



2015 CLM Annual Conference

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## **Utilizing Technology to Mitigate Premises Liability Cases**

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### **I. Implement Policies and Procedures to Prevent and Inspect for Dangerous Conditions**

The first line of defense against premises liability claims is to prevent accidents in the first instance. Many times, the prevention of an accident is within our control by taking steps to be sure the premises maintained in a reasonably safe condition. Some of the steps that can be taken to help prevent a future claim are:

- A. Personnel training — The proper training of personnel is key to the prevention of accidents and subsequent claims. When personnel are trained to keep the premises in a reasonably safe condition, the result can be the reduction of accidents and subsequent claims, saving the company dollars and improving the brand. Because turnover can be an issue in the industry, creative incentives for compliance with training should be explored.
- B. Internal policies and procedures — The proper internal policies and procedures can be helpful in preventing accidents. Before implementing such policies and procedures, consideration should be given to whether such internal policies and procedures create a duty beyond that established by the courts of the jurisdiction. In some jurisdiction, testimony regarding the company's internal policies and procedures is sufficient to establish their existence, and is preferable to a written manual.
- C. Written logs — Written logs, such as sweep logs, may be helpful in defeating a claim based upon notice if properly and accurately completed and maintained. Of course, the contrary is also true. If the log is not properly completed, it may be the evidence that the claimant needs to prove his/her claim. In some industries, the company is relying on more than pen and paper to create such a log, such as a thumb laser scan when an employee completes a task. While this may eliminate the concern of the "lost log," it does not alleviate the concern of the issue with the non-compliance with procedure, which brings us back to proper training of personnel.

## II. Preserving Evidence After the Accident

Once an accident occurs, additional steps can be taken to minimize the potential exposure to the company. Consideration should be made as to whether the investigation undertaken after an accident occurs should be done by the carrier/TPA or if counsel should be retained so as to preserve privilege. One of the factors to be considered when making this determination is the severity of the potential claim.

A. Employee/Witnesses Statements — All employee and potential witnesses should be identified and a statement should be taken. Preferably, the statement should be sworn. Information should be obtained from the witness so that the witness can be located years following the accident, including contact information for a close relative.

With respect to employee witnesses, if such persons leave the employ of the company, the terms of such departure should be considered as it may impact the “color” of the employee’s statement at a later time.

B. Photographs — Digital photographs should be taken and forwarded to a secure location where they will be preserved for potential litigation. Care should be taken that such photographs depict not just a specific area, but also the general location of the accident. It should be remember that years from the date of the accident, when the matter is litigation, the individuals examining the photographs, especially a jury, will not be familiar with the location and will need to be oriented to time and place.

C. Incident Reports — A report memorializing the details and conditions of the incident should be prepared. The report should be forwarded to a location where it will be properly preserved for future use. The report should contain complete contact information for the individual preparing the report and where he/she obtained the information contained in the report. The report should also NOT contain suggestions to avoid future accidents.

D. Video Surveillance — Video surveillance can make or break a case. It is crucial that video surveillance protocol be examined to ensure that the video is properly maintained after an accident. Oftentimes, a video loop is a short period of time and footage is lost before there is an opportunity to preserve it. Further, it is imperative that the footage that is preserved is complete, not just the incident itself.

E. Contracts/other documentation — There are many occasions when the risk can be transferred to another entity, such as a subcontractor. In order to be in a position to accomplish this, the contract between the company and the subcontractor must be properly executed prior to the date of the incident and it must be properly maintained. Care should be taken that the contract contains the appropriate language in order to effectuate the risk transfer. Once an incident takes place that has the potential of involving a third party, such third party and its carrier should be immediately placed on notice and the defense and indemnification tendered.

### **III. Expert Witnesses**

The use of expert witnesses should be considered in the appropriate cases even before litigation is commenced. If the exposure warrants it, an expert witness retained immediately at the time of the incident can provide invaluable information for the future defense that would otherwise be lost. Consideration should be given as to whether such an expert prepares an expert report, which may be ultimately discoverable in some jurisdictions.