



Shawn Khorrami

Representing plaintiffs in mass-tort cases

I embarked on a career in law with four general goals: I wanted to represent those who had suffered from injustice, but who could not afford the representation; I wanted to help as many people as possible; I wanted to handle cases where the lawyer mattered – where my skills as a lawyer helped obtain justice for my clients; and I wanted to effect positive change – be it within a single company in the way it treated consumers, change in the way an entire industry did business, change in public policy, or even change in legislation. The place where I felt I could best accomplish those goals was within mass torts and class actions. As I started practicing in 1996, a couple of months after I was admitted to practice law, I learned a lot of very hard lessons. Here, I am going to share some of those as they relate to handling large masses of clients in complex litigation.

Think *inside* the box

When handling masses of clients, I follow two big-picture rules. The first is: Think inside the box! Simply put, that means that you have to be very intentional about the basics. As we gain more experience handling cases, many things – many duties that we have to our clients – become automatic: we just do them as a matter of course without thinking about them. For example, we call our clients and give them updates when any major event occurs in their case; we send them update letters; when they call with questions, we return their calls. When handling masses of clients, all of the most basic things that we do automatically can easily be neglected and eventually become very large problems. Therefore, it is imperative that we are *intentional* about the most basic of tasks – meaning that we build systems and protocols for absolutely everything – no matter how basic and no matter how simple.

Think *outside* the box

The second rule is: Think outside the box! Mass litigation is by definition complex – more plaintiffs, more lawyers, more theories of liability, more defenses and higher stakes. There are things happening all over the country – in trial courts, in appellate courts, in various legislatures, and in the media. This presents completely new challenges and many new options. For example, my firm represents some 25,000 individual claimants in the Hurricane Katrina litigation in the Eastern District of Louisiana. The very same court is responsible for all Hurricane Katrina litigation for the region. All told, the court not only oversees hundreds of thousands of claimants, but also many dozens of class actions against insurers for claims handling, against various governmental entities for maintenance of the levies, and against many private entities for various theories of negligence. Even if each party were to serve a single set of interrogatories, responding to those interrogatories is cost and time prohibitive for the parties and adjudicating over the disputes would be impossible for the Court. Therefore, being creative – thinking outside the box – is the only way your clients are ever going to have their day in court.

Below are some key issues that arise in handling masses of clients. However, these are by no means an exclusive list. They are merely illustrative and show how and why we must think inside the box and outside the box in handling mass torts.

Client communication

Not surprisingly, one of the top reasons that clients file bar complaints in mass torts is their lawyer's alleged failure to communicate. Considering that at any one time you are representing thousands of clients dispersed throughout the country, with varying socioeconomic and cultural backgrounds, most of whom have

suffered devastating injuries and/or losses; it is particularly easy to upset a mass-tort client. So, it is crucial to dot your i's and cross your t's. The only way I have found to do that is to make sure you list everything that you need to do in discharging your ethical duties and then have a protocol for doing them. The good news is that, in my experience, mass tort clients are generally very cooperative, appreciative and are looking for relatively basic information about their case.

When it comes to communication, the same two rules apply: Think inside the box and think outside the box – make sure you are responsive and open with your client, and be creative in doing it. At our firm, we send regular update letters either quarterly or upon the occurrence of any major event in the litigation. There are a number of issues that arise unique to mass torts. First, since the update letters are being sent to thousands of clients and they contain information which may apply equally to all clients, particular attention has to be given to the attorney-client privilege. At our firm, we assume, for example, that the defense is going to obtain a copy of the letter. This is particularly true in the case of mass disasters such as hurricanes because your clients are generally concentrated within a small geographic area. When you send tens of thousands of letters to a relatively small geographic location, it is not hard to imagine that a defense investigator can end up with a copy – and not necessarily through unethical or illegal means. Therefore, while we do our absolute best to assure confidentiality, we prepare for the worst. We generally send mass update letters which contain information that is publicly available, such as court decisions, filings with the Court, etc. This way, we are providing valuable information to our clients and at the same time, not disclosing confidential information.

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Another consideration is that mass torts are generally high profile cases — they're commonly covered by the media. Additionally, because they are large and may have completely different types of cases and theories, a major event may occur in a portion of the litigation that has little or nothing to do with your particular portion. For example, in natural disaster cases, there may be bad-faith cases against insurers for homeowner claims and completely separate liability claims and theories against private or public defendants. While occurrences in one portion of the litigation may have effects on all portions, there are many events that will be specific to one or the other. Regardless, the occurrence of any major event usually triggers media coverage which in turn triggers a flood of inquiries from clients. It is not uncommon to experience a call-volume increase of thousands of calls in a one- or two-week period. So, it is particularly important to be proactive and to be prepared to send out a mailer. Otherwise, it will be difficult or impossible to handle the calls, not so much because of the initial volume, but because of rumors — clients will communicate with each other and within a very short period of time, there will be hundreds of versions of the facts.

Phone contact is also crucial. However, with high volume, there are additional challenges. At our firm, we assign a staff member to a group of clients. Depending on the type and stage of litigation, the number of clients assigned to each staff member may vary greatly. We then use those staff members as the communication line with the clients. For example, if we need to gather certain evidence — such as information regarding property loss — from our clients, the task is done by the staff member assigned to that client. Similarly, any phone calls by clients are generally handled by the staff member assigned to that client. Lawyers draft scripts and FAQs for staff members to use in answering common client questions. That way, clients generally receive information immediately and are not frustrated by having to leave voicemail after voicemail. At the same time, our lawyers are not bombard-

ed by phone calls. Additionally, scripts and FAQs not only assure that non-lawyers are not dispensing legal advice but also assure uniformity and consistency in messaging across clients. Furthermore, as clients and staff develop rapport, they learn how to communicate better, the best times to reach each other, etc., and consequently, there is greater client satisfaction.

Sending update letters and answering phone calls probably satisfies your ethical duties in terms of communication, but at great cost. With a little bit of creativity, call volume can be dramatically reduced — by as much as thousands of staff hours per month, in fact. For example, we usually create a client Web site. There is one important caveat with Web sites. While providing individual user names and passwords is not hard to do, they do not provide much by way of security. All it takes is a few clients to give out their usernames and passwords, and confidentiality is lost. The defense may even find its way into the Web site. Therefore, I find that it is best to have the Web site be public. Again, most clients are satisfied with access to some basic pleadings and general information about the litigation.

Other creative ways to communicate with mass-tort clients are postcards — postcards relay information and are less expensive to mail. For example, we may send postcards to give clients a sound bite of information and then point them to the Web site for more details. A creative and cost effective way for the lead lawyers in the litigation to communicate with clients and also answer some questions would be through a conference call. That way hundreds or thousands of clients can hear information together at the same time assuring uniformity. In-person meetings, with the exception of deposition and trial prep, are also best done by way of town hall meetings.

Evidence gathering

Gathering evidence from tens of thousands of claimants simultaneously would be nearly impossible without systems and protocols. When selecting clients, it is important to be mindful of each individual claim. In mass disasters,

for example, one client may have a flood damage claim and another may have storm damage. One may have a cause of action against the builder of his or her house, and another may be a renter in an apartment building with a claim against the landlord. Some clients may have personal injury claims because they did not evacuate — and also additional mitigation defenses which will surely be raised by the defense — and others may only have property damage claims.

Since an entire team ultimately works on the litigation, again, protocols and systems are imperative for accuracy, uniformity, consistency and efficiency. It is important to invest in software that is customizable and can accommodate gathering information from the various categories of clients. Did they suffer personal injuries or property damage or both? Is the case a wrongful death case? Were they renters or owners? Do they have insurance? Did they suffer damage from storm surge or flooding? If they suffered personal injuries, what are those injuries? Where were they located? All of this information — and much more — must be gathered and must be easily searchable and sortable. Ultimately, the trial selection process will, in large part, be based on this information. Further, from time to time, most courts around the country will require statistics regarding the plaintiffs — how many total? How many with personal injuries? How many with broken bones? How many wrongful deaths? Etc. There will be no orderly way to move the litigation forward without this information.

Your systems and protocols must be detailed and always examined for improvement right down to the smallest detail. For example, it is important to use drop-down menus as much as possible when gathering information — do not allow any team member discretion on answers. Without drop-down menus, your database will not be sufficiently searchable or sortable. For instance, it would be extremely time consuming to find out how many broken bone cases are in the inventory of clients without drop-down menus as one team member

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may input a broken bone as a broken arm, another may input it as a fractured bone, yet another may input it as shattered elbow. This would make searching and sorting automatically an impossibility. Drop-down menus assure uniformity in terminology, making your database searchable and sortable at the touch of a button.

Gathering medical records is again going to require the practitioner to think inside the box and outside the box. A mass tort means a mass of medical record orders. Our firm has a subsidiary whose sole job is medical record gathering. At any one time, there may be thousands of medical record orders outstanding. The management of the orders, assuring that records are not being ordered needlessly, and actually obtaining full and complete medical records is a Herculean task. It is only through proper management of clients and negotiation of special procedures with the defense and the Court that medical record gathering can be managed and done in as cost-effective a way as possible.

Filing cases

Even the basic task of filing cases can be all but impossible if not properly planned out. Specifically, filing thousands of cases would mean substantial filing fees depending on where the case is filed. For example, while in California we have the luxury of relatively liberal grouping rules, some states require a separate lawsuit for each claimant. For example, in Pennsylvania, it costs in excess of \$700 per claimant just to get a lawsuit on file. Additionally, many federal judges will sever claimants requiring separate filing fees for each. This is true where claimants were appropriately grouped and filed in state court and then removed to federal court by the defense, even years after the removal and transfer. Therefore, when grouping cases, consider whether your case is going to be in a forum where severance is likely or a certainty. If so, group very conservatively and be prepared to pay a separate filing fee for each of your clients.

Now, time to think outside the box. If you have 10,000 plaintiffs and do not have several million dollars sitting around to send to the courthouse, consider a tolling agreement. So, why would a defendant agree to a tolling agreement? There are a number of ways to incentivize the defendant. First, for each claimant that you file, the defendant has to pay a filing fee for its response. That provides a significant financial incentive for the defendant. Second, and a significantly larger financial incentive, is the legal fees that the defendant has to pay for maintenance of the files, even if those files are largely dormant. At the same time, among other things, the defendant has a great interest to know the caseload that it is facing; be able to have information about the plaintiffs; be able to evaluate plaintiffs in order to effectively participate in the bellwether plaintiff process – alternatively, no defendant is going to be willing to leave the bellwether process solely to the plaintiffs; and have cases ultimately pending in one or a few forums rather than dispersed throughout the country. The point is that the defendant may have varying interests depending on the nature of the litigation, insurance policies, economic conditions, political environment, as well as a host of other factors. It is extremely important to understand those interests; and be prepared to be creative in working with the defendant to address them while not compromising the rights and interests of plaintiffs.

Discovery

Traditional discovery methods are extremely inefficient and, in fact, cost-prohibitive in mass-tort cases for all involved – plaintiffs, defendants, and the courts. Discovery relating to general liability and causation can be daunting. It can involve hundreds and thousands of depositions throughout the country and many times, throughout the world. Obtaining the production of the right documents can take years, and after the fight over getting the documents produced is over, you really have to be careful what you wish for. The production(s) can easily number in the millions of

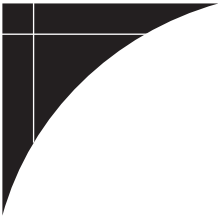
pages. For example, in one litigation in which my firm is serving as lead counsel, we recently received a production of a portion of the documents from one of the defendants. They numbered 21 bankers boxes – 21 boxes of hard drives. In all, the production totaled 105 hard drives, each containing 300 gigabytes of information. That amounts to more than 100 million pages of documents. Obtaining, reviewing, and analyzing discovery from the defense is extremely complex.

The focus of this article is responding to discovery on behalf of the plaintiffs. Again, the rule is to think inside the box and outside the box. The defense is entitled to obtain certain information from plaintiffs. Serving and responding to interrogatories and requests for production are simply not an option. Discovery requests and objections are decided prior to being served. The parties meet and confer and agree to as many of the discovery requests and procedures as possible. What the parties cannot agree on, the court decides. The result of these efforts is usually referred to as plaintiff factsheets. These factsheets replace interrogatories and requests for production.

At our firm, we first mail a copy of the factsheets to each of our clients. We allow them a few days to read, digest and respond to each of the questions and to gather as many of the documents as they can. We then contact each client and conduct interviews with them and enter their responses. Depending on the length of the factsheet – which varies from litigation to litigation – we may need to break the process into several interviews. Live interviews allow us to prod our clients to assure that we are giving full, complete, truthful and relevant responses to each request.

The entire caseload is not going to be tried at once. In fact, depending on the litigation, the court will order a process for picking test or bellwether cases. These cases are used by the parties and the court to streamline the trial process for future cases – such as eviden-

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tiary rulings that are common to all the cases in the litigation, admissibility of scientific testimony, etc. Additionally, these trials are used to determine ranges of values for the different categories of cases in order to reach settlement.

Therefore, I consider discovery in mass-tort cases to be like an upside down cone. All plaintiffs will need to complete the more general factsheets. That is like the wider open end of the cone. More specific discovery will be taken from an increasingly smaller number of plaintiffs as the parties sharpen their claims and defenses going toward the ultimate goal of trial. So, just like a cone, the time and resources devoted will be focused on an increasingly smaller pool until it reaches

the tip – those are the cases that are tried.

Mass torts present unique opportunities to truly make a difference in the lives of people who have been significantly harmed by the wrongful conduct of very powerful interests. They are also a vehicle for obtaining significant positive change. Take, for example, the pharmaceutical cases in recent years which have resulted in sweeping changes – from overhaul of the FDA to shedding light on how companies skew the scientific literature in order to increase sales of their products. But with these opportunities come substantial challenges. How to handle masses of plaintiffs is only one. The above discussion is only an illustrative

list. The bottom line is that to be successful, the practitioner must be intentional and creative – he or she must think both inside the box and outside the box.

Shawn Khorrami is the Founding Partner of Khorrami Pollard & Abir, a firm he founded two months after being admitted to practice law. KPA focuses on mass torts, class actions, toxic torts, product liability, personal injury, civil rights and labor and employment cases throughout the nation. He has litigated many class and individual actions against some of the country's largest corporations and has held leadership positions in high-profile cases representing tens of thousands of individuals. He can be reached at skhorrami@kpalawyers.com.