

# SUCCESSFUL LITIGATION BEGINS WITH PRIOR PREPARATION

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When the suit papers are served, it is too late. Months, if not years, have passed since the time the event giving rise to the suit occurred. If witnesses are still available, their recollections are either faded or twisted by the objectives of other people or other interests. Available evidence may be incomplete, inadequate, and difficult to reconstruct. Expert analysis may be undermined by the passage of time.

## Keys to Successful Litigation

Effective trial preparation is a proactive engagement. It is a planned response to a recognized risk that begins immediately at the moment of the event. It draws upon the experience of veteran trial professionals with reputations for a willingness, if not an eagerness, to engage in courtroom combat.

Early identification and examination of the evidence and the witnesses provides the highest degree of authenticity at the time of trial. The higher the authenticity of the evidence, the higher the level of credibility achieved. The greater the credibility, the more persuasive the evidence and the greater impact it has at the time of trial.

Crucial evidence such as the scene of the accident and the location of marks and debris are available for a very short window of time. The immediate response of qualified professionals allows you to document and analyze this evidence that would otherwise not be available. Technical experts can then obtain immediate access to the raw evidence.

Additionally, witness recollections can be preserved. The closer to the time of the event that a statement is taken from the witness, the more likely the recollection is to be uneroded by the passage of time. Factual issues important to your side of the case can be discovered and preserved.

The keys to successful litigation are identification and reduction of the risks, preparation of a rapid response, and execution of a plan that mitigates the loss and immediately prepares for potential litigation. Waiting until after the loss or, even worse, after suit is filed will result in increased exposure.

A veteran trial professional, experienced in the art of persuasion, develops a vision of the arguments to be presented at trial. For these arguments to be persuasive, they must be founded upon credible evidence. The greater the spectrum of authentic, credible evidence,

the fuller the pallet from which the trial lawyer can draw upon to paint his image of the truth. The key to the vitality of this evidence is an immediate, preplanned response upon the occurrence of the litigation event.

### **Analysis of the Risk**

Preparation for an immediate and effective response to a litigation event begins with an analysis of the risks inherent in your business. All businesses have inherent risks that can result in litigation. The operational aspects of your business may result in personnel claims of discrimination or for workers' compensation. Plant operations can result in actions for damages to your product or property.

Litigation may also arise from damage to others by your products or services. From catastrophic trucking accidents to computer failures, the resultant damages can trigger major litigation.

Your company probably has ongoing efforts to identify the risks that may arise. You probably also have a means of reducing these risks. These efforts to reduce, if not avoid, the risk are beneficial should such incidents occur that result in litigation. Your risk reduction efforts provide a defense against a claim for punitive damages that are often uninsurable and come right off your bottom line.

More importantly, your actions to reduce or avoid these losses are the right thing to do. The purpose of these efforts is not to justify or defend institutionalized bad behavior. Instead, analyzing and addressing the potential risks are a means of promoting and enforcing good practices that avoid incidents and damages to others that trigger litigation.

It is crucial to your business to reduce the possibility of such claims to the extent that the means to do so are within your control. However, even the best intended and most aggressive efforts cannot prevent all claims.

Events over which you lack control, the actions of others, and the nature of the risk will still conspire to give rise to litigation events. Thus, it is crucial that you prepare and implement a plan for an immediate response to the inevitable events that give rise to these claims.

Your preparation for a rapid response should be guided by several fundamental principles. Claims, if not resolved, will result in a trial. The party best prepared for trial is in the best position for a favorable resolution. The party with the best command of the facts is best prepared for trial. The party who acts immediately and effectively commands the facts. The ability to act immediately and effectively to gain command of the facts requires preparation before the event.

Your business' ongoing analysis of the risks to which you are exposed is the starting point for your preparation. These identified risks dictate the trial professionals needed to address them when they arise.

### **Selection of Professionals**

Selection of the trial professionals is the next step in the process. This permits you to choose your trial attorney and technical experts in a deliberate and thoughtful manner rather than in haste when the problem explodes. You can ensure that these professionals are experienced, have been successful, and are not afraid of the courtroom.

This latter quality is too often minimized if not ignored. Absent significant trial experience, such professionals may mire you in years of litigation rather than efficient, focused efforts that lead to trial success.

It is vital that the professional has a reputation of being willing to go to trial. You do not benefit from an attorney with courtroom anxiety. In the words of Tony Soprano, nothing is as useless as an empty gun.

Pre-selection provides time to check references and examine track records. It permits you to spend time with the professional, determining your level of confidence in and ability to work with the individual. If either is absent, you are in a position to change professionals, rather than being wedded to incompatible counsel who you must endure solely because they were involved in the crucial early hours.

Pre-selection of professionals also allows them to become familiar with your business and operations. This enables them to avoid a learning curve that would only consume time at a critical hour. Instead, the pre-selected professionals are armed with the knowledge needed to immediately determine the crucial facts and evidence.

### **Preparation of Rapid Response**

After selecting trial professionals, you should develop a plan for rapid response to litigation events. Whether it is an employee claim of discrimination or a catastrophic trucking accident, immediate response is crucial. The key facts and evidence must be developed and preserved while they are fresh and available.

The pre-selected professionals, educated as to your business and procedures should now work with you in developing a plan for reacting to the most material risks you face. The purpose of the plan is to weigh options and make provisions before the event, reducing the need for decision-making during the stressful fog of crisis.

The plan should be as detailed as possible and provide for variables and contingencies. Your plan is a living document to be reconsidered on a regular basis and applied against every alternative imaginable. It should include every conceivable detail, from phone numbers to levels of authority.

The plan should then be distributed to and, more importantly, reviewed with everyone who may potentially be engaged in the process. Duties and authorizations should be clear and ingrained.

### **Implementation of Rapid Response Plan**

Once the plan is developed, all potential participants must be constantly at the ready. The professionals must be available for immediate response. The speed of their response must be commensurate with the risk involved.

Some risks may allow for office-hour availability. Catastrophic events involving personal injuries and significant property damage demand responsiveness to the fullest extent available with our modern technologies. No less than 24/7 access by cell phones and pagers is acceptable.

### **Results from Rapid Response Plan**

Immediate response by the pre-selected professional permits the prompt addressing of the situation. The harm can be limited and correction efforts commenced immediately. Losses are mitigated reducing potential exposure during the litigation.

Further, instantaneous response maximizes the ability for evidence identification and retention in a manner that will result in the most effective presentation at the time of trial. Available confidentialities can be preserved. Potential penalties for spoliation, the failure to preserve evidence within your control, can be avoided.

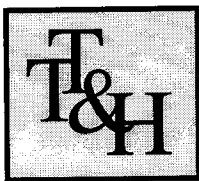
With a prompt response, properly performed by experienced trial professionals, you are ready for trial within weeks of the incident. You know the strengths and weaknesses of your case. If the facts and evidence are with you, you are armed to repel the assault. Claims of dubious merit can be met with immediate response of overwhelming evidence. Where permitted, the possibilities of sanctions for pointless litigation may dissuade actions intended to elicit payments of even limited amounts.

If the evidence is against you and you have exposure, you know it immediately. You can then act with economic intelligence and without paying a herd of dark suits to engage in litigation by de-forestation. Reasonable resolution becomes the goal, saving expenses and

resources otherwise drained by the demands of litigation. Early use of alternative means of dispute resolution which reduce litigation costs, such as mediation or arbitration, which reduce litigation costs can be considered.

Alternatively, if a reasonable resolution is not workable, you are armed with the best available evidence and prepared professionals to provide the best possible defense to the losses in any action. While the position is not the optimum, it is far better than the alternative—exposed and unprepared.

Successful litigation in an economical manner begins with the retention of trial professionals and implementation of a plan of action before the event occurs. You are then in a position to mitigate the loss and litigate the claim. Both are good for the community, your business and your bottom line.



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Thomas, Thomas & Hafer L.L.P. is a firm of experienced trial attorneys. Its objective is the effective, efficient and economical litigation of its clients' concerns. Clients particularly benefit from working with the firm to develop and implement rapid response plans in anticipation of potential litigation events. Thomas, Thomas and Hafer L.L.P. prepares a deliberate, meticulous plan for an immediate response to events that can give rise to litigation. These plans address potential litigation situations including employee claims, transportation accidents, construction disasters, and other events creating exposure for damages. When the event occurs, it is met with a plan of action, prepared professionals, and pre-positioned resources. The result is a command of the facts and witnesses, providing a foundation for successful litigation.