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# Preparing Yourself for Litigation

or

## Oops! My Report Is Going to Court



**The underlying assumption in this presentation is that you are the defendant in a lawsuit.**

**It is not “as seen on TV”!**

# Human Psychology Drives Lawsuits

- Your frame of mind and emotional state are very important.
- Emotional reactions and negative thoughts are unproductive.
- Ask questions to direct your emotions away from unproductive negative thoughts:
  - Anger
  - Frustration

# The Psychology

- Did you make a mistake?
  - How will you deal with it?
  - What does your attorney advise?
- If you are in the right ...
  - Unfortunately, it is not simply about being right.

# The Psychology

- Concentrating on things you cannot control:
  - Drains your energy.
  - Takes your focus away from the important issues.
- However, you *can influence* events and people.
- You *can control* your emotions.
  - Your emotions will be used against you.
- The outcome of the lawsuit depends a lot on what you can control.

# The Psychology

- Opposing attorneys may use tactics meant to wear you down and waste your time:
  - Asking you to produce countless records.
  - Wasting your attorney's time with motions, costing you money.
  - Driving up expert witness costs.
  - Wearing down employees and witnesses to drive a wedge between you and them.
- They want you to give up and settle. They make more money if you settle.

# First Actions

- Contact your E&O insurance carrier.
- Read your policy! Often, this is the first time one does.
- Follow the policy requirements so as to not lose coverage.
- Hire a good qualified experienced attorney for your case and situation.



# First Actions

- Review your any documents and reports.
- Review photos.
- Write down what you remember to capture it.
- Memory can be fluid, and lawsuits may take 5-10 years.

# First Actions

- Was the inspection done to a standard?
  - What standard?
- Review your contract documents.
- Did you change the scope?
  - Did you document why?
- Was a mistake made on your part?

# First Actions

- All records are subject to subpoena, including:
  - Text messages
  - Emails
  - Contracts
  - Standards and guidelines
  - Tool instruction booklets
- They may want your training courses and seminars in order to impeach you.

# First Actions

- Subpoenaing a record does not mean it will be successful.
- You can file a motion to quash a subpoena.

# First Actions

- Attorney-Client Privilege
  - Applies only to communications with your attorney.
  - Do not say or write anything you would not want to have repeated in court.
  - If you hire an expert, communications with them are not privileged.

# First Actions

- Disclose to your attorney:
  - Anything that will negatively impact the case.
  - Baggage from the past.
- You do not want the opposing attorney to bring it up first.

# First Actions

- Being truthful is the most important consideration when involved in any lawsuit.
- To attorneys, the opposite of a truthful person is a liar.
- If you are made out to be a liar once, everything you say is a lie.

# Your CV, or Curriculum Vitae

- Or resume, job history, experiences, etc.
- Get your CV up-to-date.
- Get rid of exaggerations.
- Be accurate in your statements.
- Major gaps in your CV should be explained.



# Deposition and Trial Prep

- Organize concepts.
- Organize files and materials into tabbed binders.
- Memorize key names, dates, and facts.

# Deposition and Trial Prep

- Cases should have a theme:
  - Develop the theme of the case.
  - Theme should be one sentence long.
  - Use the theme to organize the facts and ideas of the case.

# Deposition and Trial Prep

- Your attorney should prepare you for your deposition and trial
  - Question you as if you were in the deposition or trial
- They should go over the key points:
  - What points do you want to bring out?
- Prepare for your deposition thoroughly.

# Depositions

- Know yourself: what do you need to do to prepare for a stressful event?
  - Eat light.
  - Bring food or drink.
  - Dress casual.
  - Make the room comfortable.
  - Ask for breaks.
  - Fatigue is your enemy.

# Deposition and Trial Prep

- **FACT:** Your testimony can result in three outcomes:
  - You tell the truth.
  - You lie.
  - You do not know.

# Depositions

- Depositions and trials have different purposes.
- Your behavior needs to be different in each.
- The opposing attorney wants to expand your answers in deposition.
- In a deposition, you limit your answers to limit your exposure.
- In trial, the opposing attorney wants to limit your answers.
- In a trial, you want to explain your answers.

# Depositions

- No judge.
- Opposing council has wide latitude:
  - For discovery of admissible evidence.
  - Issues that affect your credibility.
- The judge determines whether evidence discovered in a deposition is admissible.
- Do not waive your right to read and sign your deposition.

# Depositions

- The opposing attorney may act friendly and concerned.
  - He or she is not your friend
  - He or she is representing the plaintiff first and foremost
- This is an interrogation technique.
- A good deposition will create the same feelings as an interrogation.
  - It is meant to unnerve you.



# Depositions

- Two strategies used to start a deposition questioning:
  - Set-up question:
    - A question or statement with which you could not reasonably disagree.
  - Tough unexpected question:
    - To throw you off balance.
    - Effectively blind you for the rest of the deposition.

# Depositions

- Opposing attorney is looking for:
  - Your opinions
  - Your qualifications
  - Locking in your testimony
  - Evaluating how you would do in court
  - Information affecting credibility
  - Intimidating you

# Depositions

- An attorney is an expert at language.
- Do not use “hedge words” in a deposition or trial.
- Know the exact meaning of the words you use:
  - Example: Define the term “significant.”
- Or you cannot be 100% certain can you?
  - How do you define “certain”?

# Depositions

- Be a good listener.
  - Listen to the exact meaning of the questions.
  - Similar to the game “Simon Says.”
  - Do not react to visual cues.
- Answer the exact question.
- Watch for compound questions; answer each question separately.

# Depositions

- Keep the question answers brief.
  - Yes or no if possible.
  - Do not explain, unless you want it on the record.
  - Explanations belong in front of a jury or judge.
- Do not answer or agree to “possibility” or “hypothetically speaking” questions.

# Depositions

- Take your time when answering.
  - Pauses will not show up in a transcription.
- Pause before answering a question.
  - This gives time for your attorney to object.
  - It gives you time to think.

# Depositions

- Attorney questioning techniques:
  - May ask “Is there anything else?”
- Any answer can have more detail:
  - Give a truthful answer.
  - You do not have to give all the information you know on a subject.

# Depositions

- Attorney questioning techniques:
  - May leave a long pause or silence after your answer.
- People naturally feel uncomfortable with silence and keep talking.
  - Silence is peaceful.
  - Just keep looking at the attorney and wait.



# Depositions

- Take opportunities to get the upper hand in a deposition with truth.
  - Attorney's question: "What licenses do you have?"
  - This is a poorly worded question.
  - You know what he means, but give him the exact answer: "I have a drivers license, a fishing license ..."

# Depositions

- Never be afraid to say truthfully “I do not know” or “I do not remember.”
- People do not like to admit doubt or ignorance.
- If “I do not know” is the answer, do not change it under pressure.

# Depositions

- Attorney questioning technique:
  - Asking the question again.
  - Asking you to take a guess.
  - Supplying an answer for you to agree to.
- Do not change your original answer.
  - Say: “I am sorry you do not like my answer, but I answered your question.”

# Depositions

- Do not accept a fact merely because the attorney says it
  - Example: “You pointed out this problem to the contractor during the inspection.”
  - If you do not remember doing this, do not agree to it.
  - You may not have done it.

# Depositions

- If questioned about any documents, take time to read them.
- Otherwise, the language in your answer be different than the document.

# Depositions

- Do not volunteer information.
- Do not let them use your ego against you.
- Do not teach them:
  - A common technique is for the attorney to make you feel important.
- Do not ramble.

# Depositions

- Listen carefully to your attorneys objections
- They may contain hints for you to follow
- Example:
  - Your attorney says: “Objection, the question is ambiguous.”
  - Your answer to opposing council: “I did not understand the question.”

# Depositions

- Only an attorney can go off the record.
- Your remarks are not off the record.



# Depositions

- Do not have depositions in your office.
  - Attorney may ask for you to get records.
  - Use it as a fishing trip.
- Be careful what you bring to a deposition or what you write
  - Opposing attorney may ask to see it.

# Trial

- Your psychological state matters most now.
- Do not view it as winning and losing; you are in a process.
- Juries and even judges will give compromise verdicts to please both sides, while actually pleasing no one.

# Trial

- Tell the truth.
- The jury or judge are evaluating your
  - Honesty
  - Character
  - Believability

# Trial

- Anatomy of a first impression:
  - 55% visual
  - 38% non-verbal
  - 7% verbal
- The facts of the case are verbal, but they are given very little weight when it comes to judging your believability.

# Trial

- Know where the courtroom is located.
- Dress professionally, conservatively.
- Dress in light blue colors.
- Be confident. Exude confidence.
- But be humble.
- Be relaxed.

# Trial

- Maintain eye contact with jury.
- Make concessions when appropriate.
- Do not be intractable.
- Be likeable.
- Treat everyone with respect.
- Use the bathroom before testimony.

# Trial

- Do not:
  - Give testimony that looks rehearsed.
  - Wear expensive or flashy clothes, shoes, and jewelry.
  - Stare at the jury.
  - Stare at your attorney.
  - Have a begging look towards your attorney.

# Trial

- Do not:
  - Act like a jerk.
  - Be intractable.
  - Be argumentative, unless necessary.
  - Be condescending.
  - Do not be clever.
  - Do not use sports analogies.



# Trial

- Use the theme of the case to present information.
  - Organize ideas.
  - Group facts and ideas into categories.
  - Group categories, facts, and ideas into threes.
  - Groups of three are best for memory retention.

# Trial

- Read you deposition before trial:
  - Know it.
  - Look for weaknesses; these are the areas the other attorney will focus upon.
  - How will you explain any inconsistencies?
  - Practice your answers.

# Trial

- Direct examination:
  - Your attorney questions you.
  - You tell your side of the story.
  - This is where you are most safe.
  - Use good communication skills.

# Trial

- Average TV show is half an hour long.
- Commercials are every 6 minutes.
  - This is the attention span of the average person.
  - Answers to questions should be short.

# Trial

- Answers should build concepts:
  - Simple to complex
  - Start general to specific
- Tell a story.
- Be a teacher.
- Give the technical answers; then, explain things in layperson terms.

# Trial

- An effective cross examination is meant to break you.
- It will create the same bodily responses in the subject as a prisoner of war under going torture.
- Mentally prepare for cross-examination.

# Process Of Cross-examination

- Expect to be crossed on qualifications.
  - Education
  - Training
  - Publications
  - Skills and relevant experience
  - Your inspection or actions
  - Your report

# Process Of Cross-examination

- Your deposition testimony will be used.
- Avoid characterizing your report as detailed, careful, thorough, and exhaustive.
- Every flaw will be uncovered to make you look sloppy and like a liar.



# Process Of Cross-examination

- **Four C's** of impeaching someone:
- **Committing** you in the deposition.
- **Confronting** you in the trial:
  - Getting a different answer from you.
  - Or giving a different set a facts.
- **Comparing** the two answers or situations.
- **Connecting** the two together.

# Process Of Cross-examination

- The connection makes you nervous.
  - There is nothing you can do now.
- The final question:
  - Were you lying now or in your deposition?
  - Well, which is it?

# Process Of Cross-examination

- Do not be a lawyer.
  - Do not try to figure out why the attorney is asking the question.
- Focus on the question itself, not on the attorney's tone or demeanor.

# Process Of Cross-examination

- Opposing Attorneys will ask set-up questions:
  - “Would you agree with me?”
  - Getting yes answers to set a pattern.
- Or close-ended questions, limiting your response.
- Opposing attorney will ask only leading questions
  - “Isn’t it true?”

# Process Of Cross-examination

- How do you handle factual mistakes in your report?
  - Attorney: “Is this your report?”
  - You: “Yes.”
  - “Do you consider it to be accurate and free of mistakes?”
  - You are being set up now.
  - “Yes, as it pertains to the facts of the case.”

# Process Of Cross-examination

- “How many mistakes are in your report?”
  - Restate the word “mistakes” to give it a different meaning to the jury.
  - You: “Are you talking about the *minor errors*?”
  - Or “If you are talking about some misstatements, I don’t know.”
  - “Could you point out what you are talking about?”
  - This shows you are not afraid of them and you have nothing to hide

# Process Of Cross-examination

- Questions where the answer is intended to be yes or no:
  - If you cannot truthfully answer this way, say: “I cannot answer yes or no.”
- Not permitting the answer to be explained.
- Asking only questions to which he knows answers:
  - This is how deposition testimony is used.

# Process Of Cross-examination

- Attorney may question you on minor differences in the facts of the case.
- Clarify if opposing attorney is asking about facts in the case or hypothetical situations.
  - Continue with the facts of the case.
- Ask you difficult questions:
  - “Have you ever made a mistake in your professional capacity?”



# Process Of Cross-examination

- It is okay to answer “I do not know.”
  - You are not trying to prove a knowledge of everything.
- Do not answer compound questions:
  - Questions are supposed to be singular.
  - If you answer a compound question, break it apart into the individual questions.

# Process Of Cross-examination

- Insist on explaining significant answers.
  - Pick your issues.
- Bend but do not break under cross.
  - Give in to obvious points.
- Try to break the rhythm of the attorney.

# Process Of Cross-examination

- Ask a question of the crossing if the answer could vary based conditions:
  - Example: “What is the R value of a brick wall?”
  - Answer: “What thickness is the wall?”
  - You show that you are more precise than the attorney.

# Process Of Cross-examination

- If asked a question about your deposition, ask to see the section of the deposition before you answer.
- Often answers in the depositions will be taken out of context or will be incomplete.

# Redirect Examination

- After cross, your attorney will have a chance to question you again.
  - This is called “redirect.”
  - Purpose: to clarify statements made during cross-examination.
- Correct any misstatements or inaccuracies you made.

# Conclusions

- Being sued is stressful, but you can use an understanding of human psychology to navigate the situation productively
- Preparation and attention to detail will go a long way toward a successful outcome
- Communicate effectively
- Know what to expect from the deposition and trial

# Questions?

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