

**Preparing for Litigation**  
*An Incident Occurred, Now What?*

*presented by*  
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**Agenda**

- Anatomy of a Lawsuit
- Common Causes of Action
- Pretrial Litigation
  - Role of Records and Reports
  - Depositions

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**The Litigation Process**

- Plaintiff files & Serves Defendant with a Complaint
  - Standard is within three years of injury
  - Injury to minor may be much longer
- Defendant must file an Answer
  - Brief period of time: 20 days
- Discovery Process
- Settlement Negotiations
- Trial

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**Injury and Loss Prevention Is Key**

- A strong risk management program goes a long way toward reducing liability
- If we can prevent the injury we won't have to absorb the expense of defending a claim
- All employees should understand their role in risk management

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**How Will I Know I'm Being Sued?**

- Any major loss will likely result in litigation. **Assume you will be sued.**
- If you are a public entity (e.g. P&R Department) you may see a Freedom of Information Act (FOIA) Request
  - This asks for any and all documents pertaining to the loss
- If a private entity, you will be served "with process" – a copy of the complaint demanding an answer

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**What Will I Be Sued For?**

- Virtually all lawsuits resulting in injury are based upon a theory of negligence
- Other common "causes of action" include:
  - Breach of Contract
  - Human Resource Issues
    - Sexual Harassment
    - Wrongful Termination
    - Discrimination

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**Negligence**

- To successfully recover, the Plaintiff must establish:
  - Duty to Act
  - Breach
    - Failure to meet accepted performance standards
  - Harm
  - Causation
    - Breach must be closely connected to the harm caused

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**PreTrial Litigation Process**

- Before trial, lawyers need to learn the facts of the case (what happened?) and performance standards that apply
  - Interrogatories
  - Document Production
    - Records/Reports
  - Deposition
    - Witnesses
    - Experts
      - Written Reports / Depositions

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**Rule: Everything Goes Through Your Lawyer**

- Once you receive a complaint, you must *immediately* contact your attorney
  - If you don't answer the complaint within 20 days you may lose the case by default
- All communications between the injured party or his/her lawyer must be filtered by your attorney
- You have no obligation to turn over anything unless your lawyer says it is ok to do so

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### Interrogatories

- A set of questions you will be required to answer through your attorney
- These answers will be “under oath”
- If you later change the answers under deposition then your credibility will be suspect
- Remember the rule: everything goes through your attorney

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### Request for Production of Documents

- Typically “*any and all*” all documents that relate to the loss that are not “privileged” will have to be turned over to the plaintiff’s lawyer:
  - Accident Reports
  - Personnel Records
  - Training records (including in-service training)
  - Employee Manuals
  - Emergency Action Plans
  - Copies of certifications and inspections

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### Documents Are Critical

- The lack of routine documentation suggests a cover-up
  - Maintenance and Inspection records for equipment are critical in the event the plaintiff alleges a failure to maintain safe equipment
  - Chemical testing logs are critical to demonstrate proper water sanitation and clarity
  - Accident / Injury reports help demonstrate proper care post injury

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**Depositions: Frequently The Most Important Piece to the Puzzle**



- A deposition is NOT an interrogation
- It is a formal proceeding wherein a witness is interviewed "on the record" while under oath

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**What is a deposition?**

- An interview that results in a written transcript that can later be used at trial
  - To show that the witness changed his or her story
  - In place of the witness if the witness is for some reason unavailable at trial
    - Moved out of the court's jurisdiction
    - Passed away
- The deposition can in some cases take the place of live court testimony

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**Four Goals of A Deposition**

- Pin down a witness to one story
  - Helps combat unexpected changes in testimony at trial
- Size up potential adverse witnesses
  - How will the witness respond at trial?
  - Is the witness credible, eloquent, easily confused, etc.?
- A Fishing Expedition
  - What new / unknown info can I get?
- Hang Opposing Expert Out to Dry

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**What can be asked at a deposition?**

- Anything that is reasonably calculated to lead to discoverable evidence.
  - Rules of Evidence do not apply
  - Questions don't have to be relevant, just based in good faith on possibly leading to something important
- Questions about prior arrests, drug and alcohol use, marital problems all may be asked

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**What can my attorney do at a deposition?**

- Your attorney's role at a deposition is limited
  - Common objections "Hearsay" or "Asked and Answered" do not apply
  - Your attorney can try to intimidate the other attorney or "throw 'em off their game"
  - Your attorney will not really ever tell you NOT to answer a question
    - All questions (other than those that are privileged) must be answered

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**How do I prepare for a deposition?**

- Practice listening carefully to questions
- Practice answering only the question asked
- Practice remaining quiet

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**Shawn's Golden Rules for a Deponent**

- Listen to the question asked and answer only that question
- Think before you speak.
- *Remember the prisoners!* Pauses don't show up on the transcript
- Don't guess! Admit that you don't know or don't remember.
- Ask for clarification. If you're confused, say so!
- Stop talking! Don't offer up more than is needed.

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**Ultimate Goal of Deponent:**

- Your goal in the deposition is to give:

*The Shortest  
Truthful Answer  
Only to the Question Asked*

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**Settlement Negotiations**

- Your insurance company will likely make an offer of settlement
  - The cost of going to trial is substantial
  - The potential for a large jury verdict makes it more cost-effective to pay out a smaller sum in settlement
- Settlement can occur up to trial, and in some cases during jury deliberation.

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**Trial: A Last Resort**

- From the Defense perspective, trial is often the last resort
  - Even in a “sure-win” situation, there stands the chance of losing
  - In the case of severely injured plaintiff’s, particularly children, most juries have a tendency to feel bad for the injured plaintiff
  - When weighing the costs of training, safety inspections, etc. against the loss of life, most reasonable people vote against companies who are in the best position to prevent the injury in the first place

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**Trial Exhibits: Incident Reports**

- Often not completed accurately or in full
  - This suggests inattention to detail, makes the rest of the operation suspect
- May differ from subsequent narratives, witness interviews or depositions
- Should provide the “best” account of the incident as it was completed while “fresh” in the person’s mind
- Will be relied upon by experts
- **Will** be used at deposition and trial

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**Trial Exhibits: Maintenance Records**

- Will demonstrate either:
  - Facility exercised reasonable care in providing safe equipment / facilities or
  - Facility failed to properly maintain equipment according to manufacturer’s recommendations
    - If it wasn’t documented, it wasn’t done

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**Trial Exhibits: Staff Certifications**

- Expired certifications do not look good at trial
- Where certification is not needed, proof of proper training is helpful.
- Consider:
  - Who conducts the training?
  - What special background do they have making them a subject matter expert?
  - Did all staff make the training? Is there a plan in place if training was missed?

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**Trial Exhibits: Photos & Videos**

- People are constantly under surveillance
  - Most cell phones now have the ability to take photos or videos
- Assume an incident will be recorded
- Security cameras often record incidents and provide “real-time” documentation of staff response
- Photos at the time of an incident are helpful to establish a baseline

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**Witness Statements**

- A double-edged sword
- Employees present at the time of the incident may be considered witnesses
- Witness **interviews** may be helpful
  - Record at least full contact information so the witness may be contacted for follow-up
- Would caution against getting written statements from witnesses

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**Trial Exhibits: Internal Communications**

- Internal emails surrounding an incident may be discoverable by the plaintiff
- Email should not be used to discuss the facts incidents that have occurred on property
  - Steps you take to improve conditions and prevent future accidents (subsequent remedial measures) are generally not admissible
  - Email discussions on proactive remedial steps may be protected

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**The Paper Trail**

- A necessary evil: documents are often given heavy weight as witness recollection may fade over time
- Keep good, accurate records according to your company's document retention plan
- Don't destroy records once an accident occurs
- Don't turn over documents to the plaintiff: *everything goes through your attorney*

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