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Surviving in the Courtroom

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Introduction

In today's world where litigation aims to cure all our unresolved ills, the Safety and Health practitioner finds themselves entangled in a tenacious web of conflicts between plaintiff and defendant. The plaintiff typically being the injured worker, or a member of the worker's family. The defendant then being the employer, a contractor to the employer, or specific management and staff employees of the employer who may have allegedly been instrumental in creating the circumstances under which the employee was injured.

Being well prepared to handle this entanglement, in a calm and professional manner, requires the safety and health professional to be well aware of the complexities in the legal arena and the rules which govern behavior and success. You can't do the dance if you don't know the steps. Similarly, you can't perform your best in the legal setting unless you have somewhat of an understanding of how the system works and how procedural rules apply. A survival course which prepares you to at least "tread water" in a legal sea of strange words and behaviors is one which will familiarize you with the nomenclature and procedures which are practiced in courts throughout the nation in essentially the same way.

Who is likely to be sued?

Why sue the safety or health professional, or even name them in a legal action? This becomes all too clear when one reads the deposition transcripts of safety engineers or industrial hygiene personnel who have been individually named in law suits. The safety and health professional will not typically have "deep pockets", nor will they be adorned with many worthwhile monetary assets which can be claimed in a judgment, then why name them in a law suit? The primary, and often most productive discovery[1] advantage, is that the safety and health professionals generally know "where all the skeletons are buried". Who better to ask, than the safety or health professional, why the safety program failed to protect and guard the floor opening through which the employee fell, or why were the asbestos containing gaskets installed and removed with little concern for respiratory protection? Safety and health professionals need not be the "in-house"

specialist but can be a wide spectrum of safety and health practitioner situations from in-house employee or contractor employee to paid consultant.

Where does the injured employee find remedy?

When a worker is injured or exposed, we generally look to Workers' Compensation as the primary remedy protecting the employee and the employer. Should the Workers Compensation insurers deny a claim, or insufficiently provide care for the injured worker, the worker typically seeks redress from other avenues of recovery. The multitude of lawyers and law firms vying for the chance to "help" are plastered over the TV channels on a 24 hour basis. One need only peruse the “yellow pages” of your local phone book to see page after page of ads for lawyers anxious to come to the rescue of an injured worker. "If you’ve been injured at work, we'll sue your employer, and get you a “big bucks” settlement in order to ease your pain and suffering, and it won't cost you a cent!"

And so begins the headache of a protracted litigation process which will surely ensnarl you as the Safety and Health professional, who either should have kept it from happening, or who knows all the reasons why it did happen. The conference presentation can only deal briefly with the various stages of the litigation process which are related to the industrial workplace and how these processes should be handled from a non-lawyer point of view. Actual and hypothetical injury scenarios are used to illustrate the flaws and pitfalls in safety and health practice which may be used to extract essential discovery information during your deposition or against you at time of trial.

You may spend endless hours preparing Job Safety Analyses for all your workers, but give little thought to analyzing your own risks on the job in relation to your professional liability. What you say and do, in your role as Safety and Health professional for your organization, can and will be held against you in a litigation process. This presentation provides the student with a simple checklist of do's and don'ts to prevent or ease the pain of dealing with the Subpoena that arrives at your home on a Saturday evening. This subpoena delivery procedure may actually be a legal strategy to keep you worrying over the entire weekend when few people are available to assuage your anxiety.

Asset retention!

Those of us in the Safety and Health professions have generally considered our primary job as being protectors of the worker’s safety and health, from the perspective of accident and illness prevention. Employers generally interpret the function of their Safety and Health departments as loss reduction centers which hopefully prevent the outpouring of bottom line dollars when and after catastrophe strikes. Perhaps an additional aspect of this safety and health professional’s role could be more accurately described as enforcing asset retention in the workplace.

What are the workplace assets we try to retain? Plant, machinery, people, production and product quality are all assets which are directly controlled and preserved by safety and health policy and procedures.

- If we have an explosion in the workplace we can lose the plant building and all the operations within.
- When a worker amputation splashes blood all over the piece of production equipment which the worker operated, it may take days, weeks, or months to revitalize the production process due to blood borne pathogen panic, decontamination and a need to rehabilitate worker anguish over future injuries.
- When a worker is crushed in a trench cave-in the public we lose public and worker confidence, time and costs of discontinued work, as well as the public tragedy of news coverage on the 11:00pm TV News.

Convincing management that a firm, realistic, detailed, and enforced policy of safety and health will produce a positive effect on the "bottom line", is a goal of most in-house safety and health professionals and outside consultants as well. Companies, or employers, too small to have in-house safety and health personnel can only hope for appropriate direction from their workers' compensation loss control representatives or consulting help from the appropriate governmental agency[2]. The largest obstacle to creation of such programs is the often elusive concept of an imaginary endpoint. If a safety and health program is working, seldom will anyone realize its effectiveness. Yet when such a program fails, demonstrated by an accident or illness, it only becomes too clear that something should have been done differently. The focus of 20/20 hindsight, becomes all too clear when applied by the safety police[3] or the forced involvement of a civil law suit.

These are but a few of the many examples of why an effective safety and health policy deserves more attention than is typically allotted in the corporate focus. If safety and health programs are working, production continues as intended. When these programs cease to function, and the inevitable accident or injury surfaces its ugly head, production similarly deteriorates in proportion to the numbers of workers involved or the extent of property damage incurred. And now, enter the attorneys to heal the wounds of injury. If you are named as being complicit in the injury or illness process, will your company defend you or push you to the forefront as the "designated responsibility barer"?

Let's sue the bastards!

In an effort to convince the reader that law suits can and do reach down to the level of the safety and health practitioner, the following are hypothetical examples of "actual" Litigation involvement's based upon Safety and Health. *[Small differences in the fact scenarios have been introduced to protect the legal confidentiality of the actual persons involved.]*

1. A Governmental inspector, who while investigating a machine shop environment, requests that the operator of a power press brake demonstrate how he typically inserted parts into the die with his bare hands. The worker's finger is amputated and sues the OSHA Safety engineer. *[The governmental agency settles out of court.]*

2. A consultant Industrial Hygienist performs an "aggressive" asbestos air monitoring for a client who does not believe that his previously contracted asbestos abatement contractor performed an encapsulation of acoustical ceiling professionally, and sues. The contractor

counter-sues the Hygienist, alleging that the one horsepower leaf blower used to aggressively churn the sampled air was the actual cause of the asbestos release. *[Case dismissed, only after $20,000 in personal legal defense costs paid by the Hygienist!]*

3. Safety engineer for a major manufacturing operation is invited to an emergency production meeting where he learns that a substantial production run may be lost due to a "faulty" safety valve on a 200 gallon air receiver servicing pneumatic controls on the production line. The management team at this meeting agrees, over the arguments of the safety engineer, to wire shut the pop-off valve for the short 2-hour remainder of the run. The tank explodes killing 6 and injuring 12 others. The Company points to the Safety engineer saying, "…he knew better, and should have made them listen"! *[The safety engineer is named in the law suit and spends over $50,000 on his legal defense.]*

4. A 23-year old female "touch-up" solder person, in an Electronics plant notified the Safety engineer that she is pregnant and needs to know if anything at work will hurt her baby. The Safety engineer says, "…don't worry, the little bit of lead you work with won't hurt you or your baby!". The women's baby is born with a congenital cleft-palette and the baby, as a third party litigant who is exempt from the exclusivity of Workers' Compensation, sues the Company and the Safety engineer. *[The company defends the S.E. but she sufferers through 5 days of grueling Deposition, then abandons her position and the Profession.]*

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[1] Discovery: is a legal game of "fish", where each side asks for evidentiary bits of information, from the other side prior to trial, which must be surrendered if available. Discovery is generally concluded 30 days before a trial date.

[2] OSHA (Occupational Safety & Health Administration) Consulting services, on either the State or Federal level can provide various levels of information, training, and safety or health audits without fear of citation or penalty to the employer.

[3] The euphemism "safety police" is often applied to the regulatory arm of OSHA who have the ability to issue citations which bear civil monetary penalties.