

Did We Say That? Taming Communications for Litigation

Employment and Labor





The troubles of our beleaguered fictitious legal team at Sunderland Manufacturing continue. Having dealt with employee texts that created contractual obligations for the company, determined how to address telling metadata in a document, and encountered litigation resulting from an office party, the

team is back to tackle runaway communications that have created "bad documents" uncovered in litigation.

Jean: This product has a 25 percent failure rate. That means we will kill a quarter of the people who use it!
Dan: I understand, but we spent US$12 million developing it. If we can't get FDA clearance, can we sell it overseas? Europe? Africa?
Jean: Since the FDA won't let us kill Americans, can we kill people in countries that will let us? Is that what you're asking?
Bob: You know, I told those people in R&D that this was a problem months ago!
Tracy: No Jean, that's not what Dan meant. It's just that this device is way better than the crappy one we're currently selling. I'm sure the PX13 caused another patient's epileptic seizure just last month.
Bob: That patient probably wouldn't be in a coma now were it not for the PX13.
Susan: That's not true, Bob. There's nothing wrong with the PX13. It passed all the critical testing before launch.
Dan: So you see, Jean, we really need to get this product into the marketplace right now!

Jordan Powers, general counsel of Sunderland Manufacturing, read the email exchange that had occurred among members of the research and development team. She addressed her deputy, Barry Miles:

> *"We'll deal with the bad documents in litigation and have the regulatory group deal with the FDA issues. But just as important, we need to develop training that we'll roll out across the company in all countries so exchanges like this don't surface in litigation."*

With no budget to purchase off-the-shelf training, Miles created a training program that would strike the right balance between delivering critical messages without boring employees to death.

Which communications matter?

All internal and external communications generated by company workers fall within the scope of a comprehensive communications training program:

- Electronic or hard copy;
- Emails, memos, and communications to peers, supervisors, subordinates, customers, regulators, and other third parties;
- Personal notes;
- Calendar entries;
- Voicemails; and,
- All documents as defined by the company document retention policy and any other policy or procedure that defines "documents."

Avoid the impact of poor communication

Poor or careless communications can affect the company's reputation and compromise competitiveness. They can expose the company and individuals to civil or criminal liability, and negatively impact the company's position in lawsuits and investigations.

Key defensive writing techniques

Employees can be trained to take the following considerations into account in crafting their communications:

- Relevance — stick to information relevant to the subject;
- Accuracy — stick to the facts, ideally the correct ones;
- Clarity — keep communications simple and unambiguous;
- Brevity — do not use 10 words when two or three will suffice; and,
- Context — communications shouldn't make anyone shudder if they turn up as headline news… or in the general counsel's office.

Do this, not that

Practical tips are helpful in illustrating desired and discouraged communication behaviors. At Sunderland Manufacturing, employees were told:

Do

- Assume your writing will be preserved forever;
- Assume your document will be appear on television;
- Respect confidentiality;
- Copy the minimum number of people necessary;
- Use facts and data to support assertions;
- Control the use of "technical jargon" and use trademarks correctly;
- Think before you write, edit before you send; and,
- Mean what you say, and say what you mean.

Do not

- Make unsupported statements or conclusions;
- Discuss product safety issues in financial terms;
- Disclose company or personal confidential information to placate a disgruntled customer or third party;
- Use speculation or exaggeration;
- NEVER draw conclusions about the cause of a reported problem or injury;
- Blame someone else in the company or describe internal disputes;
- Use words or expressions that could be misinterpreted; and,
- Throw in humorous or sarcastic words.

Debunk privilege myths

Communications training is incomplete without guidance on the doctrine of privilege and how it works. In addition to describing what it is, how it is invoked, and who owns it, it is also important for employees to understand what it isn't.

- It is not a guarantee against all disclosure.
- It does not cover everything. For example:
    - Business communications with in-house counsel are not privileged;

    - Communication with counsel that is not for the purpose of conferring legal advice is not privileged; and,
    - Simply copying counsel on an email does not invoke privilege.
- It is not bulletproof; a client can waive privilege by sharing otherwise privileged information (e.g., forwarding to others).
- Some countries do not recognize privilege even when in-house counsel are rendering legal advice. In some circumstances, greater privilege protection can be obtained by using outside counsel.

Create context

Bringing communication realities home ideally includes tying its concepts to the organization's business. In the case of Sunderland Manufacturing, training provides guidance to sales and customer service reps about what to say and not to say when addressing customer complaints. Miles also explained the primary components of a plaintiff's claim and how careless communications might help a plaintiff meet its burden of proof, establish causation, and possibly result in damages against the company.

Train, retrain

Communications training is not a one-and-done exercise; periodic training and reminders should be ongoing. Creating online modules that automatically prompt employees in the functions, for which the training is most relevant, can reduce the labor required to maintain a consistent training program.

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