Immersion Session

DOCUMENTATION DEEP DIVE

IMPROVE YOUR PERFORMANCE MANAGEMENT PRACTICES AND DOCUMENTS

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Document Deep Dive:
*Improve Your Performance Management Practices and Documents*

**Presenters**  
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*Why A Presentation on Documents?*
Why?

- They are often the most important evidence:
  - Documents are given *absurd deference* by judge and jury
    - For better and for worse
  - Good or bad documents can completely invalidate witness testimony and credibility
    - Or they can confirm the truth of witness testimony

Why?

- Juror’s Poll:

  *Is the best evidence of an employee’s work performance the employee’s performance evaluation?*
  - 61% said YES

  *Is the company negligent if it does not properly document an employee’s performance problems?*
  - 91% said YES
Why?

- What we see: *Too many documents are drafted, sent or deleted without thought (or without sufficient thought)*
- Good document practices make for better people management (just as bad document practices . . . )
- Good document practices lower litigation risk *before and during litigation*
- Managers and HR often don’t realize the significance of the documents they create (or fail to create)
- Unless you are the rare exception: *You can do better!*

Thus . . . Our Objectives Today

- Discuss how documents are used in litigation
- Help you create thoughtful, intentional documents and document practices and improved HR practices
- Help you consider and address each likely *audience* for your key documents
- Help you recognize and effectively respond to dangerous documents and bad document practices
- And have some fun doing all of this
But first . . .

Litigation Basics

- Statutes of Limitation
- Pre-Litigation Demand or Agency Complaint
- Complaint, Answer, Motion to Dismiss
- Discovery:
  - Interrogatories, Requests for Production, Requests for Admission, Depositions
  - Third-party subpoenas
  - *Everything is discoverable unless a privilege applies, and it applies a lot less frequently than you may think*
  - Discovery Motions
Litigation Basics

- Motion for Summary Judgment
- Pre-Trial Motions
- Trial
- Post-Trial Motions and Appeals
- Mediation and other negotiated settlements
- Fees and costs: plaintiff, defendant, insurer

Discovery = Disclosure

- **The general rule**: Each side in litigation is entitled to force the other side to disclose all relevant facts.
- Discovery is proper if it is “reasonably calculated to lead to the discovery of admissible evidence”
- **Exceptions** to these disclosure obligations (i.e., privileges) are narrowly construed to preserve the public policy interest in fair resolution of disputes.
Discoverable Documents

- E-mail correspondence between HR rep and client manager about (almost) **anything**; plus each draft of each such document, including metadata
- E-mail correspondence between HR Manager and Executive Director about (almost) **anything**; plus each draft, etc.
- Documents in sealed envelopes in locked drawers with 50 “**confidential**” stamps on the envelope
- **Most** workplace harassment investigation reports (and all investigation notes and/or draft copies of that report, including metadata) prepared by the human resources department or other company or third-party investigators, even if attorney directed

Discovery = Depositions, Including Yours

The worst day of your life!

- If your documents suggest you are not being honest or don’t know what you are talking about!
  - “Were you telling the truth **then**, or are you telling the truth **now**?”
  - “Are you seriously trying to tell me that you can’t understand your own notes from a meeting that formed the basis of your decision to fire a 25-year employee?”
  - “So you fired her for being ‘unprofessional’ in a meeting with you, is that your testimony? Excellent, so how about if you give me a nice, concise definition of the term “unprofessional?”
Attorney/Client Privilege is Narrow

- Protects attorney/client communications that were conducted for the purpose of obtaining or providing legal advice
  - Adding an attorney to the communication means *nothing* unless . . .
  - The use of a *privilege* label means absolutely *nothing*

- Applies regardless of whether the communications are labeled
- Privilege does not protect *facts*, only *communications*

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**Case Study:**

*Plaintiff’s Attorney Asks HR Manager Deposition Questions Based on False or Incomplete Statements in Document*
A few more words on litigation . . .

The “Myth” of At-Will Employment

- In every state (except Montana and kind-of Alaska), employment is “at will” unless otherwise agreed to by the parties.
- Either party may terminate the employment relationship for any reason or no reason at all . . . Unless this is being done for an unlawful reason.
- So what? You had better have a good and lawful reason for dismissal or any adverse action.
- And documents which provide compelling evidence of your reasons.
Litigation Words of Wisdom

- The outcome of litigation will not necessarily be determined by the facts as you know them
- Party and attorney credibility is paramount
- Party and attorney credibility, once lost, is tremendously difficult to regain
- Employer credibility is suspect from the outset
- Everything you have said and done (or failed to do) can and will be used against you in a court of law
- A bad decision by a supervisor or manager is just a bad decision by a supervisor or manager, but a bad decision by HR is far worse because . . .

Litigation Words of Wisdom

- In any matter that could potentially lead to litigation (i.e., in all matters), you want a ton of documents that create an accurate and compelling record of the actual facts and your:
  - reasonableness
  - objectivity
  - fairness and lack of prejudice
  - candor
  - diligence
  - subject-matter knowledge
  - compliance
  - truthfulness
  - general wonderfulness
E-Mail Communication is Too Frequently a Gift to Plaintiff’s Counsel

Is your e-mail such a gift? Are you sure?

How about your management team’s email?

Emails Are A Gift . . .

- Discuss the following email string:

  **To Joni (HR REP):** I’ve just about had it with this jwrk. He’s been here three months, and he’s constantly messing things up. I’m not going to take this any more. I want him gone tomorrow.

  **To Jeri (Manager):** That’s not going to work. I checked his probationary reviews, and they’re all good, so you must establish a record of poor job performance.

  **To Joni:** This is nonsrsne. I can see now that this guy’s an idiut, and I’ve already made my dcsn. Are you telling me I have to pretend I’ve not made up my mind?

  **To Jeri:** Yes. I understand you’ve already made the decision to manage him out, but you must take your time. Give him a set of things he must do or not do, and tell him you will fairly consider his performance in making any employment decisions. I’ll help you get him out of here.
Discuss the Gifts . . .

✓ “Manage him out”

✓ “I’ll help you get him out of here”

✓ “Tell him you will fairly consider his performance…”

✓ What else?

✓ How does HR’s involvement in this string make things worse?

Jwrky Documents

✓ When you see this stuff: STOP IT! RIGHT AWAY!

✓ Pick up the phone or walk into somebody’s office

✓ Get these communications offline (better yet, put a lid on the inappropriate comments and sentiments)

✓ Delete the documents (unless doing so is unlawful)
E-Mail Communications

- Once upon a time, this stuff didn’t exist
- This stuff is **NOT** in any way private or confidential (and is not easily disposable):
  - Assume *every one* of your e-mail messages will be disclosed to one person in the world you least want to see it!
- They have these things called “meetings” and “teleconferences”
  - *If you (or your people) really must do or say something stupid, don’t do it in a document!*

California Lawsuit from 2010

- 52-year old Ph.D. director of operations is fired; sues for age discrimination
- **Annual review document:** “Excellent attitude . . . Very intelligent . . . Creative . . . Terrific problem solver . . . Consistently met expectations”
- **E-mails:** “Slow . . . Fuzzy . . . Lethargic . . . Too old to matter . . . Ideas obsolete . . . Lacked energy . . . LP not a CD . . .
- Internal e-mail questioned a decision to deny his bonus because it was “not consistent with treatment of similarly situated performers”
California Lawsuit from 2010

- Emails:
  - “Make sure I am appropriately prepped . . . My line at the moment is that there is no role for him in the organization . . .”
  - “We’ll all agree on the job elimination angle.”

 Stops This Before It Happens

- Consider how you can set the proper tone every day
- Intervene whenever you see such practices
- Make this an agenda item in your meetings
Another Email Gift to Plaintiff (?)

Document in HRG’s desk file:

- I am concerned about the decision to fire Joan. It seems to me that the manager was angry at her because of her complaint about Jim. I tried to stop this, but I was overruled.

Another Email Gift to Plaintiff (?)

Email from HR Director to Production Manager:

- John, I’m concerned about what’s happening in your work group. Hakim is not getting a fair chance, and we should talk about this ASAP, because I think he will soon file a lawsuit if we don’t make this better. And I’m also concerned there is enough evidence to support certain claims he might assert.
Performance and Performance-Management Documentation

Performance Documentation

- You can’t ignore the bad stuff because it will come back to haunt you.
- All such documents (periodic reviews; disciplinary letters; PIPs) can be extremely important in virtually every kind of litigation involving employment issues.
- Such documents must be beyond reproach: objective, thoughtful, thorough, specific, fact-based, honest, easy to read.
- Poorly written or inaccurate (or gutless) review documents are way worse than no review documents at all.
  - For discussion: If your managers or organization don’t have what it takes to give a candid performance review, don’t do performance reviews.
Best Practices: PIPS & Disciplinary Memos

- Do not blindside an employee with a performance document
  - Meet with the employee
  - Discuss, learn and consider the employee’s story before you decide what to do
  - Take notes... good notes... in full view of employee
  - Obtain mutual agreement as to next steps (if possible)
  - In your notes, record employee’s response
  - Make a record of the meeting and the plan, and send or hand it to the employee

Best Practices: PIPs and Disciplinary Memos

- At the employee meeting (cont.)
  - If you don’t know what to do, delay your decision about next steps.
  - Compared to the “here is your written warning” or “here is your PIP” approach, this is more likely to be effective and more likely to be helpful in litigation.
Case Study:
Blindsiding an employee with a PIP

Case Study:
Blindsiding an employee with a disciplinary memo
Case Study:
Meet with employee to discuss potential disciplinary memo

Case Study:
Meet with employee to develop a PIP
Attorney/Audience Discussion

- Do we need to use “formal” warnings and disciplinary documents?
- Is there a better alternative?
- What about “memos to file” without the employee’s knowledge? Is this a good idea?

Best Practices: Performance Reviews

- Tell the truth!
- If your review says she is a good employee, you will never be able to retract that statement!
- Don’t be a wimp! (But don’t be a jerk!)
- Don’t hold back to avoid hurting people’s feelings! (But, again, don’t be a jerk!)
Case Study:

Plaintiff’s attorney deposes manager who gave good plaintiff good performance reviews but who fired employee for poor job performance

Best Practices: Performance/Disciplinary Documents

Refer to specific, verifiable, objective facts, dates, witnesses:

- No meaningless phrases unless accompanied by facts that give meaning:
  - Not a team player
  - Not a good fit
  - She was unprofessional

- 25 pieces of unreliable evidence are no more reliable than one piece of unreliable evidence

- Remember: A “fact” has no significance unless you can prove it
Best Practices: Performance/Disciplinary Documents

- Present facts not your reactions to or characterizations of these facts
- Don’t pussyfoot around, state EXACTLY what happened. Consider:
  - “I was disappointed by your inappropriate language”
  - “I was disappointed when you responded to my concerns by calling me a ‘petty, vindictive bitch’”

*The jury isn’t interested in your emotional response to the employee’s comments; we want the jury to have its own emotional response*

Case Study:

*Plaintiff’s attorney asks HRG deposition questions about meaningless terms and unverified facts*
Best Practices: Performance/Disciplinary Documents

- Address each likely or potential audience for your document:
  - The employee
  - Every other employee
  - Every one of the employee’s Facebook friends
  - Potential plaintiff’s attorneys
  - The EEOC
  - The judge
  - The jury
  - The press

Best Practices: Each Document Stands on Its Own Two Feet

- Again, consider your audience(s)
- Don’t make people read other documents to understand the one document they are reading
Document Worst Practices

- Loading your documents with idiotic, counterproductive platitudes:
  - “Jim, you are a great employee and we value you greatly as a colleague; however, we are going to conduct an investigation into allegations about egregious misconduct”
  - “Joan, we greatly value your many years of service to the company, but we are putting you on a PIP for poor job performance.”

Best Practices: Discipline/Performance Documents

- Focus exclusively on the work
- The rest is (almost always) none of your business!
  - Medical conditions = none of your business
  - Personal problems = none of your business
  - “Is there anything we can do to help you attain and maintain effective job performance”
Disciplinary/Counseling Meeting Notes

- These are your notes (they are not for the employee) but you must assume they will be discovered by the employee
- They should not be a transcript, but they should capture key aspects of what was said and how it was said
- Type them in real time or have a witness do so
- Pause as necessary to make sure notes are complete

Disciplinary/Counseling Meeting Notes

- They should be sufficiently detailed so you can remember what happened if you read these 3 years later
- Use employee’s actual words if those words have significance
- Describe employee’s specific conduct at the meeting if that conduct has significance
- Your notes are not the place for your opinions; just the facts
Documents for Discussion

Review messages:

- Your work is too sloppy and we need you to do better. Soon.

Documents for Discussion

Review messages:

- You must improve your attendance and punctuality.
Documents for Discussion

Review messages:

- Your colleagues tell us they would not want a family member to have you for a doctor.

Documents for Discussion

Review messages:

- You have a reputation for being a jerk.
Documents for Discussion

Review messages:

- You have a reputation for being difficult to work with. You must fix this immediately.

Documents for Discussion

Review messages:

- You performance is improving the last few months. Keep up the good work!
Documents for Discussion

- Discuss the following **final warning**:  

  “Dr. Jones, this written warning is intended to put you on notice that we will no longer tolerate your unacceptable disregard for company policies. I have previously met with you on at least six occasions to discuss these company violation issues with you, but you continue to show disrespect for our institution. Because we really value your clinical skill set, I have decided to give you a second final warning, but I will be forced to terminate you if you violate company policy again.”

Documents for Discussion

- Discuss the following **counseling note**:  

  “Jan, we met today to discuss your many recent difficulties on the shop floor. Frankly, I don’t know what’s wrong with you lately, your colleagues are just not as confident about you as they used to be. Several of us have discussed the situation, and we are concerned that maybe you need to get help for your health problems, which are clearly affecting your work quality and your relationships at work.”
Documents for Discussion

- Discuss the following written warning:

  “Jalen, we met this afternoon to discuss your poor attendance. You can see by reviewing the attached attendance log that you have been absent for personal reasons on 4 occasions in the last 30 days. On your most recent absence you failed to provide us with any notice of your absence, thereby creating an unanticipated staff shortage on the floor. You agreed during our meeting today that you would promptly establish and maintain dependable attendance. Your failure to do so may result in your dismissal. Please let me know if there is anything I can do to help you establish and maintain an acceptable dependability record.”

Documents for Discussion

- Discuss the following annual review entry:

  “James, although you have outstanding skills and customer feedback, your overall review score is “needs improvement” because of two significant issues: First, as documented in the two attached written warnings, you have had two shouting matches with your colleagues. In each case you admitted to me that you initiated the conflict because you believed your colleague was “stupid.” Second, as we discussed in the PIP (see attached) that was presented to you last month, you are failing on an ongoing basis to timely submit your monthly pipeline report. Your outstanding sales skills are of little value unless you can effectively manage these issues each and every day at our facility.”
Documenting Workplace Investigation

Pre-interview
Post-interview

Investigation Document Best Practices: No Scripted Interviews

- Too frequently, HR investigators prepare detailed scripts for interviews
- DON’T DO THIS . . . EVER!
- Instead, create bullet points of important topics to cover
Investigation Document Best Practices: No Scripted Interviews

- Scripted interviews are guaranteed to make you look bad:
  - Your job is to listen to the witness, process the answers, and then generate more questions based on those answers.
  - Interviews are not supposed to be uniform, they are supposed to lead the interviewer to the important facts.
  - Interviews are supposed to be dynamic (i.e., the opposite of scripted).
  - Interviewers always skip questions (as they must) on scripted interviews, which makes the interview look incomplete.

Investigation Notes: Record Everything Important

- These are your notes (they are not for the employee) but you must assume they will be discovered by the employee or used in litigation.
- They should not be a transcript, but they should capture key aspects of what was said and how it was said.
- Type them in real time or have a witness do so.
- Pause as necessary to make sure notes are complete.
Investigation Notes Best Practices

- They should be sufficiently detailed so you can remember what happened if you read these 3 years later
- Use witnesses’ actual words if those words have significance
- Describe witness’s specific conduct at the meeting if that conduct has significance
- Your notes are not the place for your opinions; just the facts

Attorney/Audience Discussion:

Is it good to require witnesses to sign interview statements or summaries?
Reasonable Accommodation Documents

Best Practices: Documenting Reasonable Accommodation Discussions

- As always: These should document your general wonderfulness
- The objective is to determine (and to document your efforts to determine) if there is an accommodation that will enable employee to perform essential functions of his/her job or any available job.
- Don’t ask about the illness or medical condition; ask about the limitations and “how we can help”
Best Practices: Documenting Reasonable Accommodation Discussions

- In a sense, these are investigative notes, so create and treat them accordingly
- As with PIPs and disciplinary matters, meet first, learn and process information, then make your decisions
- And follow-up with written communication to the employee

Documents for Discussion

- Discuss the following:

“Thank you for meeting with me today to talk with your poor job performance. As we know, your productivity in the call center has dropped by 42% in the last month. You acknowledged your poor performance, and said you are having sciatica pain that makes it more difficult for you to concentrate. I asked how we could help. First, you initially said there is nothing we can do to help, because nothing relieves the pain. But then you said it would help to have a standing desk, because the pain is worse when you sit for long periods of time. I said I would follow-up with you ASAP after checking out desk options. I’m pleased to report after checking with HR that we can get a desk delivered tomorrow to your work station. I’ll check-in with you next week to see how the desk is working. In the meantime, let me know if I can assist further.”
Documents for Discussion

- Discuss the following:

“Dirk, you used to be a good employee, and now you aren’t. You don’t seem very happy lately, and if that’s the case, I feel bad. But it’s also not any of my business. What matters to me is whether you are doing your job. Your job is really pretty simple: Read the customer order, find and pull the product off the shelf, and deliver it to the dock. Quickly. You’ve done this well for years. You either need to start doing it again or you need to find another job. I’ll respect your decision either way, and I think I can even get you some severance pay if you’d rather go find another job. But you need to decide quick, because I’ve got product to ship. Please tell me by Thursday, or I’ll make this decision for you. Thank you.”

Closing Comments: Document Retention Requirements

- In the event of actual or threatened litigation, ALL potentially relevant documents must be retained in their original format.
- It is not sufficient to maintain written versions of electronic documents.
- Destruction of material documents—whether intentional or otherwise—will be construed as evidence of bad faith, and may result in sanctions.
Closing Comments: Document Retention Requirements

- You need to know how your documents are retained, stored, destroyed
- You need to know how to stop individuals or company protocols from destroying potentially relevant documents after litigation is threatened or initiated
- Don’t wait until the lawsuit or claims is filed: Learn all of this now so you will be prepared if a litigation claim is threatened or filed

QUESTIONS
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