Litigation mitigation: 
Proactive risk management in the wake of the West Warwick club fire

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INTRODUCTION

The fire that tore through a West Warwick, Rhode Island, nightclub on the night of February 20 left 100 people dead and many others with severe burns. Attorney Brian Cuhna, who filed the first wrongful death suits arising from the fire, sees many factors that led to the disaster. The band fired off the indoor pyrotechnics that ignited sheets of highly combustible insulating foam that had been applied to the ceiling. The band had a history of citations from Maine and New Jersey for similar unlicensed use of pyrotechnics. The foam manufacturer had knowledge of a previous case resulting from a fire in which the foam, which was apparently intended for use as packing material, not building insulation, burned in exactly the same way. Yet despite this previous improper usage and extreme flammability, the manufacturer did not put warnings on the foam. The foam manufacturer is an unknown quantity, as they bought out the previous manufacturer of the product used in the club.

There is a factual dispute as to whether the bar owners authorized use of the fireworks. Mr. Cuhna believes “it all begins with the Derderian brothers,” the club owners who ran a “slipshod operation on a shoestring budget” which led them to take shortcuts. He characterizes the fire inspector as “lazy” and having a history of citing the bar owners for violations that went uncorrected. In Mr. Cuhna’s view, the inspector had a duty to be diligent regarding changes in the building, among which he numbers installation of the flammable foam insulation that ignited and burned quickly, dripping flame on audience members. The band, the foam manufacturer, and the club owners are essentially without assets, leaving the town’s $4 million insurance policy as the only possible source of recovery for more than 500 claimants.

Legal responses to the fire

In the aftermath of the blaze, concerned people across the nation are taking legal steps to ensure against future club fires. The US Commerce Department’s National Institute of Standards and Technology and the National Fire Protective Association’s (NFPA) Technical Committee on Assembly Occupancies launched national investigations into fire and building codes and structures. Their discussions will center on sprinkler requirements, allowable interior finishes, egress standards and exiting requirements. The NFPA will also focus on code enforcement, including possibly creating standards for frequency of inspections.

The West Warwick fire has motivated states and cities across the country to look at their codes and reinspect clubs. In Delaware, proposed legislation would raise the fines for overcrowding from a flat penalty of $100 to a per-person charge ranging from

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$10 to $100. The hope is that a possible fine of $1,000 for exceeding legal occupancy by only 10 persons will promote self-regulation in Delaware bars and clubs. The city of Philadelphia greatly increased its enforcement of existing occupancy and exiting laws, closing 13 of 258 licensed clubs in the city, and proposing 16 new regulatory requirements, including mandatory automatic fire alarms and greater visibility for “lawful occupancy” signage. Compliance could cost the clubs thousands of dollars. Philadelphia officials made the point that the costs of meeting new rules would be much lower than the aftermath of a fire.

“There’s a far more significant cost if a tragedy happens in Philadelphia like in Rhode Island,” said Philip Goldsmith, the city’s managing director.1

Given the completely inadequate resources available to compensate the families of the deceased and the burn victims, increasing insurance requirements for operators of bars and dance clubs might also make sense. These are fine steps and, after the politicking that always attends such changes, they may well save lives and protect property in the future. However, I submit that many businesses should consider taking additional steps on their own initiative rather than waiting for the regulatory hammer to fall.

After the fire, the owners of the club and the manufacturer of the foam are now aware of potential legal issues and duties that may be impugned to them. Failure to comply with a duty when that failure is the legal cause of harm will result in liability. Knowing one’s duty, seeing the horrendous effects of failing to perform that duty and still not changing one’s approach to conform with that duty may result in a higher level of blame. A court may find conduct in these circumstances to be grossly negligent or egregious. These levels of fault can result in overcoming immunities that might otherwise protect the conduct of units of government and their employees. Heightened levels of fault may also result in significantly increased jury awards against businesses that fail to heed the fiery warning of West Warwick.

Lessons learned

How do concerned governments and businesses profit from the lessons of the West Warwick fire? The most important step is to become a proactive risk manager, one aspect of which is enlisting legal counsel as a partner in preventing future liability. Legal counsel can provide input before problems arise to lessen the likelihood of liability. Working together with legal counsel in this way is the essence of “litigation mitigation.” Litigation mitigation has three goals: lowered exposure to legal claims; increased life safety; and augmented protection of property.

While legal counsel is trained to view the first of these three elements as his or her priority, all three are of vital importance for a risk manager. In fact, life safety and property protection flow naturally from legal shelter.

Consider the potential benefits of litigation mitigation to those in a similar position to that of the defendants in the West Warwick matter. A band concerned about violations of law in its use of pyrotechnics should work with its attorney to discover how the breaches might occur and what steps are needed to avoid citations. The attorney could also advise them on the potential legal repercussions if future violations should result in personal injury or property damage. A band should also work with its counsel to create guidelines regarding settings where the use of such devices is appropriate and those where they must be avoided. The end result would be legal safety for the band and its members as well as protection of lives and property.

A foam manufacturer or similar business should consult closely with legal counsel after injury or property damage involving one of its products. To avoid future legal problems, the manufacturer must determine whether the product was used properly. If not, the nature of instructions regarding proper usage should be considered. Are the warnings adequate? Do they specify that the use at issue was improper? Perhaps warnings regarding use should be printed directly on the product. If a material is particularly dangerous but the danger is not obvious (as with highly flammable material), the manufacturer may be under a greater duty to warn.

Business owners and units of government that bring their attorneys on board as proactive partners in mitigation will find many benefits. For example,
the lawyer will counsel adherence to all applicable fire and building codes, and also suggest that individual businesses might view codes as floors for performance rather than ceilings. The thinking here is that business people and code writers might have different goals in their approach to legal standards. The code writer wants a reasonably fire-resistant structure with good egress and exiting. Since statistics show that the average small business will fail if it cannot open its doors for a month, the business owner may wish to upgrade fire resistance (perhaps by installing sprinklers) to ensure that any pause in business will be minimal. Such steps will result in lowered liability exposure (going beyond the codes shows a safe mindset), increased property protection (through greater fire resistance), and greater life safety.

Units of government and businesses need to work proactively with their lawyers to make sure that employees both fulfill their duties and create the proper records to document that they have done so. With the attorney’s help, standard operating procedures (SOPs) can be written to provide benchmarks for performance of physical tasks and record-keeping. Attorney input helps create a system for periodic monitoring of both actions on the job and record-keeping to ensure compliance with SOPs. Monitoring provides real-time notice of shortcomings, which may be corrected prior to injury or property damage and resultant liability exposure. SOPs need to address various legal subjects, including OSHA compliance, employment practices, business and government ethics, conflicts of interest and other topics specific to the business or unit of government involved.

Today, risk managers must consider areas of potential liability that would not have greatly interested them a decade ago. Leaders must think about terrorism and its consequences as part of comprehensive preparedness. Proactive involvement in terrorism and security matters has become the norm; for instance, the law now mandates pre-planning for schools.

The risk manager’s approach to disaster recovery and business continuity must expand beyond protecting business data to encompass safety of key personnel and their families. More businesses are becoming involved in family disaster planning for all employees. These employers recognize that their ability to perform in the aftermath of a disaster will depend on how quickly they can get their staffs to the work site and functioning. Assuring staff members that their families are safe will hasten this step as well as build organizational loyalty. Increased security may require closer scrutiny of every new person hired. The attorney can assist in evaluating hiring practices to ensure safety while respecting employee privacy.

Every business should consider working with legal counsel to prepare a plan for action in the event of a terrorist act or other emergency. The employer may have a duty to warn of imminent terrorist acts. Relationships with local emergency response and emergency management (EM) organizations should be worked out in advance for any dangerous event.

**Challenges to proactive partnering**

Several hurdles must be met before litigation mitigation can occur. Proactive partnering with attorneys is an approach that is contrary to the way many organizations normally do things. Traditionally, business or government managers view the attorney as a “legal firefighter” whom they call after the legal blaze has erupted. A lawyer’s first contact with the client often occurs when the client says over the phone, “Someone is suing me!” These managers should also consider that the attorney might have a role analogous to a fire inspector going through a building to identify fire hazards. The attorney partner in mitigation can often recognize the tinder for a legal blaze and point out inexpensive ways to lessen the danger.

To the layperson, attorneys may convey an aura of secular priesthood with their obscure phraseology and arcane rituals. The product that lawyers sell their customers is expertise in the murky world of the law. For some attorneys, surrendering any of their understanding of how the law might affect clients is a significant financial risk. After all, litigation mitigation will ideally lower fees for attorneys in the wake of future legal difficulties. Also, some lawyers rejoice in the cryptic sense of exclusivity conferred by their knowledge of legal language and procedure, just as some emergency managers happily toss around
acronyms that few understand. Special language and ceremonies set both groups apart from one another. Such an approach is anathema to forming partnerships. Only when attorney and client trust and understand one another as equal partners can litigation mitigation succeed.

The evolving nature of the legal market also may make such relationships less likely. Corporate clients demand a law firm that can “do it all,” resulting in a continual increase in the size of law firms. At the same time, many business clients view lawyers as machinists able to tinker with the legal mechanism instead of reliable counselors. Companies feel free to ignore lawyers’ advice if it does not correspond with what they wish to hear. The result is the opposite of a good litigation mitigation relationship—the lawyer is seen as a distant “legal information engineer” who is a tool rather than a partner.

Cost is another barrier. Many business owners and government officials feel that lawyers are very expensive and that they can’t justify spending $100 or more per hour for uncertain benefits. While it is true that attorneys cost more per hour than other types of mitigation, the benefits of enhanced safety are well worth the cost. In return for a guaranteed number of hours on a recurring basis every year, some law firms may be willing to provide discounted hourly rates on proactive assistance.

Quantifying the costs and benefits of mitigation steps is difficult. Phil Roberts, long-time deputy director for Indiana SEMA, once said, “Mitigation is hard to sell because you can’t see the results. How do you gauge the cost of the flood that didn’t occur?” Calculating the cost of lawsuits that do not take place is as complex as measuring the cost of a non-flood. But how much would it have been worth to avoid the aftermath of that frightful night in West Warwick? What might have happened had a few hundred dollars been invested in litigation mitigation? Had a proactive partnership existed between attorneys and clients before the event, perhaps all the deaths, injuries and property losses might have been avoided.

Politics

Units of government face their own obstacles to litigation mitigation. For smaller units, like rural municipalities or counties, their attorney advisor may be a local practitioner who receives lower hourly payment for doing government work than he or she collects for regular hourly fees. This structure may relegate government work to those times when normal business is slow, and may not coincide with the hour when the unit needs the attorney’s help. Rural units also rarely provide any monies for Continuing Legal Education (CLE) for the lawyers who work for them. The well-intentioned but inexperienced rural lawyer may be incapable of providing the level of sophisticated advice the units needs, as well as unable to obtain the CLE training necessary to provide it with informed guidance. This situation is hazardous for the attorney, who may be risking malpractice by advising beyond his or her competence.

Another reality is that the attorney counseling the local unit may well have the contract to do so as the reward for political activism rather than any particular legal skill. This is especially true where an elected mayor or council controls the unit. As West Warwick Town Manager Wolfgang Bauer notes, a unit’s attorney is often appointed on a political basis, even when the City Manager is a merit position. This situation does not necessarily result in inadequate counsel, but may bring about frequent changes in midstream, potentially resulting in duplicate legal fees for getting “up to speed” and inconsistent legal advice.

EM and lawyers

Many business and government leaders are ignorant of the laws that regulate their conduct. Emergency managers in particular may ignore the law and proclaim that they are too busy saving lives and protecting property to bother with all that legal mumbo jumbo. Such an approach is curious, given the “all hazards” nature of EM. When one examines the educational materials available to most emergency managers, however, their attitude becomes more understandable. Although EM is a creature of law at the federal, state and local levels, FEMA educational materials are noticeably lacking when it comes to coverage of legal issues. I firmly believe that liability issues are the great unplanned-for hazard faced by emergency managers.
The best lawyers know and understand their client’s business. Unfortunately, EM lawyers have few resources beyond statutes and interpretations thereof they can look to when advising their clients on basic legal issues. They may need education addressing the client’s organization that goes beyond the CLE traditionally engaged in by lawyers. The EM lawyer may consider taking the EM Professional Development Series offered by FEMA’s EM Institute (EMI) or university-level courses in order to better understand the client’s business.

CONCLUSION

The outcome of legal disputes in the wake of a disaster like the West Warwick nightclub fire will never entirely satisfy either victims or potential defendants. Money damages are a poor substitute for lives lost, victims injured, businesses ruined and property destroyed. Many involved in such a tragedy believe that its only beneficiaries are the lawyers who enter the scene after the event to pick up the pieces.

There were opportunities to avoid the legal mess that has resulted from this conflagration. Proactive partnerships between attorneys and clients could have led to analyzing potential bases for litigation and taking positive steps to avoid it. The law does not require such partnerships, but they certainly make sense for risk managers wishing to avoid liability, promote life safety and protect property.

Litigation mitigation is a practice whose widespread adoption is long overdue. Professional emergency managers, in particular, should embrace proactive partnering with attorneys as a part of their overall emphasis on mitigation. Such an approach, however, requires a commitment to partnership from both the attorney and the client. Both must be dedicated to seeking out education in applicable legal standards. The attorney must commit to learning the client’s business in order to give the best legal advice. Mutual respect and understanding make the partnership prosper. Only where litigation mitigation is actively practiced can leaders confidently state that they have made every effort to save lives and protect property.

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REFERENCES