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**LITIGATION CRISIS MANAGEMENT**

By Randy Sutton

**First Steps in Controlling Liability When Your Business Faces a Crisis**

Every business faces moments of crisis. A process server or state agency may serve notice of a lawsuit or investigation. An employee may suffer a serious injury at work. A manager may be accused of sexual harassment. How the company responds to the crisis can determine whether the situation escalates or is quickly resolved. This article focuses on the first steps every company should take to minimize liability.

**Bring Your Lawyer into the Loop.** Whether the crisis is smoldering or has just exploded, legal counsel should be notified immediately. Having the lawyer's outside perspective can expose unforeseen issues. In addition, unlike attorney-client communications, conversations with your CPA or other business advisor can be subpoenaed by the opposing lawyer.

**Regulate the Flow of Information about the Crisis.** In litigation, except for attorney client privileged communications, your opponent has the right to review all relevant documents and data. This can include email and confidential memos. Regulate the flow of information about the crisis, keeping in mind how your statements would look if enlarged at trial and displayed for the jury as part of your opponent's closing argument. Think carefully about who you bring into the loop to help manage the crisis. Anyone who is knowledgeable about the situation is subject to deposition. The more employees involved in handling the situation, the more depositions the opposing lawyer may be able to take. Because attorney-client conversations are confidential and protected from disclosure, consider involving your lawyer in decision-making.

**Take a Snapshot of the Company's Records.** The company should segregate its documents and data immediately. This will make compliance with document requests easier. If old and new information is overly commingled, a judge is more likely to allow invasive searches of your records. Promptly suspend document destruction policies and preserve backup tapes. Courts have little tolerance for the destruction of records once litigation is pending. To preserve history and avoid accusations of document destruction, you should make a backup of your entire system and store it in a safe location where they won't get lost or accidentally overwritten.

**Investigate & Document History.** In the fast pace of day-to-day-business, the history of most critical events goes undocumented. Memories quickly blur and fade, making testimony less convincing or accurate. Inconsistencies in testimony, missing documents, and uncertainty about key events can harm your chances of victory. That's why it is especially important to prepare a chronology of the events, gather important documents, and identify and interview key witnesses. To help keep the investigation confidential, it should proceed under your lawyer's supervision.

**Evaluate & Mitigate.** In a lawsuit, the opposing lawyers analyze every event, fact and document under a microscope. It is very important that your lawyer knows what to expect at deposition and trial. If the company did something wrong, early action can often correct or mitigate the problem. Once the matter is in litigation, it is usually too late to fix what is broken. On the other hand, if the company did everything right, a thorough investigation can give the company and its lawyers the

confidence to negotiate firmly with the other side. These are only a few of the steps that a company should take in managing a business crisis. Legal counsel can assist in deciding whether the matter should be tendered to your insurance carrier, whether you need to disclose the issue to a regulatory agency, and other important considerations. How the crisis is handled in the very early stages will often determine the company's ultimate liability.

## **UPCOMING SEMINAR**

The Employment & Litigation Practice Group will be presenting "Viva Lost Wages - How to Keep your Employees from Hitting the Wage Claim Jackpot" on Thursday July 28, 2005. Space is limited. Contact Jenny Lucas at our office to reserve a spot.

*If you would like more information, or if you have questions regarding this article, please contact Randy Sutton.*

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