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"Taking Away Plaintiff's Exhibit A": Avoiding the Creation of Harmful Internal Documents

The Next Step In Creating a Culture of Risk Avoidance: Avoid the Creation of Harmful Internal Documents

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INTRODUCTION: THE SCOPE OF THE PROBLEM

It should come as no surprise that poorly-phrased e-mails or memoranda can expose a company to liability, exacerbate a crisis, and cause damage to reputation. While effective corporate risk avoidance in the twenty-first century requires that, regardless of the size or decentralization of a company, information

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relevant to the identification of emerging risks flows to proper decision-makers within the company,[2] it also demands that such communications be phrased accurately, thoughtfully, and responsibly. Companies have begun to appreciate the fact that they make their "record" everyday through the documents they generate internally, which may eventually be played out in litigation. Indeed, there is no shortage of examples of companies that were exposed to significant liability, in part because their employees generated what, in hindsight, were ill-thought-out memoranda, e-mails, and other internal documents which could be construed as an acknowledgement of a company's wrongdoing. These are often the same documents that will be used by claimants to prove, for example, that business considerations trumped issuance of appropriate safety warnings or candid responses to inquiries regarding the risks associated with a particular product. While the company tries to control the legal and public relations fallout of these documents by demonstrating how they were being misquoted or taken out of context, the damage has already been done.

This problem is symptomatic of a broader problem across all industries—from financial institutions to pharmaceutical companies—in which seemingly insensitive or incendiary verbiage or ill-considered musings in internal e-mails, memoranda, marketing reports, and even board meeting notes can turn the tide of a litigation against a corporate defendant.[3] Moreover, the mere existence of such documents will continue to subject the company to risk, as it could provide a basis for government investigations, congressional inquiries, intense media scrutiny, and damage to brand or corporate reputation. The only long-term, sustainable solution to eliminating or minimizing the risk posed by such harmful internal company documents is to avoid their creation in the first place if at all possible.

This is no easy task. With the explosion of e-mail and electronic documentation over the past two decades, it is now easier than ever for an employee at any level to memorialize and widely broadcast personal opinions and musings in writing, which can have a negative impact for the company down the line. If companies are to curb the creation of potentially harmful internal documents, employee training and document discipline needs to be the primary focus. This is not about "covering up" issues or observations. It's about injecting thoughtful, common sense discipline into internal corporate writings to avoid the unintended consequences which flow from speculative, inaccurate, or insensitive verbiage. As several commentators have suggested, the most feasible way to ensure that employees think carefully before generating documents is to institute a companywide document discipline program that educates employees about the harmful consequences their written words can have on the company, and implements guidelines for the responsible creation of documents. Ultimately, it should become part of the corporate culture.

These initiatives, however, cannot fall to the company's general counsel alone. General counsels often supervise large, multi-national corporations that in turn have multiple business units, including different employee populations, such as salespeople, managers, marketing specialists, *et al*. Different segments of the employee population may require specialized forms of training. Likewise, where a company has branches in different countries, it may be appropriate to tailor employee training based on local cultural norms. Not all general counsels have the resources to undertake such detailed programs alone. To effectively train employees in document discipline and instill a culture of risk avoidance, the full resources of the company will have to be leveraged, including, perhaps, the assets of outside counsel.

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[2] *See* Arvin Maskin, *Taking Charge of Risk Avoidance: Begin With Lessons Learned & Leverage Resources*, ABA Sec. of Litig. Corp. Counsel CLE Seminar, Feb. 17-19, 2011, at 5-6 (on file with the author).

[3] Arvin Maskin, *Creating a Culture of Risk Avoidance*, BUSINESS WEEK, Mar. 6, 2009, *available at* http://www.businessweek.com/managing/content/mar2009/ca2009036_914216.htm.

Forward-thinking corporations now implement global diversity training programs to sensitize their employees. Why not implement similar training programs to educate employees about what they reduce to writing?

This article will explore both the advantages and challenges of instituting a companywide document discipline program, and offer some practical suggestions for ways in which in-house counsel can structure and implement employee education programs that foster document discipline and risk avoidance.

THE SOLUTION IS NOT LESS DOCUMENTATION, BUT BETTER DOCUMENTATION

At first glance, one may think that the solution to the problem of bad documents is to minimize the number of documents that a company produces. Such a "document freeze," however, may have a number of harmful consequences in the event that the company is pulled into litigation. First, the absence of substantive documentation regarding a company product, transaction, service, or practice may itself convey the impression of wrongdoing, or at least raise a red flag. In the event that a litigation proceeds to trial, plaintiff's counsel will likely press company executives, managers, or employees to explain why there is a dearth of documentation regarding an important event, process, or practice.[4] The lack of adequate documentation may suggest that a particular decision was either not thought through or that the company was being less than candid by insulating its decision-making process with the absence of a written record.

Second, any reduction in the number of employee-prepared documents, while theoretically minimizing the number of "bad" documents, will also minimize the number of "good" documents, which could prove crucial in explaining a company's conduct and in avoiding liability.[5] Having a complete and comprehensive company record is important because it can help to contextualize and mitigate the effect of any harmful documents that are created.[6] For example, in products liability litigation, it is often crucial for a product designer or manufacturer to produce a complete paper trail or record showing that any quality-related issues raised in a document were thoughtfully considered, and that reasonable steps were taken by the company to address the concerns expressed in the documents at issue.[7]

Thus, while encouraging employees to avoid e-mail and opt to use the phone or meet in person may help reduce the overall volume of potentially harmful internal documents, such an approach is not a cure-all, as the potential costs of under-documentation can outweigh its benefits. Instead, what is needed is an

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[4] *See* Robert R. Salman, *Writing for the Busy Executive: Avoiding the Smoking Gun*, PRACTICAL LAWYER, Mar. 1998, 44 No. 2 Prac. Law. 15, 16-17.

[5] *See* Ian E. Bjorkman, *Harmonizing Litigation Strategies With a Client's Business Goals*, ASPATORE, 2008 WL 5939808, at *3; Martin Samson, *How to Conduct Business With an Eye Toward Litigation*, N.Y. L.J., May 18, 1996, *available at* http://www.internetlibrary.com/publications/htcbwaetl_art.cfm.

[6] In this regard, it is essential for a company to have in place effective document retention protocols so that it can preserve relevant documentation for future litigations and investigations. While the topic of document retention is beyond the scope of this article, it is nonetheless critically important in today's high-stakes litigation environment, especially as plaintiffs' counsel continually seek to exploit uncertainties in the law of spoliation of evidence.

[7] Todd E. Kastetter, *Quality Concepts and Litigation: The Role of Record-keeping in Products Liability Litigation in the USA*, MANAGEMENT DECISION 37/8 (1999), at 633-42.

intelligent document discipline program that trains employees to record information that is necessary in a factual, thoughtful, and objective manner. This might be easier said than done at first glance, but there are some steps which can be taken to facilitate the exchange of important information with the right people within a company, while minimizing the generation of documents which may have to be explained later. Identifying which information needs to be recorded, in what format, and to whom it needs to be addressed, including "do's and don'ts," needs to be tailored to the particular organization.

COMPONENTS OF A DOCUMENT DISCIPLINE PROGRAM: A FEW SUGGESTIONS

While each company must assess its own needs in light of the particular conditions it faces, an effective corporate document discipline program should typically have three separate—but concurrent—tracks: (1) in-house counsel's publication of document creation guidelines for company employees; (2) periodic employee training seminars and sessions to reinforce the necessity of applying care when generating and circulating company documents; and (3) periodic review and monitoring of the output of company documents by upper management, in-house counsel, and outside counsel.

A. Guidelines for Document Creation

The literature is full of suggestions for internal guidelines regarding document language and format that general counsel can adapt to meet the needs of their particular company workforce. Consistent with the goal of creating a corporate culture of risk avoidance, these suggested guidelines are geared towards promoting "defensive writing," which can assist the company in future disputes.[8] Some of the more common and intuitive suggestions include:

- Avoiding drawing legal conclusions (e.g., contract interpretation), using legal jargon, making assertions regarding fault or liability, or predicting the outcome of pending or future litigation;
- Avoiding documenting personal opinions or discussing matters that lie beyond one's professional expertise;
- Avoiding drawing factual conclusions without a complete record of the facts;
- Avoiding the use of slang, exaggeration, sarcasm, inflammatory language, or language that could easily be taken out of context;
- Avoiding discussing product safety or other liability-rich issues carelessly or insensitively (e.g., by discussing product safety in financial cost-benefit terms or by attacking the motives of potential claimants);
- Avoiding assigning blame within the organization;
- Refraining from creating a document if it is unnecessary, particularly where the subject matter is sensitive or could end up in litigation (pick up the phone or meet in person instead);

[8] *See* Eli R. Makus & Eric W. Junginger, *Managing Information in an Electronic Workplace* (Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP), at 8, *available at* http://www.hansonbridgett.com/docs/press_room/hb_in_the_news/E-Discovery_and_DocRetention.pdf.

- Limiting the recipients of a document to those who absolutely need to be copied on it;

- Be specific, detailed, comprehensive, professional, and objective when recording, analyzing, or discussing information, especially when it concerns an issue that has a litigation risk associated with it;

- Be sure to properly document all phases of a transaction, business decision, or product development, such as contract review procedures, design procedures and reviews, testing protocols, inspections, controls, internal audits and reviews, field and performance data, and other important information;

- Where an employee creates a document that raises a potential liability issue for the company, the employee's supervisor should "close the loop" on that document by creating a separate document showing that the issues raised in the first document were considered, analyzed, and fully addressed;

- Where a document must discuss strategy or marketing, employ language that reflects legitimate policy decision-making on the basis of relevant criteria; and

- When in doubt about whether certain information or discussions should be memorialized in writing, consult with counsel, or have counsel review the draft.[9]

The underlying theme of each of these fairly straightforward guidelines is that, before putting pen to paper (or text on a computer screen), each company employee should think to herself: How would this document be interpreted if it were published in a newspaper or on television, or worse—scrutinized by a judge, jury, governmental agency, or adversary in a future litigation?[10] This is not an overnight process. It will take time to make it a part of the fabric and culture of a company, but given the potential consequences of having no system in place at all, it is well worth the effort to formulate some sort of program which best fits the company.

B. Periodic Employee Training and Compliance Seminars

To supplement published document creation guidelines, in-house counsel—with the help of regular outside counsel—should consider periodic training seminars to emphasize the importance of drafting all

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[9] *See id.*; Gary Goldman, *A Former In-house Counsel's Guide to Litigating Age Discrimination Discharge Cases*, PRACTICAL LAWYER, Dec. 2009, 55 No. 6 Prac. Law. 23, 29; Philip B. Toran & Eric A. Fitzgerald, *Responding to Recent Trends in Insurance Liability*, ASPATORE, 2009 WL 534237, at *4; Bjorkman, *supra* note 5, at *3; Michael J. Gaertner, *Navigating the Antitrust Laws to Achieve Business Objectives*, ASPATORE, 2008 WL 5939813, at *4-*8; Lester Sotsky & Brian D. Israel, *Protecting Against Environmental Tort Litigation: Successful Strategies and Proactive Measures*, BNA CLASS ACTION LITIGATION REPORT, Aug. 26, 2005, 06 CLASS 595; Teresa M. Dufort, *Bad Documents Can Bite: Identifying Ways to Eliminate or Manage Litigation Through Better Documentation*, POOL & SPA NEWS, May 7, 2004, *available at* http://findarticles.com/p/articles/mi_m0NTB/is_10_43/ai_n6029463/; Kastetter, *supra* note 7, at 641; Salman, *supra* note 4, at 17-18; Mark M. Rosenthal & Robert A. Miller, *When Your Client's Business Deal Goes Sour*, A.B.A. JOURNAL, June 1985, 71-JUN A.B.A. J. 58, 60-61.

[10] *See* Goldman, *supra* note 9, at 29; Dufort, *supra* note 9; Rosenthal & Miller, *supra* note 9, at 60.

documents with an eye towards potential litigation.[11] These internal seminars provide a good opportunity for in-house counsel to review examples of poorly-drafted documents and instruct employees regarding the appropriate use of language and format. To stress the potential relevance of all company documents to future litigation, in-house counsel should also consider simulating a cross-examination of an employee at these seminars "to illustrate how what they put in writing can be misunderstood and misinterpreted years later."[12] Such periodic training sessions are especially important for employee populations that consistently prepare documents that have a tendency to become central to litigation—such as claims reports prepared by insurance company agents, or customer complaint files and related memos.[13] It is also useful to instruct employees based upon "lessons learned" from prior litigation involving the company or from litigation involving similar industries. Evidence from other litigations often provide the most vivid illustrations of how seemingly innocuous comments in routine memos can become the centerpiece of a litigation, and are thus excellent teaching tools.

Also, as noted above, document discipline does not mean record less. All too often, a company's conduct has to be explained through reliance upon incomplete documents generated many years ago and on the faded memories of elderly employee-witnesses. This underscores the need for care in the formulation of a company record which needs to be complete and accurate.

C. Ongoing Compliance Review

Another layer of risk protection that should be considered is an ongoing review of documents by upper management, in-house counsel, and—as necessary—outside counsel. Such review helps to ensure that the company's document discipline guidelines are being complied with, and—if necessary—allows the company to "close the loop" on potentially harmful documents that have already been generated.

SPECIALIZED DOCUMENT DISCIPLINE TRAINING FOR DIFFERENT SEGMENTS OF THE EMPLOYEE POPULATION

The broad three-part document discipline program described above will certainly need to be adjusted and adapted to each corporation based on the nature of its business, its particular employee structure, and corporate culture. Thus, what works for an insurance company will not necessarily work for a pharmaceutical company, and the training that is appropriate for a company's directors and officers may not be appropriate for middle management. While this article cannot offer specialized advice for any particular industry or institution, the following suggestions may prove helpful to in-house counsel as they customize their document discipline training initiatives for various segments of the employee population.

A. Marketing Department

Recent cases provide examples of what a marketing department should think twice about putting in writing. For instance, one pharmaceutical company's internal marketing materials allegedly instructed the company's field personnel that, when asked by doctors about the potential safety risks of a particular drug, they should "dodge" the question. The marketing materials allegedly then went on to provide samples of evasive answers that salespeople could use to respond to doctors' concerns. Needless to say,

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[11] *See* Makus & Junginger, *supra* note 8, at 7; Yee Wah Chin, *What Not to Say in the Course of Acquisitions and Transactions*, PRACTICAL LAWYER, Apr. 1998, 44 No. 3 Prac. Law. 27, 31.

[12] Maskin, *supra* note 3.

[13] *See* Toran & Fitzgerald, *supra* note 9, at 4.

internal communiqués that are phrased in this way give the impression that a company has something to hide and could become plaintiff's evidence in chief in a lawsuit or a government investigation, to say nothing of damage to a company's reputation. Such documents are obviously inflammatory and can distract the trier of fact from meritorious defenses.

In-house counsel need to stress to their marketing departments that their documents are likely to be the primary focus in future litigations, regardless of whether the case concerns products liability, antitrust, securities fraud, or breach-of-contract claims. It is easy to imagine how plaintiff's counsel in an antitrust case will scrutinize documents produced by defendant's marketing employees which might misuse terms like "market," "price stabilization," or "monopolize," which carry a lot of legal baggage.[14] To prevent such misuse of legal jargon in internal marketing materials, in-house counsel should think of approaches to sensitize employees concerning phrases in marketing documents which can be misconstrued and used against the company to create a false impression. Assume that plaintiff's counsel will also seek to contrast what appears in internal documents versus what was contained in communications to customers or government agencies to prove concealment or fraud. Again, there are approaches to sensitizing employees regarding how internal documents will be used to construct a case of corporate wrongdoing. This is another way in which in-house counsel can leverage outside counsel's experience for instructional purposes.

B. Research and Development (R&D)

R&D employees' documents are also susceptible to becoming plaintiff's exhibit A at trial, not least of all because company scientists—focused more on the technical aspects of their work in their inter-office communications, rather than its form or legal implications—can have their words taken out of context. All of the above proposed document discipline guidelines apply with equal force in the case of R&D professionals, especially where those professionals manage and communicate manufacturing quality-related information pertaining to a product in development.[15]

In the case of R&D, the most important thing companies can do to curb the creation of potentially harmful documents is to institute and enforce a quality-related information documentation procedure that requires employees to timely record "[c]hanges to design criteria, parameters, specifications and drawings," which will "ensure that obsolete information is properly relegated as such."[16] Furthermore, companies must vet employees who record quality-related information to ensure that they are both qualified and competent. This vetting process should be followed by a training program that instructs employees to document and discuss information in a professional, objective manner, "free of distractions and extraneous matters."[17]

C. Manufacturing

Poorly-phrased e-mails, reports, and other documents by manufacturing employees are also the fodder for the plaintiffs' bar in products liability suits. Such documents often unwittingly attribute liability to the company for releasing a product with a potential design or manufacturing defect. Even worse,

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[14] *See* Chin, *supra* note 11, at 32-33.

[15] *See* Kastetter, *supra* note 7, at 634, 641.

[16] *Id.* at 634.

[17] *Id.* at 641.

manufacturing employees often allow such documents to remain unaddressed, thereby failing to "close the loop." For example, in *Bowden v. Spalding & Evenflo Cos.*, 591 So.2d 936 (Fla. App. 1991), plaintiffs exploited documents produced by Sears' engineers recommending changes in the design of a baby exerciser to obtain a $7.54 million jury award.[18] The recommendations above regarding R&D employees apply with equal force to manufacturing employees: companies should institute protocols that limit (a) who can record quality-related information, (b) which quality-related information can and should be recorded, and (c) the manner in which such quality-related information is recorded and distributed.

D. Customer Relations

Documents prepared by customer relations departments can be problematic because customer relations specialists, as recorders of client complaints, often mistakenly record the customer's grievance as a fact, rather than a mere allegation.[19] In the insurance industry especially, the initial communications between an insured individual and the company's claims specialist can be at the heart of any subsequent bad faith litigation, so any information obtained from such communications must be documented carefully.[20] Each company's customer relations team must therefore be instructed to be "specific and detailed about the sources of the information contained in their communications,"[21] avoid speculation, and otherwise record information professionally and without extraneous comments.[22]

Moreover, just as important as knowing *what* to put in writing is knowing *when* it is appropriate to forward that writing along to other company employees or departments. Accordingly, customer relations specialists must also be trained to identify those situations when it may be essential to pass on information gathered from customer complaints to their supervisors or colleagues, or when it is not necessary to do so.

E. Management

Because managers are especially busy these days and often must be blunt with their employees to be effective, they may find it difficult to craft documents and e-mails with enough attention to make them litigation proof.[23] Nevertheless, all levels of management must be trained in some simple guidelines for writing documents that anticipate potential litigation issues. Robert R. Salman proposes five basic rules for executive and managerial writing: (1) write the truth; (2) think first, then write; (3) revise and edit; (4) let counsel review the writing; and (5) don't make the case for the other side.[24]

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[18] This and other cases of poor documentation by manufacturers are discussed in Kenneth Ross, *The Importance of a Proactive Document Management Program*, FOR THE DEFENSE, Oct. 1999, at 24.

[19] *See* Dufort, *supra* note 9.

[20] *See* Toran & Fitzgerald, *supra* note 9, at 4.

[21] Dufort, *supra* note 9.

[22] Toran & Fitzgerald, *supra* note 9, at *4.

[23] *See* Salman, *supra* note 4, at 16. Additionally, middle managers are often afflicted with a tendency to draft documents containing ill-used legalese, which can incriminate the company in subsequent litigation. *Id.* at 19.

[24] *Id.* at 17-18.

F. Board of Directors

While the document output of a company's directors is likely to be the smallest of all the employee categories discussed here, it nevertheless also has the greatest weight. A carelessly written note at a board meeting, poorly-phrased comments in the margins of strategic planning or marketing documents, or even a stray remark at a board meeting (which may make its way into the official minutes) can easily expose the company to antitrust, securities fraud, or contract liability. Board members must therefore not only exercise caution in taking notes at board meetings, but also not make off-the-cuff comments, and should at any rate review the board meeting minutes to ensure that their statements were properly recorded by the meeting secretary.

CONCLUSION

As general counsels in today's high-stakes litigation environment continually look for ways to avoid risk, a practical and logical way for companies to minimize the threat of liability and public scandal is to put in place protocols and procedures to avoid the creation of the sorts of harmful internal documents that have negatively altered the course of past litigations and have created corporate crises. This must be accomplished while at the same time ensuring the flow of communications which will enable corporations to conduct business and allow corporate decision-makers to effectively identify and manage risk. In-house counsel, however, cannot do it all alone: to succeed, such document discipline regimes need to: (a) leverage the full resources of the corporation, (b) be a top priority for the corporation's upper management, and (c) be implemented on a companywide scale. Indeed, if implemented properly, a document discipline program can help create a culture of risk avoidance that permeates the entire company. Needless to say, it is in each company's best interest to work towards achieving this goal.