



804 Best Practices for Preventing Litigation

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Faculty Biographies

Robert Berger

Robert A. Berger currently serves as assistant director in the division of enforcement and investigations of the Public Company Accounting Oversight Board (PCAOB), a regulatory organization created by Title I of the Sarbanes-Oxley Act of 2002, located in Washington, DC. In this capacity, Mr. Berger investigates the potential violation of the securities laws and professional standards by accounting firms that audit publicly traded companies.

Before joining the PCAOB, Mr. Berger managed litigation at McLean, Virginia-based BearingPoint, Inc., a global consulting firm with over 15,000 employees doing business in more than 130 countries worldwide. At BearingPoint, he managed the company's international litigation and arbitration and its technology disputes. He also conducted management training seminars as part of the organization's litigation prevention program. Prior to BearingPoint, Mr. Berger was a partner with the law firm of Winston & Strawn where he represented clients in a variety of civil and white-collar criminal matters.

Mr. Berger earned his B.A. from Evangel University and his J.D. from Boston University School of Law.

Paul J. Ehlenbach

Paul Ehlenbach is vice president and assistant general counsel-litigation for The Boeing Company in Chicago. In that capacity, he leads a group of attorneys and paralegals who are responsible for managing resolution of the company's business litigation as well as conducting and responding to investigations and providing legal support to Boeing's office of internal governance. He is a member of Boeing's law council, has oversight over technology initiatives, and has spoken nationally on topics such as ADR, the false claims act, and the use of technology in litigation management.

Prior to joining Boeing, Mr. Ehlenbach was a litigation partner in the Seattle office of Perkins Coie, where he focused his practice on complex litigation and government contracts. He also served as a trial attorney in the Civil Division of the U.S. Department of Justice under the Attorney General's honor program and as a judicial law clerk for the Honorable John C. Shabaz.

Mr. Ehlenbach has been active in a number of professional organizations and currently is a member of the U.S. Court of Federal Claims Advisory Council and a member of the executive committee of the Chief Litigation Counsel Association. He recently joined the president's council of the Museum of Science and Industry in Chicago.

Mr. Ehlenbach received his undergraduate degree from Santa Clara University and his law degree from the University of Wisconsin-Madison, where he taught legal writing and served as an editor of the Wisconsin Law Review and the Wisconsin International Law Journal.

J. Lawrence McIntyre

J. Lawrence McIntyre is vice president, secretary, and general counsel of The Toro Company in Minneapolis, a manufacturer of outdoor power equipment for golf courses, lawns, and yard care. In 2004 Toro had revenues of approximately \$1.7 billion, and has manufacturing facilities in Minnesota, Wisconsin, Nebraska, Texas, California, as well as Mexico, Italy, England, and Australia. Toro has about 5,000 employees and an in-house law department with six lawyers and five paralegals. Mr. McIntyre is responsible for the Toro's legal functions, corporate compliance, insurance and risk management, safety, and governmental agency relations.

Prior to joining Toro, Mr. McIntyre was a securities and corporate law partner of the former Minneapolis and Saint Paul, Minnesota law firm of Doherty, Rumble & Butler.

Mr. McIntyre holds a B.A. from the college (now University) of St. Thomas, and a LL.B from the University of Minnesota Law School.



Session Number & Title

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Litigation Prevention Framework

● Proactive Litigation Prevention

- What can you do before a dispute arises that will (1) reduce the likelihood of future disputes, (2) reduce the size of future disputes, and/or (3) better prepare you for future disputes?

● Reactive Litigation Prevention

- Do you have a plan in place to react to disputes when they arise?

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Proactive Litigation Prevention

- Prioritize Your Litigation Prevention Efforts
- Litigation Prevention Strategy Tools
- Measure the Results
- Use Results to Reconsider Priorities and Modify Litigation Prevention Strategy



Prioritize Litigation Prevention Efforts

- **Examine Past Disputes**
 - Where is the litigation budget being spent?
 - Do disputes follow identifiable patterns?
 - Product line
 - Division
 - Specific employees or clients
 - Type of dispute
- **Consider Regulatory Actions**



Prioritize Litigation Prevention Efforts

- **Protect your company's Achilles' heel**
- **Consider hard to quantify elements**
 - Customer satisfaction
 - Employee morale
 - Value of employee time



Litigation Prevention Strategy Tools

- **Consider the Type of Litigation**
 - Customer disputes
 - Employee disputes
 - IP Litigation
 - Corporate Litigation
 - Regulatory Actions
 - International Litigation



Litigation Prevention Tools

- Training
 - In-person
 - Computerized
- Quality control programs
- Contract review
- Policy & Procedure development/review
- Post-mortem review of disputes



Quality Control Programs

- Leverage existing QC programs
- Two-way communication critical
 - QC results should inform litigation prevention efforts
 - Review of past disputes should inform QC efforts
- Always be mindful of future discovery of QC documentation



Measure the Results

- Not everything that is important can be measured
- Everything that can be measured is not necessarily important
- Metrics will vary by litigation type—one size does not fit all



Reactive Litigation Prevention

- **Early Case Assessment**
 - Leverage Internal Expertise
 - Best if performed by in-house counsel
 - Set Realistic Goals
- **Early Dispute Resolution**
 - Myth #1: Mediation is not useful until the parties complete discovery
 - Myth #2: Proposing early dispute resolution is a sign of weakness, undercutting your bargaining position

Toro's ADR Program

Pre-Litigation Mediation

J. Lawrence McIntyre

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Background

Toro Manufacturers lawn mowers which cut grass, but also (if misused) can cut fingers and toes.

Toro is subject to product liability claims which, in a litigation context, can involve high costs and risk of punitive damages.

Toro prefers to avoid litigation and, instead, proactively resolves claims or mediates disputes.

The Price of Litigation

- Escalating costs, fees and expenses.
 - Potential for runaway jury verdicts based on emotion instead of logic.
 - Bad publicity from adverse results.
 - Contributions to Plaintiffs' attorneys' document banks (e.g. ATLA).
 - Litigation provides educational opportunities to adversary which are otherwise unavailable.
 - Litigation erodes atmosphere conducive to best/earliest settlement.
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Program Mechanics

(How it works)

- Toro receives notice of a possible claim via telephone call, correspondence, notice from dealer, newspaper clippings service, or service of lawsuit.
 - Product Liability Specialist (a non-lawyer) contacts claimant or counsel to discuss claim, obtain preliminary information, and communicate a desire to resolve the claim.
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Program Mechanics

(How it works)

- **Meeting scheduled between Product Liability Specialist and claimant/counsel to assess claim:**
 - *Informal interview of claimant (generally at claimant's home)*
 - *Examine/copy documentation re: liability and damages*
 - *Inspect/test/photograph product, accident scene, or other matters at issue.*

Program Mechanics

- **Product Liability Specialist evaluates claim and attempts amicable resolution through conventional negotiations – 67% Resolution Rate.**
 - ***Injured party encouraged to obtain counsel.***

Program Mechanics

- **If claim not resolved, file is forwarded to national mediation counsel to offer claimant and counsel opportunity to resolve claim via facilitated mediation.**
 - *Mediator selected from Toro's list of effective mediators.*
 - *Toro has a short list of mediators who have mediated a number of cases for Toro each year. They are independent, but are able to give Toro a priority on their calendars.*
 - *Mediation scheduled for a date certain 1-2 months from receipt of file.*
 - *Sworn statement of claimant scheduled for day preceding mediation.*
 - *Any other investigation conducted; exhibits prepared.*
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Program Mechanics

- **Updated documentation obtained**
 - *Medical bills & records; Wage loss documentation.*
 - *Expert reports re: liability and/or damages.*
 - **Mediation brief prepared**
 - *details facts, law, issues and argument.*
 - *provided to mediator (but not to claimant's counsel) in advance of mediation*
 - *nothing held back or "saved" for trial.*
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Program Mechanics

- **Sworn statement of claimant taken**
 - *casual dress; disarming, friendly tone used.*

- **Post-statement conference with Toro & local counsel to finalize evaluation of exposure.**

- **Mediation next morning - better than 95% chance of advantageous settlement with minimal litigation costs, fees & expenses.**

Advantages of Pre-Litigation Mediation Program

- **Legal fees capped by flat fee retainer agreement.**
- **Avoids virtually all litigation costs and expenses.**
 - **No Depositions**
 - **No Expert Witness fees**
 - **Avoids production of extraneous internal materials**
 - *Exchange of information is amicable, limited and controlled.*
- **Eliminates animosity with adversary.**
- **Negotiation from position of greatest strength.**
- **Toro controls destiny of case.**
- **Confidentiality of results.**

Types of Claims

- **Product liability claims**
 - *Outdoor power equipment*
 - *Irrigation equipment*
 - *Electrical products*
 - *Consumer products*
 - *Commercial products*

Types of Claims

- **Other Claims (Process modified to fit circumstances)**
 - **Auto accident claims**
 - **Fire loss and property damage claims**
 - **Commercial claims**
 - *Breach of Warranty*
 - *Employment related*
 - *Lost profits/Loss of future business/diminished reputation*
 - *Breach of contract*
 - **Claims asserted by Toro (as Plaintiff)**

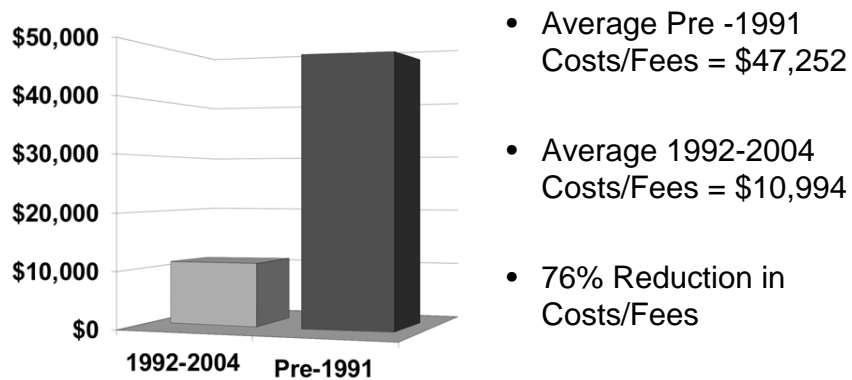
Prevention Aspects of Mediation Program

- Toro uses engineers to inspect products involved in claims and to evaluate alleged product facilities.
 - Engineers see first hand how product failures or use can cause personal injuries.
 - Mindset for designing safety in future products
- Mediation Counsel meets periodically with Toro engineering staff to report on product liability claims.
 - Trends in types of product defect claims discussed.
 - Opportunity to improve product design to avoid safety issues.

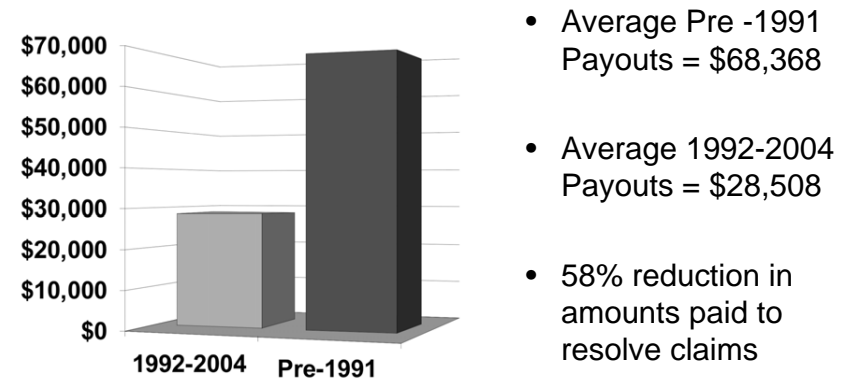
The Toro Company Experience (1992-2004)

- Over 1150 product claims diverted to Pre-Litigation Intervention Program.
- 69% settled within 12 months.
- Last courtroom adventure was 1994.
- Savings in costs, attorneys' fees, expenses, verdicts and settlements.
- Insurance premiums reduced due to lower total annual costs.

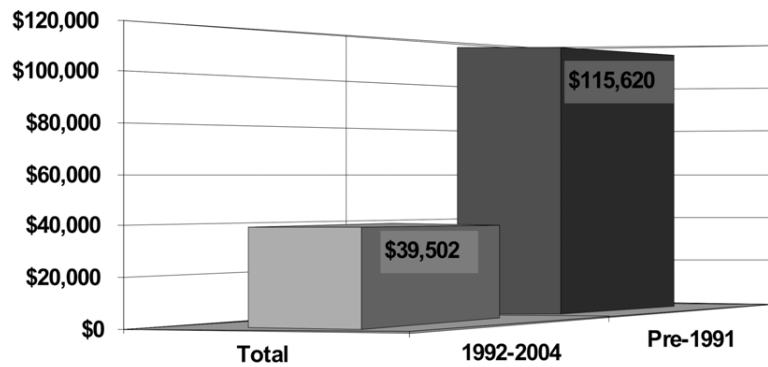
Average Per-Claim Costs/Fees Comparison



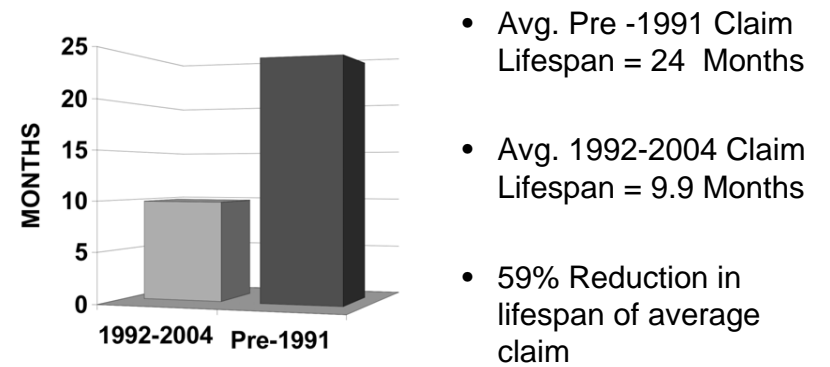
Average Per-Claim Verdicts/Settlements Comparison



Comparison of Average Total Cost to Close a File



Average Claim Lifespan Comparison





**Section 804:
Best Practices for Preventing
Litigation**

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**20-20 Hindsight: Use of After
Action Reviews to Avoid
(Or Mitigate Adverse Impacts of)
Future Litigation**

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WHAT IS AN AFTER ACTION REVIEW?

- **Origin in U.S. Army**
 - **Purpose: Learning NOT Evaluation**
 - **Three Questions:**
 - **What did we intend to do?**
 - **What actually happened?**
 - **What can we learn from it?**
- **Candor – No Sacred Cows**
- **Immediacy – Timely Trumps Perfect**



POST-LITIGATION AFTER ACTION REVIEWS

- **Participants**
 - **In-house litigator**
 - **Outside counsel**
 - **Business lawyer**
 - **Client or client committee**
 - **Expert consultant (optional)**
 - **Legal management (optional)**



POST-LITIGATION AFTER ACTION REVIEWS

● Agenda

- Circumstances that gave rise to litigation
- Outcome, means of resolving litigation
- Management of the litigation
 - In-House Activities
 - Law Firm Activities
- Recommendations for Future Action



Circumstances that Gave Rise to Litigation

- Focus varies according to nature of case
 - E.g., in contract case, may focus on relevant elements of contract negotiation, formation & performance
- May highlight events/conduct that created risk, key evidence
 - Good time to discuss email and electronic documents
- Missed opportunities to prevent



Outcome, Means of Resolution

- Planned v. actual course of case
- Validity of initial assumptions
- If settlement, basis and reasoning
- Impact of litigation on business resources
- Déjà vu all over again
 - What would we do differently when faced with same problem?



Management of the Litigation (In-House)

- Was correct client identified in a timely fashion?
- Were business goals understood and communicated clearly?
- Were necessary resources made available?
- Risk management: synthesis of goals, strategy, tactics & cost
- Coordination with business client



Management of the Litigation (Firm)

- **Subjective**
 - Accuracy of factual, legal analysis
 - Anticipation of events
 - Management of discovery, litigation support
 - Quality of resolution strategy
 - Results
- **Objective--Metrics**
 - Effective lawyer hourly rate
 - Partner/Associate/paralegal ratios

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Management of the Litigation (Law Firm) (cont.)

- **Continuity of staffing/turnover**
- **Cost/budget performance**
 - Timeliness of billing
 - Cost breakdown by task code
 - Actual v. budget analysis, incl. budget iterations
 - Litigation support costs
- **Time to resolution**
- **Total cost (fees & expenses + settlement/judgment) (commodity work)**

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Recommendations for Future Action

- **Change in business processes**
- **Revisions to standard T&Cs**
 - **More care in drafting disputes clauses**
- **Employee discipline**
- **Additional factors to consider in selecting pre-litigation counsel**
- **New customer communication strategy for matters under investigation**
- **Additional training**
 - **“Document Does & Don’ts”**