



## Protecting the “House”

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# Secrets for a Successful Defense Team



*Casino*, the 1995 Martin Scorsese film starring Robert De Niro, Sharon Stone, and Joe Pesci, chronicles the fall of organized crime’s management of the Las Vegas casino industry in the 1970s and early 1980s. Through the eyes



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of sports handicapper, Sam “Ace” Rothstein, the film gives the viewer a behind-the-scenes look at the inner workings of a Las Vegas casino. In one memorable scene, Ace, played by De Niro, describes the elaborate, multidimensional team of casino personnel in place to defend against cheaters looking to beat the house. He describes the dealers, the box men, the floor men, the pit bosses, the shift bosses, the casino manager, the “eye in the sky,” and the “ex-cheats” all strategically deployed to do one thing: stop the swindling gambler from winning.

While there are certainly significant differences between defending a casino from a cheater and a company from a dubious asbestos claim, there are commonalities in that both require a well-orchestrated plan and a dedicated and talented team. The asbestos defendant may not have the resources of a Las Vegas casino, but it is critical that the defendant nonetheless develop a team within the constraints of its litigation budget. The typical structure of a defense team includes the client or insurer (or both), the national coordinating counsel, and a network of local counsel. From this core, each defendant often builds additional support, including a designated trial counsel, corporate witnesses, and a cadre of experts.

The successful defense team works together to represent the company through all stages of the litigation. From setting litigation reserves and reporting to corporate management, to responding to written discovery and taking depositions, the team’s functions are myriad and diverse. This article will focus on three often overlooked responsibilities of a successful defense team: conveying the company story, creatively investigating the claim, and bringing all of the team’s resources to bear ultimately to win the case at trial.

### **Developing Your Client’s Narrative**

One of the critical “secrets” to the successful defense of any toxic tort claim is the ability to convey the client’s “corporate story” at trial in a creative, efficient, and effective manner. A thoughtful approach that will resonate with the varying demographics and education of the jurors is important to any defense team’s success. There are a variety of potential approaches within which to frame your client’s narrative. Outlined below are certain strategies to assist you in navigating the important work of developing a powerful corporate presentation.

### **Do Your Homework**

Before your client walks in the door, do your homework regarding the client’s corporate background, product lines, and branding. We often find that because the issues at play involve corporate events that occurred decades before the litigation, internal information regarding our client’s

history may have been discarded in the ordinary course of business, and frankly, memory fades. Consequently, the more you learn in advance of any client meeting, the more you will refresh your client’s recollection and the more you will enhance your understanding of important historical issues. Potential, preliminary research should include

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“secrets” to the successful defense of any toxic tort claim is the ability to convey the client’s “corporate story” at trial in a creative, efficient, and effective manner.

- SEC filings;
- Newspaper articles;
- Tax records;
- Trade organization involvement;
- Marketing pieces;
- Website narrative;
- Prior lawsuits;
- Prior workers’ compensation claims; and
- Historical Society information in the area.

Investigating and understanding your client’s “external” corporate history will be invaluable in advance of your meeting and guide your questioning. Further, understanding the manner in which your client marketed itself to the public is necessary to ensure that the story developed does not conflict with the company’s image and branding strategy. For example, does your client market itself as being on the cutting-edge of technology? Does its advertising reference the importance of safety in use of its products? Was it involved in safety-related trade organizations? All of these factors are important

to helping shape themes for your corporate story.

**What Did the Client Know and What Did the Client Do About It**

Understanding what your client knew, when the client knew it, and what the client did in response is critical to defending toxic tort litigation. Given that memory fades, current employees may be unaware of historical corporate behavior and background regarding the state of the art of the client's knowledge. Consequently, completing a thorough investigation of the internal corporate structure and knowledge is important. As for your internal investigation, areas important to explore with your client, include

- Trade organization involvement
- Regulatory development involvement
- Medical department and monitoring
- OSHA investigations
- Workers' compensation claims
- Prior lawsuits
- Detailed chronology of the use of the alleged toxic substance
- Warnings
- Supplier information and warnings
- Material Safety Data Sheets
- Engineering department and monitoring
- Research and development practices

Knowing how your client obtained medical, scientific, and product information is critical, and subsequently, how it was proliferated internally are key in crafting your corporate story.

**PMK, or "Person Most Knowledgeable," All the Way**

Who should tell your story? Will you hire an independent witness to tell the corporate story? Is a current employee best up to the task? Or is a former employee willing to invest the time and attention? In selecting whoever will serve in this pivotal role, here are some factors to consider in your determination:

- Not defensive
- Not take it personally
- Understands the issues
- Willing to review and analyze legal documents
- Presents well
- Willing to endure one, or more, depositions
- Experience with the product
- Hands-on knowledge

**Give Your Client a Personality**

Venture beyond the legal issues involved in the litigation to humanize the corporation. Juries need to understand that a corporation is comprised of people to relate to its actions better. The ways in which you can assign a personality to the corporation, and convey it to jurors, include

- Portraying a connection to the jurisdiction
- Discussing humble beginnings
- Explaining it is a family run company, if it is one
- Mentioning safety awards
- Including its community activism
- Having a representative present during the trial

**Develop a Framework**

After performing a deep-dive into your client's corporate history and background, distilling the information for presentation is critical. One school of thought in presenting the client's corporate conduct is to use the plaintiff's experts' definition of good corporate stewardship and juxtapose your client's behavior against it. With that, develop repetitive themes to convey the information. For example, in the ovarian cancer cases, a plaintiff's expert testified that a good corporate company should

- Watch and monitor the science
- If lacking in internal expertise, hire an outside expert
- Participate in government agency or regulatory agency development pertinent to the product at issue

Similar to a defendant in one of the ovarian cases, take the criteria and identify what your client did for each point listed above to comply with the plaintiff's alleged standards.

Another potential approach to presenting your client's story is taking the scientific method and juxtaposing it against your client's corporate behavior.

- When did your client have an inkling?
- When did your client develop a hypothesis?
- Did the client test that hypothesis?
- When did the client reach a conclusion, and what did the client do about it?

The scientific method serves as a nice framework to explain conduct and will pair well with an explanation of the state of the

art and proliferation of information both internally and externally.

**Creative Investigation**

At least one member of the successful defense team must be responsible for a thoughtful and creative investigation of the allegations against the company. Properly investigating the claim goes beyond perfunctory discovery. Rather, effective investigation means, among other things, (1) conducting a thoughtful collection and review of available records, (2) performing probing research into the claimant's background, and (3) scrutinizing the plaintiff's worksites.

**Records Collection**

Each jurisdiction has a unique procedure for the collection of records. Some jurisdictions rely on defense liaison counsel to request and to collect records, some appoint a discovery lead counsel based on the specific allegations in the case, and others rely on third-party records collection services. Whatever the method of assembling relevant records during discovery, there are a standard set of records collected in almost every case when applicable. They include the following:

- **Medical and billing records:** Identify alternative exposures; discover evidence to support medical defenses; calculate economic damages.
- **Employment records:** Corroborate or refute exposures; identify alternative exposures; demonstrate knowledge of hazards; establish occupational timeline.
- **Union records:** Establish knowledge of hazards and occupational timeline.
- **Military records:** Corroborate or refute exposures; identify alternative exposures; demonstrate knowledge of hazards; establish occupational timeline.
- **Social Security records:** Establish occupational timeline.
- **Social Security Disability records:** Establish occupational timeline; identify alternative exposures.
- **Veterans Benefits Administration disability records:** Identify alternative exposure; discover evidence to support medical defenses.
- **Workers' compensation records:** Establish occupational timeline; identify alternative exposures.

- **Federal and state income tax records:** Calculate economic damages; establish occupational timeline.
- **National personnel records (federal civilian employees):** Corroborate or refute exposures; identify alternative exposures; demonstrate knowledge of hazards; establish occupational timeline.

These records should be collected as soon as possible in every case. Generally, they are obtained through authorizations executed by the plaintiff, but many can be obtained through a subpoena or a court order. Each of the above types of records can potentially contain a treasure trove of helpful information. For example, medical records, military records, and workers' compensation records can often include useful alternative exposure information. Social Security records, employment records, national personnel records, and union records can often shed light on the plaintiff's alleged exposures and provide evidence about when they were, or when they were not, at a particular job or worksite. Obtaining and reviewing these records before a product identification deposition can result in a more effective cross-examination. Bankruptcy trust claims forms are also extremely useful in developing alternate exposure evidence, but they are a topic beyond the scope of this review.

## Investigation

When investigating the allegations in any case, the team member charged with directing the research should focus on two primary targets: (1) the plaintiff (or product identification witness), and (2) the jobsite or jobsites.

### *The Plaintiff*

There are several resources available to research the plaintiff (or other product identification witnesses) beyond the tools available in traditional discovery (interrogatories, requests for production, among the others). Such investigation is ideally conducted before a deposition so that the fruits of the investigation can inform the cross-examination, but the investigation should continue during the entire trial preparation period.

There are numerous online search engines that are useful in researching individuals. Some of the best are listed below:

- **Google.com:** A traditional Google search is a good place to start when researching an individual. Clicking on the "news" tab can help find references to the witness in periodicals.
  - **Pipl.com:** This engine searches the deep web and finds sites that are not within a traditional search engine's reach.
  - **Familytreenow.com:** This search tool finds relationships to other people that might be useful in an investigation.
  - **Legacy.com:** This is an online database of obituaries useful for developing information on family relationships, occupations, locations, and hobbies. The "guest book" often includes comments that may prove helpful in an investigation.
  - **Flickr.com:** This is a photo-sharing site that may have relevant content.
  - **Westlaw.com or lexisnexis.com:** These sites have engines to search public records for individuals, business, and locations. They can also be used to search criminal records and court dockets.
  - **Social media sites (Facebook, LinkedIn, Twitter, Instagram, and Myspace):** Given their age, many plaintiffs may not use online social media themselves, but younger family members do and may not be as attuned to the need for discretion during the course of litigation. Caution should be taken not to "friend" or otherwise connect with the plaintiff or other witnesses through social media.
- There are also more traditional investigation techniques for researching individuals:
- **Libraries:** Local libraries are good sources for finding newspaper articles and obituaries that might contain useful information.
  - **Local resources:** Municipalities may have birth, death, marriage, property, criminal, and civil records that can be searched. Searching court dockets can result in discovery from prior unrelated litigation.
  - **Prior depositions:** Your law firm's database of prior deposition transcripts is also an excellent source for information. A search of available transcripts should be conducted to determine if the witness has given a deposition in a prior asbestos case.
  - **Private investigator:** An experienced private investigator can be invaluable in investigating a plaintiff or a witness. It

is critical that the attorney speak with the investigator before any interaction with potential witnesses. The investigator must understand the imperative to be forthright about who he or she represents when interviewing a witness and to avoid contact with a represented party in any matter.

## When investigating

the allegations in any case, the team member charged with directing the research should focus on two primary targets:

- (1) the plaintiff (or product identification witness), and
- (2) the jobsite or jobsites.

### *The Jobsite*

In many asbestos cases, a detailed investigation of the plaintiff's jobsites is worthwhile. Such an analysis can be useful in refuting the incidence of the defendant's product or establishing the presence of alternative sources of asbestos exposure, or both. The investigation of any jobsite should include determining the owner or owners of the site; any contractors working at the site; the type of products (if any) manufactured onsite; whether asbestos was used in the manufacturing process; whether the process used high-temperature steam lines (requiring thermal insulation); other equipment that was onsite and whether it contained asbestos components or insulation; whether the site has been the subject of government investigations or citations; and what safety precautions were used at the site to protect employees, contractors, and visitors.

Again, there are various online resources available to investigate a jobsite:

- **Google.com:** This is a useful starting point when researching a particular

site. A general search may yield helpful links to begin your investigation. Plaintiffs' law firms often have descriptions of common jobsites that include information about potential alternative exposures. The Google map feature may allow you to get an aerial or street view of the jobsite to gain perspective. The news tab may lead you to articles about the site.

- **OSHA Establishment Search** (<https://www.osha.gov/pls/imis/establishment.html>): This is OSHA's database of over three million inspections conducted since 1972. Please note that searches must be limited to a maximum of 10 years or no results will be returned.
- **NIOSH Health Hazard Evaluation (HHE) Search** (<http://www.cdc.gov/niosh/hhe>): The HHE workplace studies can be searched by keyword.
- **National Archives** (<http://www.archives.gov>): Although not all documents can be viewed online, the web-based search engine is useful to identify available records maintained by the National Archives.
- **FOIA Online** (<https://foiaonline.regulations.gov/foia/action/public/search/#>): This search engine accesses government database of FOIA requests to and responses from numerous federal agencies: Defense Logistics Agency, Department of Defense, Department of the Navy, Executive Office for U.S. Attorneys, Federal Communications Commission, Federal Labor Relations Authority, General Services Administration, Merit Systems Protection Board, National Labor Relations Board, National Archives and Records Administration, Pension Benefit Guaranty Corporation, Social Security Administration, U.S. Environmental Protection Agency, U.S. Customs and Board protection, U.S. Department of Commerce, and U.S. Small Business Administration.
- **Ebay.com**: The online marketplace Ebay can be searched for literature, photographs, and other information about a company or worksite.
- **Flickr.com**: This is a photo-sharing site that may include images of a worksite.

It is important to expand jobsite investigations beyond purely internet research. Non-web based resources include

- **Sales records**: Investigation of a site should always include determining whether the client has any records in its possession that can refute the plaintiff's testimony about the presence of a product at the worksite.
- **Local building codes**: These may be useful in establishing that a particular product could not have been used at a site, or alternatively, that other products used onsite contained asbestos. Local building code departments may be able to assist in finding and reviewing historic codes from the time period at issue. National, regional, or state codes may also be useful.
- **Town department records**: Other municipal departments retain records relating to public works or town projects. Depending on the plaintiff's occupation, such records may be helpful in developing information on a project with which the plaintiff was involved.
- **State environmental agencies**: State agencies often have records regarding site inspections, including air monitoring data and reports.
- **Building permits/specifications/blueprints**: Information about building projects can be obtained through municipalities, premises owners, architects, and general contractors.
- **Boiler and pressure vessel registries**: Many jurisdictions have databases for tracking boilers and other pressure vessels. These can be useful resources for proving or disproving the presence of a specific type of boiler or other pressure vessel at a given location. These databases can often be accessed through state regulatory agencies.
- **Plant/premises records**: Owners of premises may have records reflecting the products or equipment used onsite. Equipment, building, and abatement records may be useful in demonstrating that a particular defendant's products were not at the site in question, or alternatively, that other asbestos-containing products were present. Obtaining documents relating to a premises owner's or employer's knowledge of asbestos hazards may be useful to your defense.
- **Bankrupt company records**: Certain bankrupt entities have records available for review that may be useful in

establishing the presence or absence of products or equipment at a given site. Some of the entities with repositories or other records include: Johns-Manville, National Gypsum, Babcock and Wilcox, and Combustion Engineering.

- **Libraries**: Local and industry libraries can be useful in developing information about specific sites. Libraries may contain corporate histories, newspaper articles, old catalogues, and old municipal records, minutes, and plans.
- **Naval records**: If the case involves naval exposures, proving exposures to thermal insulation aboard vessels will likely be important. Access to naval records regarding the ships at issue will be critical. There are naval experts experienced in searching relevant ship records and who can testify regarding the plaintiff's probable exposures.
- **Prior depositions**: In addition to being a useful source of information on prior deponents, your law firm's database of prior deposition transcripts can also be helpful in developing background information on worksites and the products used onsite. These transcripts can also lead you to witnesses with information about the site.
- **Physical inspection**: If the worksite in question is still there, completing a physical inspection of the premises could be effective in determining whether a product or equipment was used there. Visiting the site can also be useful in identifying witnesses with knowledge of the worksite.

Accessing the above resources can be done through informal contact with the custodian, a FOIA request (if applicable), or a subpoena. The researcher should give due consideration to the discoverability of the fruits of his or her investigation obtained under each of these methods and take an informal approach whenever possible. As discussed above, a good private investigator is also an excellent resource in effectively completing discovery on a worksite.

Successfully investigating the allegations in an asbestos case requires more than just serving boilerplate discovery requests. The defense team member charged with investigation must think critically about requesting and reviewing the plaintiff's records and conduct a thought-

ful and thorough inquiry into the witnesses and jobsites at issue in the case. Only by employing a creative approach can the defense team hope to level the playing field and position the client for success at trial.

### Getting to a Win: A Case Study

Perhaps more so than at any other stage of the litigation, trial is a time when the members of a defense team must understand and fulfill their role on the team. Having clearly defined tasks not only promotes efficiency by avoiding the duplication of effort, but if tasks are assigned correctly, the assignments can also maximize the skills of the trial team.

The goal of the activities discussed up to this point is to position the defendant to successfully resolve the claim, either via dismissal or settlement. For numerous reasons, at times settlement becomes impossible or unappealing, and the defendant must make the difficult decision to proceed to a trial. One such New York City Asbestos Litigation defendant (Defendant B), facing a seven-figure demand, decided to proceed to trial in the spring of 2017, and was able to secure a defense verdict. The next portion of the article looks at how the members of the defense team worked together to achieve this result.

### Trial Counsel

Defendant B was fortunate in that its national coordinating counsel was also its national trial counsel, so the trial lawyer was already intimately familiar with the litigation strategy and challenges. It seems intuitive, *but the point of trial counsel is to try the case*. Depending on the jurisdiction, by the time that you reach voir dire, or at the very latest, opening statements, trial counsel's sole focus should be putting on the best possible case for the client. Given that goal, Defendant B chose not to have the trial counsel involved in settlement discussions during trial. Settlement dialogue can be an emotional process with stops and starts, making progress, and then seemingly regressing. It is simply too distracting for trial counsel to think that they are getting close to a settlement during a trial. Trial counsel should remain singularly focused on trial.

### Local Counsel

Some trial lawyers may be of the mindset that once they become involved in

a case, there is essentially no need for local counsel to remain involved beyond the inane procedural aspects of the case. That type of thinking can be a mistake: local counsel are terrific resources for the client, and they can play a material role in trial. Specifically, local counsel are the folks responsible for preparing the case for trial, and they are the people most knowledgeable about the case before trial counsel becomes involved. As the trial attorney reviews all pertinent information and becomes familiar with the case, local counsel can partner in strategy development, based on the nuances of the evidence, jurisdiction, judge, and plaintiff's counsel.

In our example, local counsel also was the legal expert on the jurisdiction's law and served as second chair of the trial—to advise the lead trial counsel on any relevant legal nuance in the presentation of the evidence. Practically speaking, local counsel also handled page-line designations and the more technical aspects of entering evidence, working in close consultation with trial counsel.

### Insurance Professional

Asbestos defense attorneys will already be cognizant that various parties may control the defense. A myriad of models exist, with everyone from the defendant itself, to the insurer, to national coordinating counsel, to some sort of committee comprised of several of the aforementioned parties. In the case study example, the insurance professional in close contact with the insured performed this function.

Often, someone may not think of the insurance adjuster as a key part of the trial team, but in actuality, the insurance adjuster can often be the leader of the team. In our case, the insurance adjuster took over the settlement negotiations function, to free counsel from that concern and allow them to focus on the best possible presentation of the case. The insurance adjuster also coordinated with local counsel and trial counsel to develop the best possible theme for presentation of the evidence, while making sure that proper weight was being given to any legal issues specific to the jurisdiction. In our instance, that involved reaching out to national contacts to secure documentary evidence.

Moreover, the insurance adjuster worked through any resource issues, making sure that everyone knew what tasks they were responsible for. When the plaintiffs rested ahead of schedule, the carrier was able to call in additional resources to prep one witness while another testified, ensuring a smooth presentation of the evidence in a logical order.

Whether safeguarding a Las Vegas casino, or defending an asbestos case, employing a well-planned team approach, within budgetary constraints, is critical to success.

In sum, trial counsel should not feel as though they cannot rely on local counsel or their insurance professional when taking a case to trial. No one party is an island; rather, they should all work closely together in as much of the case handling as possible. Working collaboratively will allow trial counsel to focus completely on conceptualizing and presenting the trial strategy in the most effective manner possible, with the appropriate resources to defend the case successfully.

### Conclusion

Whether safeguarding a Las Vegas casino, or defending an asbestos case, employing a well-planned team approach, within budgetary constraints, is critical to success. For the asbestos defense team, this includes developing the client's narrative, creatively investigating the claim, and ultimately tying it all together to win the case at trial. The stakes are high in litigation, and as in the casino business, only by developing a thoughtful, multilayered, defense can we prevent plaintiffs' counsel from bringing down the house. 