

Springtime Is The Time To Focus On The Fundamentals

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Spring is in the air. Baseball players are in spring training practicing the fundamentals of throwing, catching and hitting. Ah, spring—families everywhere are cleaning their garages and giving their homes an annual once over, disposing of the needless stuff that used to seem important.

Corporate America would be wise to learn the lessons of the lions of spring, baseball players and American families. Now is the right time to practice the fundamentals and clean house. Annual reports, 10-Ks and Qs are filed, but vacation season is not yet upon us. Can there be a better time to focus on the fundamentals?

Why is it important to focus on the fundamentals?

After Enron, WorldCom and so many other high profile corporate meltdowns in just the past few years, after the billions recovered in asbestos litigation based on decades-old policies found after tens of millions were paid to find them, after the many horror stories about the damning email produced in discovery, there should be no need to discuss why periodic housekeeping is so fundamentally important. But let's put things in a perspective that even the most

skeptical CFO can appreciate. *Properly maintaining old documents and old electronic data is cost effective!*

How so, you ask? When your company is sued, the other side engages in discovery. While the rare gem of a lawyer might seek only the few truly relevant documents, almost all lawyers are trained to believe that more is better and everything is the best. Judges, tired of the games so long associated with discovery abuses associated with corporations comfortable playing hide the ball, are prone to require a defendant to produce everything, figuring the case is likely to settle and, if it doesn't, relevance can be sorted out at trial. All those documents you never got around to throwing away now have to be examined to see what they say and whether they are privileged. And even if you are a Las Vegas gambler and turn documents over without review, the documents still have to be numbered and photocopied. And eventually even the biggest Las Vegas gambler goes bust—the documents someday will have to be reviewed. Studies and experience confirm that the cost of producing each page just once is at least \$1-2. If you're sued repetitively, the cost is much higher. Producing millions of pages of documents costs real money. It costs a lot less to properly dispose of documents.

Let's not forget electronic documents, especially emails. The cost of producing emails is much higher than paper documents. The sheer volume of electronic data in most corporations is staggering. Courts will require you to produce it, and most often will require you to incur the cost of separating the relevant data or documents from the irrelevant. It costs a lot less to throw it away. Your IT department needs to be a major participant in this housekeeping effort. And beware the excuse that "we might need this someday." Instead, try and figure out the number of times old documents have been truly helpful, and then compare whatever you come up with to the scores of examples of old documents haunting a corporate litigant.

There you have it—its better to throw stuff away than let it accumulate. But beware the exception!

Don't pull an Arthur Anderson!

If your company is involved in threatened or pending litigation, document disposal should not be done willy-nilly. Make sure the General Counsel or the attorneys involved in the lawsuit are apprised of document disposal efforts. A word to the wise—if housekeeping is regular and scheduled, courts are inclined to look kindly on such efforts. If it's not scheduled, well, we need only

look at what happened to Arthur Anderson. Seriously, there are tax, securities and other important issues that need be considered when scheduling document housekeeping. Make sure it's a well-planned, well thought out effort.

Some documents should be organized and preserved

Beyond document housekeeping, there are a number of other fundamentals that deserve regular attention. First, are your subsidiaries properly documented? Board Minutes up to date? Unneeded shell corporations dissolved? Filing and registration fees paid? Plaintiffs in many lawsuits love to pierce the corporate veil. If you want the protections of the corporate form, you need to be certain you follow the corporate niceties all the time. Once you are sued, it's too late.

If your company is one of the many that grew by acquisition, do you have all of the deal documents centrally located? Do you know which subsidiaries have arbitration agreements? Indemnity rights or obligations? Have you cataloged the liabilities you acquired? Once the past information is recorded, updating it is a piece of cake.

And then there is insurance. Tens of millions of dollars has been spent looking for old insurance policies and hundreds of millions of dollars of coverage has been lost because the lost policies were never found. Centralize storage of old insurance policies and make sure those documents are never discarded. If you've grown by acquisition, figure out now what your insurance rights are and docu-

ment them. If you left policies behind when you acquired a subsidiary, now is the time to contact the seller and secure information about potentially applicable insurance. Old insurance can be a huge asset—treat it like one.

Remind everyone of the rules

Some people write dumb things in emails because they don't think about what they are writing or who will be reading it. Now is a good time to remind people not to write something, on paper or electronically, that they wouldn't want to see on the front page of a national newspaper. Also, reenforce the fact that virtually every story has two sides, or at least a shade of grey. Writing in a self-righteous manner usually does a disservice to the truth. Finally, remind employees about the rules of attorney-client privilege. And harp on the most forgotten rule of the privilege—sharing communications with others can waive the privilege. Truth be told, a lot of emails from lawyers that are forwarded on to someone else probably lose their privileged status.

Everyone needs to be involved

There is nothing more maddening than having everybody in the company dispose of documents during regular housekeeping except for Ralph in Accounting. When the lawsuit arises and a sweep is made of everyone's office, the lawyers are dismayed to find out that Ralph has saved everything. Or more likely, he saved the

documents damning to the company and not those that placed the negatives in perspective. Housekeeping must be a company-wide priority.

Apply the lessons of history to your company

In every sport, there is a variation on this theme: "Good offense wins games. Great defense wins championships." The same is true in litigation. Relentlessly mastering the fundamentals is critical to the legal health and success of your company. Use this spring to focus on the fundamentals and transform your company into a champion.

Kirk Hartley and Patrick Lamb are senior trial partners with Butler Rubin Saltarelli & Boyd, a Chicago litigation boutique. Both have substantial experience with product liability and mass tort defense. In addition, both have substantial post merger and acquisition litigation experience, and now devote substantial time to the convergence area, legacy liability management and defense.