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Rapid Response Team : Controlling Exposure Risks

I. Initial Assessment

Secure Incident Location/Evidence

One of the most important aspects of an investigation is to insure that the initial scene is maintained in order to preserve the site for a complete investigation. Upon notification of an incident, the attorney should be contacting the site and having all personnel remain off the site location once the emergency personnel have left the scene. In order to avoid any issues with claims of destruction of evidence, the Rapid Response team has to insure that a protocol is in place to insure that the site is secured as soon as practical.

Assemble Proper Team

When building a team for the Rapid Response program, you need to insure that the attorneys who are part of the team are fully versed in construction law and are fully aware of the potential issues that may arise as a result of the accident and possible suits that may arise. You also want to be certain to have an investigator as part of the team who is ready to appear for investigations within an hour of being notified of the incident. Additionally, you will want to have a team of experts available for evaluation of the site and possible causes of the accident. Establishing the proper teams before any incident occurs makes all the investigations run smoother and avoids any issues when conducting the investigation.

Insure Safety of Injured Party

While it is important to insure that all evidence is secured, the first order should be to insure that the injured party is being attended to and that any issues with the injured party are addressed. Many times owners/contractors will have a medical assistant on site to assist the injured party with medical issues and completing forms and documents. If the injured party is treated properly by the owner/contractors, it will help in the overall picture when the injured party may be contemplating any actions. We always want to insure that the injured party is the main focus of the investigation and once the injured party is removed from the site, you can then conduct the complete investigation.

Coordinate with Safety Personnel and Emergency Personnel

When arriving at the site for the Rapid Response Team, many times the emergency personnel are still on the site. You want to assist in any way to insure that the emergency personnel are getting all the assistance possible and that if there are any issues concerning an unsafe condition that you coordinate with the safety personnel on site to correct the conditions. You also need to insure that these conditions that are corrected are communicated through the attorney to the client to insured privileged communications and confirm that these items would be post remedial repairs which should not be discoverable in a future litigation against the owner/contractors.

II Investigation to be Conducted

Interview Witnesses

When the Rapid Response Team arrives on the site, it is important to locate the witnesses at the site and insure that they are kept separate from each other. Generally, if witnesses discuss the incident prior to obtaining a statement, it is difficult to get an unbiased statement from the witnesses. Consequently, you should be insuring that all witnesses are kept separate from each other and that witness statements are obtained as quickly as possible following the incident.

Additionally, if you have a someone who was present at the site but claims that he did not see anything, it is just as important to obtain a statement from this witness confirming that he did not see anything for future reference. We have had cases where the individual states that he did not observe anything and a year later comes back and said that he saw what happened and it is usually favorable to the injured party. As such, the Rapid Response Team needs to obtain statements from individuals that they have not observed anything in order to insure that the statement can be used in cross examination at a later time if the person alleges that he saw what happened.

Obtain Evidence/Photographs of Site

When the incident involved a defective item, it is imperative that the Rapid Response Team secure the item that is the subject of the incident. When obtaining the evidence, we must insure that there is a proper chain of custody with respect to who has the evidence so that we can use the item at the time of the trial.

If the evidence belongs to another contractor not within your Client's control, it is important that you attempt to obtain the cooperation of the other party. You should be familiar with the contracts between the parties as some of the contracts will require the parties to cooperate in the investigation.

If you are unable to obtain the item involved in the incident, you should at least attempt to document the condition of the item via photographs and statements of the

parties. It should also be documented as to which entity took possession of the item and what attempts were made for you to obtain the item in order to avoid spoliation claims by other parties at the time of the trial. If we are able to document the steps we undertook to obtain the evidence and were unable to obtain it, we will be able to argue against any spoliation charges with respect to our Client at the time of the trial.

With respect to photographs of the site, you need to insure that any photographs obtained are actually depicting the conditions as they existed at the time of the incident. You want to attempt to avoid any inflammatory shots such as blood or photographs of the injury. Additionally, you want to insure that the members of the Rapid Response Team do not show up in any of the photographs as the parties in the litigation will question any individuals in the photographs and we want to insure that the members of the Rapid Response Team are not brought into the litigation as potential witnesses at the scene of the incident.

Evaluate Potential Violations/Issues with Safety Entities

Many times when the Rapid Response Team is present at the site, there are local agencies present in addition to OSHA investigators. As part of the team, you want to attend the meetings the client's employees attend with these officials and guide them accordingly in their responses. You also want to review any potential violations which may be issued and attempt to resolve the issues with the personnel at the scene.

III Document Investigation/Evidence

Retention of Evidence and Avoidance of Spoliation Issues

As noted above, it is important to insure that all evidence is properly documented and retained for future litigation. The Rapid Response Team should be directed as to the proper collection of evidence and the investigator on the team should have the proper information required in order to establish the chain of custody of all the evidence.

It is also important to have the team versed in potential evidence that needs to be preserved in these cases in order to avoid any issues at trial. A separate evidence room should be established for all evidence to be stored in case of possible litigation of the matter and retained for the period of time until the expiration of the Statute of Limitations. If no litigation is commenced within the applicable Statute of Limitations, a discussion can be entered into with the Client as to whether the evidence should continued to be maintained or saved for a possible third party action by another party.

Preparation of Incident/Accident Report

One of the most important pieces of evidence in these type of incidents involves the incident or accident report and how it is completed. As part of the Rapid Response Team, it is essential that the attorneys on the team assist in the preparation of the report. Generally, you want to insure that the report is prepared with only the facts of how the incident occurred and that there are no opinions placed in the report such as the cause of the accident. You also want to insure that there is no information contained in the report as to any possible corrective actions that would be taken.

Furthermore, if any statements are taken of witnesses and it is not the normal course of the Client to obtain statements of witnesses, you want to insure that the statements you obtain are not included in the accident or incident report nor should they be referred to in the report. In order to insure that the statements are considered documents prepared in anticipation of litigation, you need to insure that the statements are kept separately from the accident/incident reports.

Issues on Possible OSHA/Governmental Violations

Since violations that are issued to the Client as a result of any incident can sometimes be used by a plaintiff as evidence of some negligence, it is important to address potential violations issued for the work site.

As noted above, it is important to insure that if there are any governmental agencies present on the site that your Client accompanied by an attorney on the Rapid Response Team for any interviews conducted. It is also important for you to determine what issues are being investigated by these agencies so that you can begin to draft your defense of the Client in any possible administrative hearings.

If a violation is issued, the members of the Rapid Response Team should be prepared to attend any hearings involving the violations and attempt to defend the Client at the hearings in order to avoid any potential inference at trial of negligence due to the issue of any violation.

Furthermore, if there are violations issued, you want to consult with the Client with respect to any possible corrective actions in order to avoid any further violations in the future.

IV Issues Arising During Investigation/Litigation

Maintaining Privilege

Although the Rapid Response Team is combined of a number of different individuals for the purposes of investigation, you always want to insure that the relationship between the attorney and the Client remains privileged. Consequently, you want all investigator reports to go from the investigator directly to the attorney and then transmit what the Client may require directly from the attorney. If you have the investigator send any reports directly to the Client, you may lose the privilege and a good part of your investigation could be discoverable.

Additionally, you want to insure that any discussions you may have with the Client during the investigation of a sensitive nature are secure and separate from the other members of the Rapid Response Team in order to avoid any issues which could affect the privilege.

As soon as the plaintiff's counsel learns that there was an investigation conducted at the site by the Client, the plaintiff's counsel is going to try to obtain copies of all the investigation obtained. We want to maintain the privilege in all respects so that the plaintiff's counsel will have a difficult time obtaining our investigation material.

Contact with Injured Party

Generally the Rapid Response Team is on site at the time of the incident and at that point, the injured party is generally not represented by any attorney. If the injured party remains on the site after the incident and is able to speak, it is always a good idea to obtain a written statement from the injured party as to the cause of the accident and the injuries alleged. The statement is generally obtained by the investigator on the team.

If the injured party has been removed from the site already, it is always a good practice to have the investigator attempt to obtain a statement from the injured party either at the hospital or at the injured party's home if he is released from the hospital. Generally, these statements are the most accurate as they are given before any attorneys are brought into the case and before the injured party is advised as to what he needs in the case in order to recover.

It is important to confirm that the injured party is not represented by any attorney prior to obtaining the statement. The investigator also needs to be trained as to when a statement should not be taken as well. If the statement by the injured party is extremely adverse, you may just have the investigator obtain a statement but not have it signed or have the investigator merely summarize the statement obtained.

Evaluate Witness/Evidence

The members of the Rapid Response Team should know what type of evidence to obtain for the case and what type of witness statements we need in order to defend a case.

As noted above, we want to obtain statements from all witnesses but sometimes if a witness statement is going to hurt the Client, you may want to only obtain a verbal statement and have it summarized by the investigator. You also do not want the statement to have information on the how extensive the plaintiff's injuries are or what the witness observed about the injuries unless the statement actually confirms that the injuries were minor or non-existent.

Additionally, you will need to have the members of the Rapid Response Team be able to determine what type of evidence is required in order to defend any possible litigation that may arise following the injury. It is important to meet with the members and discuss what evidence could be helpful in the defense and what evidence could add to the plaintiff's case. In this regard, the members should communicate with each other at the site and ascertain what evidence needs to be collected for the defense of this matter and what items are unnecessary.

As noted above as well, all evidence should be properly obtained and documented with the intention that the items will have to be submitted into evidence at trial at a later time.

The proper overall investigation of a construction site accident by an experienced Rapid Response Team can assist in the overall defense of any subsequent litigation and will assist in reducing the overall cost of any litigation.