential litigation management decisions which include:

1.) Metrics – what statistics are you going to maintain and measure to gauge your progress and ultimate success?

2.) Settlement process – who is going to do it and upon what basis? – national counsel, local counsel, in-house counsel or a professional claims adjuster?

The right answers to these questions are not the same for every company, and depend on their products, history, insurance and other circumstances. This article will suggest various ways to approach these issues and discuss some the advantages and disadvantages of the options based on my experience. My views on this are based on twenty years of experience in asbestos litigation as outside counsel, in-house counsel and as a board member of the Center for Claim Resolution. I have learned from my own mistakes and successes, as well as from the perspective of an interested bystander watching that of others. I have written this article based on a sincere desire to have others benefit by what I have learned and not repeat the mistakes made by myself and others.

Metrics

There is an old business adage that you manage what you measure. I think to a large degree that is true. Therefore, the decision about what to measure must be based upon careful consideration of how well the metric actually reflects something meaningful in the litigation. Choosing a metric that is not a meaningful measure of success can have adverse consequences. Once an in-house manager measures and reports (either to senior management or publicly) a particular statistic, it forces the company to either manage that factor, admit failure or explain why it is not significant. A good case can be made that

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1 The views expressed in this article are those of the author and do not reflect the business practices, management styles, management decisions or the strategic or tactical considerations of any particular entity including any entity that employed the author or to which the author has provided services. Rather the views are a distillation of the author’s experiences and observations over more than 20 years of participation in the asbestos mass tort system in various capacities.
the early metric decisions contributed to the asbestos litigation morass. I will use the asbestos personal injury litigation as an illustrative example in this article.

**Case/Claim Counts**

Initially, one of the easiest, and at the time seemingly most significant, statistic a company could track was how many claims were pending against it. It seemed intuitively obvious that fewer claims should mean the company’s ultimate liability was less and more greater. Given that the early claim projections were that there would be a relatively modest finite number of claims, this made sense at the time. Thus, in the early years every company conscientiously measured, reported and tried to reduce its pending case counts.

While tracking case counts were a very meaningful statistic as it allowed management to observe litigation pace and trends, many companies soon learned managing to case counts alone gave plaintiffs’ counsel a significant pressure point and the incentive to file even more claims, regardless of merit. Many companies concluded that an effective way to reduce these counts was to enter into low cost inventory deals with plaintiffs’ firms. A relatively small sum was paid on every case in the particular plaintiff counsel’s “inventory” without regard to product identification and without paying much attention to the legitimacy of the disease, jurisdiction or capability of that plaintiffs’ counsel. Such settlements appeared to work as they resolved large numbers of cases and significantly reduced, or at least prevented, increases in claim counts. Plaintiffs’ counsel, however, were quick to recognize that claim counts were now a pressure point. Over a relatively short period of time, the tracking of claim counts for their own sake and the management technique of inventory settlements only led to the filing of hundreds of thousands of non-meritorious claims. Companies were then in a catch-22 situation: having employed, disclosed and adopted the claim count metric as their measure of success, while at the same time facing huge increases in case filings and burgeoning indemnity payments, they were forced either to admit that claim counts were not important for their own sake or to continue with the vicious cycle of settling ever-increasing numbers of claims at ever-increasing amounts. It should come as no surprise that once the companies had gone far down the road of using pending claim counts as the measuring stick of success, there was no turning back.

Oddly, my experience is that while a very small or a very large number of claims need to be carefully evaluated and might represent some degree of risk, in most instances the number of pending claims is not by itself a very meaningful measure of potential liability. Scores of companies with many tens of thousands of pending claims have very little

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2 I use the term claims or cases interchangeably to mean the number of plaintiffs having made a claim against the company. Some companies historically reported the number of “cases” filed against it, some of which may have hundreds or thousands of plaintiffs and the number of plaintiffs having filed a claim against the company. This appeared to be a thinly veiled way to make it appear the company had fewer claims than it did.
potential liability beyond defense costs.\textsuperscript{3} At the other end there are companies who have rather modest claim counts with much more significant potential indemnity liability.

**Average Indemnity Paid Per Claim**

Another commonly used metric that also led to problems in asbestos litigation was the average indemnity paid per claim. Companies concluded that measuring per claim indemnity averages would be a financial metric by which progress or success might be measured. This was closely related to, and an outgrowth of, managing claim counts. Similar to claim counts, presumably if the average indemnity paid per claim went up, this meant litigation was getting worse and if down, things were getting better. In addition, at least superficially, measuring indemnity averages per claim created the appearance that the company’s liability (at least for pending claims) was measurable and under control. For example, a company might report that in the current quarter it had spent $2.6 million to settle 1,300 claims at an average of $2,000 a claim and that it had 21,000 remaining pending claims. Some quick and dirty math ($2,000 \times 21,000$) allowed the reader to conclude the company’s indemnity for its pending case counts was in the $42,000,000 range, a reasonably manageable sum for most large companies. Moreover, to the extent that the per claim indemnity average could be maintained or even lowered, it appeared that management’s settlement strategy was working and should be continued.

Unfortunately, in asbestos litigation reality was often quite different as the key element of the disease mix of the settled claims was not typically examined or reported. Thus, using the example above, (assuming that of the 1,300 claims settled perhaps two were very serious mesothelioma claims that settled for $500,000 apiece and 1,298 were unimpaired asbestosis or pleural plaques that settled at an average of approximately $1,200 apiece), the average has little meaning. Any extrapolation of overall liability based on such averages for all of a company’s pending cases would be suspect. Moreover, use of such averages could create significant management issues in future quarters if the disease mix was different than the previous quarter. For simplicity sake assume the same company came near the end of the next quarter in which it had settled no or very few groups of low risk disease cases at small sums. We assume it again settled two very serious mesothelioma cases at the same $500,000 apiece, but only 100 of the marginal cases at the $1,200 per claim average. The company faced the prospect of reporting that it had settled only 102 cases and it’s per case settlement average for the quarter had mushroomed to nearly $11,000. Using the same formula, the reader would conclude that the liability for the company’s 21,000 pending claims was closer to $231,000,000. Such wide swings in the average shows this metric is a faulty indicator company’s litigation strategy. Its use could lead to counterproductive settlements merely to manipulate the metric.\textsuperscript{4}

\textsuperscript{3} While defense costs can be significant, I know of no company that ended up in bankruptcy because of paying too much in defense costs while many have needlessly ended up in bankruptcy by paying too much in indemnity on too many non-meritorious cases.

\textsuperscript{4} Some companies in the past sought to eliminate this quarter to quarter variation by keeping a running total average as to period by period reports. The effect was to essentially postpone the realization that either the trends in the litigation had changed, the strategy was not working or the metric was not useful in measuring the success of the strategy.
Like the claim count metric, use of average indemnity as a metric in asbestos litigation also arguably creates litigation problems. Plaintiffs’ counsel were quick to recognize that some entities’ use of the average indemnity per claim increased the pressure on companies to continue down the path of settling cases regardless of merit so that it appeared the “average” cost of resolving the most serious claims remained under control. New cases continued to rise as plaintiffs’ counsel “found” hundreds of thousands of claims.

Once a company starts down a path of measuring and reporting a particular number, that number takes on an importance almost impossible to change. It can be forced to manage the litigation based on achieving certain numerical results rather than using the numbers to reach the best management decisions and strategies.

The obvious question is, if pending claims and per case settlement averages are not appropriate metrics, what should a company measure? The earlier suggestions that there is no magic answer holds and depends on the company, its products, insurance and a host of other issues. For example, if your company’s product had limited geographic distribution or was used only by a particular occupation, perhaps measuring the number of mesothelioma claims in that region or by occupation would be appropriate. My personal favorite metric is cash. How much did we spend this quarter or year as compared to last quarter or year? I have long believed that asbestos litigation is a temporal, rather than claim, problem. It is not clear when it will end, but like everything it must at some point. The key statistic then is to maintain total spending at an annual level that the company can tolerate under its business plan for an indefinite future. If the assumption is correct then my metric is correct. You must decide what to measure based on your strategy and how success is defined.

**Information Management**

Another critical management issue is how to create and update massive amounts of information generated in asbestos litigation. This includes basic information that can often be gleaned from the complaint such as plaintiff’s name, whether plaintiff is deceased or living, jurisdiction, case number, plaintiffs’ counsel, defense counsel assigned, disease, occupation, social security number and exposure period. As the

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5 “Cash” is a rather simplistic term here but what I mean is the amount of out of pocket money the company spends and can afford to spend after receiving insurance and any other proceeds. It must take into account the ability to pay this amount in the current year and in succeeding years. Unfortunately some companies learned some hard lessons when their business had a downturn and they no longer had the cash to continue to pay indemnity levels expected by the plaintiffs’ bar and banks were not willing to lend money to unprofitable companies to pay claims. Such companies were forced into bankruptcy because they ran out of “cash”. Exacerbating the problem was an early belief that asbestos litigation was going to be a relatively short term issue that would be over in the early 1990s at the latest and that insurance would solve most companies’ problems.

6 By end I do not mean getting to the point where there will be no cases but to the point where it is handled like any other products liability case - no special rules, dockets or procedures.

7 Depending on the jurisdiction some permutation of this information will be available and despite the earlier discussion on the virtual irrelevance of the number of pending claims it has become so part of the
litigation progresses, this information may be updated along with other key information such as plaintiff’s dependents, earnings, witnesses for each side, deposition dates, settlement conferences and trial dates. When the case is resolved, the disposition must be recorded, amount paid (if any) and all other information the company or its carriers think is important.

Again, how this issue is handled is a matter of circumstances and to some degree preference. If a company’s case load is small (<1000) and the number of new filings is and is expected to remain low (<10/mo.), then data management can generally be managed in-house with aid of commercially available databases. This can be updated periodically by in-house personnel or national coordinating counsel. If a company’s case load is beyond these limitations, it almost always is prudent to have a third party administrator (TPA) for data collection and maintenance.

There are a couple of compelling reasons to use TPAs. First and foremost is accuracy. As with metrics, an old adage proves to be true – “garbage in, garbage out.” The process of reviewing the complaints and inputting the data is highly tedious but must be done consistently and accurately. In my experience it can never be done well or cost effectively in-house. Those who input the data tend to come and go requiring constant training. Unless carefully trained and monitored, each person will interpret his or her instructions differently. One might interpret the phase in complaint that “plaintiff has an asbestos related disease” as an asbestosis case and another as “disease unknown”.

In addition, a company might be very proud of its IT department and feel they have expertise and resources to fully support the data collection and maintenance issues for asbestos. The reality is that against other pressing internal company needs these projects are most often mishandled or under resourced.

Another benefit to outsourcing data management is that a large share of these costs might be billable to the insurance carriers as part of defense costs. Most carriers involved in asbestos litigation recognize the need and value of collecting this data and will pay (with some resistance) the cost if done by a TPA. Rarely will they agree to pay if done by in-house personnel. A TPA will also receive most of the complaints, maintain them in an electronic file, send a copy to the company’s designated local counsel, notify national coordinating counsel (NCC) and give notice to appropriate carriers. Experienced TPAs can also easily tailor reports and data output to meet internal and external accounting requirements to comply with SEC disclosure rules, Sarbanes Oxley and insurance company audits.

Assuming a company decides to use a TPA, the next issue is how sophisticated a system is needed. This depends on the company’s circumstances and need. TPA systems are one of two types including pure database or case management systems. Database systems simply track the data inputted and are rarely updated after the case is received except when it is resolved. These will produce reports based on the company’s (and its carriers)

expectations in this litigation, everyone is forced to report it. The key is to down play its importance and emphasize the importance of whatever metric you decide is significant.
needs but will do little else. It is possible to include litigation type events and other information obtained during the course of the litigation such as deposition dates, trial dates and other relevant facts. This, however, is a significant and expensive task and is nearly impossible to accurately update since the data change frequently, and there is lag time and communication issues. Generally, the information is obtained by an associate or paralegal at the company’s local counsel who communicate it up the chain to national coordinating counsel who then pass it to the TPA. Given this much information, with so many changes chances for miscommunication, the odds are that any trial date in such a system would be inaccurate. In addition the company must pay the lawyers and paralegals for their time, every step of the way. Typically, if a company uses a database system, either local counsel maintains the case relevant information and alerts NCC (or in-house counsel) in advance of key events or NCC counsel maintains a universal calendar and a parallel file for each pending case. Both systems are fraught with dangers of missing key dates and the cost for NCC to maintain files can be prohibitive. These methods should be used where pending case counts or litigation activity is very low.

For most companies with a significant asbestos docket, a case management system (CMS) linked to the TPA database is the best option. There are numerous case management systems available. The primary drawback with most is that they were designed for standard litigation and not mass torts. Such systems have difficulty handling massive amounts of data or meeting the unique needs of the asbestos defendant. Generally the TPA runs and maintains the case management system, input all initial data and notify local counsel who will then will be given limited access to the CMS to input litigation dates, attach important documents such as deposition summaries, medical reports, dismissals and other important milestones or key events. Both in-house counsel and NCC typically have access to this information and can quickly run reports on upcoming events. Because the information is a result of direct input at the level where the information originates, the accuracy of the information will generally be very sound.

In addition, with advance planning the system can capture information required by insurers to audit the cases. They can be given limited access to the CMS to extract information they need or have it sent to them. Besides basic case information, typically insurers require case specific information for cases settled such as product identification information from discovery and supporting information on the disease diagnosis. In a good CMS this supporting documentation is part of the electronic file and can be easily accessed by the insurers.

There are other audits besides insurer audits required of many companies. These are mandated by Sarbanes Oxley and SEC requirements to audit the accuracy of the data and to test the data collection systems. Some TPAs have had independent external audits

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8 While there are independent TPA companies, some NCC also function as the company’s TPA. Generally this is very expensive and it is not something most law firms do very well. Aside from the additional costs in my experience data is inputted inconsistently and systems are not updated routinely.

9 One quick note on the accuracy of the information – it will never ever be 100% accurate. Given the number of cases and the number of people involved in transmitting information some degree of inaccuracy is inevitable. Every effort needs to be made to keep the information as accurate as possible but if you lay awake at night when your checkbook doesn’t balance to the penny, this will drive you crazy!
conducted of their systems that comply with SAS 70. This greatly reduces the time, effort and expense for the company’s internal and external auditors to independently verify that the data being reported to management, SEC or the investment community is accurate, and that they are in compliance with federal audit requirements.

The biggest downside of the CMS is cost, but taking a broader view, these costs can be partially or completely offset by reduced legal fees and dispensing with NCC counsel to maintain separate files and track each case independently. The additional costs are also offset by the increased reliability level of the data and lower risk that the company will not be aware of significant events in cases until deadlines have been missed or trial dates are imminent.

**Settling Cases**

**General Issues**

The final critical management issue is settling cases. Although this might be the most important and most difficult task everyone seems to want to take the lead. Everyone thinks they are good at settlement and settlement strategy and most in fact are not.

The settlement process is important because every settlement is a precedent with at least the particular plaintiffs’ firm that is negotiating the settlement and likely beyond. Regardless of disclaimers by the company, and agreement by plaintiff’s counsel that a particular settlement is not a “precedent”, one should anticipate that each settlement sets a floor for future settlements among similar cases. Historic settlement averages can be reduced, but that process often involves increased litigation risk, a substantial expenditure of time and resources, and a strong company will. Conversely, favorable settlements can build and be used by the company in future negotiations. As discussed earlier, indemnity payments are crucial to a company’s success. Many bankruptcies have resulted in large part from poor settlement strategies and execution.

Assuming a company has settlement authority, perhaps the most important decision a manager must make (beyond the actual litigation and settlement strategy) is who will actually negotiate with plaintiffs’ counsel. The list of likely candidates include: local counsel, national counsel, trial counsel, in-house counsel or a professional claims adjuster. The best negotiators are most often those not in adversarial roles. In the selection process there are a number of factors to consider.

First, the person must be very knowledgeable of asbestos litigation in general and the facts of each case in particular. They must know the medical and scientific issues relating to the claim and the product in question, the jurisdiction, plaintiffs’ counsel, the plaintiff’s circumstances, the company’s settlement history and ideally some perspective on the overall history of asbestos litigation. (Another old adage applies here, those that do not learn the lessons of history are doomed to repeat them.) Some of this should be resident knowledge with the person, but much is case specific. To be effective, the person must invest significant time to understanding case facts. An in-depth understanding
must be developed of strengths and weaknesses of the disease, the credibility of the product identification, the experts for both sides and a thousand and one additional facts that play into the perceived settlement value of the case. Transcripts of medical records must be reviewed in detail. In order to fully understand the company’s settlement strategy, risk tolerance discussions must take place with the lawyers who took the depositions.

Second, the person must have the right personality, and that means the right combination of an honest assessment of the case, the ease of a salesman, the strategic ability of a chess player to see and anticipate many moves in advance and a bit of riverboat gambler absent undue recklessness. The popularization of the Texas Hold-Em tournaments on TV are a testament to our fascination with and the skill involved in the art of “reading” the other side’s weaknesses and getting “tells” as to how the other side is likely to react. As we have all seen it is not always the person with the best cards who wins: bravado and psychology play a large role in the final outcome. In the same way the other side might not know one’s key expert will be unable to testify in an upcoming trial, and the company is going to be forced to settle. It is crucial not only that the potential weaknesses in the case (such as the unavailability of a key witness) not be communicated to plaintiff’s counsel, but also that the company’s need to settle is not subtly communicated through the various interactions between the negotiator, defense counsel and plaintiff’s counsel. Conversely, it is just as important to glean whatever information is possible about the other side’s intentions and preparedness for trial before and during the negotiating process. Lawyers and the professional negotiator talk to a variety of people in the case. If for instance, the defense knows that a key lawyer for plaintiff has not changed his plans to start his vacation the following Monday when trial is supposed to start, it is a strong indication, that plaintiff’s counsel has already decided to settle at whatever amount they can get and gives the company’s negotiator a huge advantage in the discussions.

While the qualities necessary for the negotiating may seem obvious, few people actually have them. Some, because of their involvement in the litigation, are not in a very good position to conduct the negotiations. As identified earlier, the likely candidates as negotiator are local counsel, nation counsel, trial counsel, in-house counsel or a professional claims adjuster or some combination of these.

**Local Counsel**

Local counsel is one of the most common choices and probably the worst. The scariest words one can hear from local counsel as to why he or she should handle negotiations is the “good relationship with plaintiffs’ counsel, the judge or the mediator” and that relationship will somehow facilitate an advantageous settlement. This is faulty logic as all a plaintiffs’ lawyer attempts is to win the largest sum of money for a client. Whether plaintiff’s counsel likes your negotiator, this will generally not factor into the calculus.

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10 It is probably necessary to make a quick disclaimer. The discussion that follows is based on generalizations. There are many exceptions to virtually every statement and conclusion made. However, based on my many years of direct experience and observations, the patterns repeat themselves too often to be ignored.
Although the opposite can be true that if plaintiff’s counsel has a pre-existing serious dislike for the negotiator this can be very harmful and work against a company’s ability to settle a case.

Another strong argument against using local counsel as negotiator is that they are too close to the situation to view the negotiations with the required detachment and perspective. Every local counsel seems to believe (quite sincerely) that his local plaintiffs’ firm, his jurisdiction, the local juries and the local judiciary are the most dangerous in the country. Generally the company will find itself negotiating with its own counsel as he or she attempt to persuade the company to increase the authority to avoid going to trial in his personal litigation hellhole. There are several reasons for this. While local counsel are happy to take depositions and go through the motions of preparing a case for trial, the last thing want is for a case to actually go to verdict. Verdicts present not only risk for the client but also are a great risk for counsel. An adverse verdict reflects poorly on local counsel and may put at risk keeping current or getting future clients. It is much more safe to convince a client to add another thousand, ten thousand or hundred thousand to the settlement pot than to risk going to trial. In addition, settling a case garners favor with plaintiff’s counsel (many of whom are fabulously wealthy and local or even national celebrities) and with local judges – who they will see repeatedly in the future. Local counsel has no motivation to make plaintiffs’ counsel or the judges lives difficult with protracted negotiations. Again it is far easier to get more money from the client than resist the pressure put on by plaintiff’s counsel and the local judiciary. Finally, the risk of subtle adverse communications is high. If local counsel intends to settle, the temptation to take the foot off the gas in trial preparations is almost irresistible. This will be quickly picked up by plaintiff’s counsel and will translate into higher settlement dollars.

While it is important to keep communication lines open with local counsel as a source of input and intelligence, they should neither be used to negotiate settlements nor even be advised of the progress. Generally I will not even tell them the settlement amount after case is resolved. Their focus should be to prepare a case for trial and that message both in words and actions need only be conveyed to plaintiffs counsel by local counsel.

Although local counsel has many seeming advantages in negotiating settlements (familiarity with the case, the jurisdiction, the judge and availability for settlement conferences) \ they are perhaps the worst choice in terms of overall effectiveness in implementing a national strategy. To be clear, the assertion here is not that local counsel consciously or intentionally works against client interests. The dynamics are such, however, that it is almost impossible for them to be most successful.

**National Coordinating Counsel**

An experienced National Coordinating Counsel (NCC) can be a good choice. The biggest challenges are time, temperament and availability. NCC should be the cheerleader of your litigation strategy and defense – the person most enthusiastic about the strength of a defense case. That role is often inconsistent with taking a broader view
of plaintiff’s case, plaintiff’s counsel and a realistic assessment of any defense weaknesses.

The most important qualities necessary in any negotiations is patience. The side in the biggest hurry in the negotiations always loses and this is true for virtually any kind of negotiation. Although I have negotiated many settlements and contracts, a lack of patience is what makes me less than the best at it. Unfortunately it is often easier to just throw a little more money at a problem to make it go away. In a one-off contract negotiation or tort case this may not be a big deal and might be cost effective. This is particularly true if expensive trial preparations and key strategic decisions are being made simultaneously. In the art of negotiating settlements in mass torts such as asbestos, where every settlement is likely to affect future settlements, throwing money at a problem can snowball and have long term adverse financial consequences.

Patience is particularly problematic for many experienced national counsel. If they are effective then they are in demand with many competing interests for their time. They generally have other clients, supervise a host of associates and keep an eye on all the fires in all the cases across the country. They tend to travel a fair amount. Thus for them to be available for the necessary back and forth between plaintiff’s counsel, settlement judges, magistrates and whoever else they need to deal with on a particular case is likely to require such a commitment of time such that they will either try to rush the process (remember those who rush lose) or convince the company to add more money to settlement authority to get rid of the case quickly.

In addition to a problem of time commitment, there can be availability problems. In some jurisdictions, the court has mandated settlement conferences. Most often, it is sufficient for the company’s negotiator to attend by telephone but occasionally the court will require someone with “reasonable authority” to be present. Usually courts will use this threat as pressure to “encourage” companies to settle their cases. Occasionally it goes beyond threat and a person is actually required to attend in person on little notice. If your NCC is your negotiator, it is hard for him to be available for such random scheduling events.

Finally, there is the adversarial nature of the NCC’s position. NCC is likely to be a seasoned current or former trial lawyer who is known to plaintiff’s counsel, but in a very different context. They will not be seen as a non-combatant even if they no longer actively litigate cases. NCC should be the epitome of the defense and their opinion should be reserved solely for the client. Negotiations are best conducted by non-combatants. NCC should be intimately involved with the internal communications regarding the case and like local counsel can provide extremely useful information and advice.
Trial Counsel

Commonly, if a case is not settled prior to the start of trial, plaintiffs’ counsel or the judge will try to engage trial counsel in settling the case. As earlier discussed, it is a bad idea to allow any “combatant” in the litigation to conduct negotiations for a number of reasons. While it is essential to maintain frequent communication with trial counsel to know the situation and to garner whatever intelligence possible, I generally do not even communicate to trial counsel the status of settlement negotiations. The clear and unambiguous message this sends to counsel is that they are there to try the case and need to be prepared to go all the way. I want that message conveyed by my counsel in the courtroom. If my trial counsel is convinced that the company is prepared to go to verdict, that message through counsel’s words and actions will come through loud and clear to plaintiff’s counsel. This makes settling a case more likely and on the best terms possible. Frequently plaintiff’s counsel will threaten that, once a trial starts, they would discontinue settlement negotiations or increase settlement demands. While in some instances with certain counsel these threats are real, they tend generally to be very hollow and can be discounted. There are two additional reasons that trial counsel are not the best at settling cases.

Trial counsel would almost always prefer to see a case resolved by settlement than by verdict – particularly the most difficult cases in which there is the greatest trial risk. Like local counsel they actually understand that there is a significant chance of a favorable plaintiff’s verdict regardless of trial counsel’s skill. In my experience, trial counsel will give multiple reasons why the case should be settled. As an example, in one case after a jury was chosen, I asked our very experienced trial counsel what he thought of the jury. He said he thought it was OK, but there were a number of people on it he was concerned about and encouraged us to settle. After pointing out the positives of the jury I said it looked like the best jury I had ever seen in an asbestos case. He reluctantly agreed it was the best jury he had ever seen in an asbestos case. (FYI we got a defense verdict in the case.)

Trial counsel should be seen by themselves, the judge and plaintiff’s counsel in only one role – the lawyer there to try the case and get a defense verdict. In many jurisdictions the judge is aware of and might even participate in the settlement process. If the trial judge is aware that the trial counsel is negotiating the settlement, he can use in court rulings as pressure if, in his opinion, the company is not being “reasonable” in its settlement posture. Perhaps the only person who wants a case to settle more than local and trial counsel is the judge. Verdicts are nightmares for them. Long trials take huge amounts of court and judge’s time and are expensive. Then there are post trial motions and appeals where everything the judge has done is called into question. Thus, some judges will do almost anything to force a settlement and you do not want to put your trial counsel into this situation. It is far easier for him to simply say to both the judge and plaintiff’s counsel that he is there strictly to try the case and that others have the authority to conduct settlement discussions. He should have the person’s name and contact information.

Who should try your case is another question that is far too complicated to address in this article.
In-house Personnel

In-house personnel can be a good choice if a person with the requisite skills and experience is available, but this would be unusual. As with NCC, in-house personnel have time and availability constraints. In addition there is the problem of “personalization.” If plaintiffs’ counsel, the judge or magistrate know that the person they are dealing with actually works for the company, there is a tendency to use this fact to make threats and almost personal attacks. It is advisable that the company and the person managing the asbestos litigation remain outside the reach of the direct participants in the discussions. In this way, a third party is seen as objective and when negotiating on behalf of the defense can portray them in whatever light was best suited to the circumstances. While it is vitally important that a corporate witness appear at trial to personalize the company to the jury, it is equally important that Plaintiffs’ counsel, judges and mediators not be given access to the company decision makers. Frankly, this takes a fair amount of ego restraint by in-house personnel, but it is in the best interest of the company.

Professional Claims Adjuster

Given the problems that have been thus far identified, the best possible choice of a negotiator in most cases is a professional claims adjuster. He or she might come from a TPA, but it is advisable to stay away from using insurance company personnel because their objectives may be very different than the company’s for reasons far too detailed to discuss here. We can, however, learn from the experience of insurance companies who have effectively used such personnel for many years. The best of these professional negotiators become experts in their narrow field and adapt to each circumstance. In addition to having time and energy to focus on the issues affecting settlement, they do not have competing interests and can remain detached about taking verdicts.

The hardest part is finding someone who has the requisite skills and experience. There are, however, many individuals and companies that specialize in claims resolution, so it is not impossible. The biggest perceived downside is that it might appear they are adding a layer of cost. I do not think this is really true. Typically their rates are lower than an outside attorney. Ultimately the company will reap substantial rewards for the extra money in a smaller settlement in the instant case and future cases.

Conclusion

I have touched on only a few of the less than obvious but significant litigation management decisions facing in-house counsel – metrics, information management and settling cases. This is far from an exhaustive list. There are exceptions to every conclusion and I readily admit these are subjective views but are based on many years of experience, watching mistakes and successes of others and myself. I invite your thoughts, comments and experiences by e-mail mark.hess@navignatconsulting.com