

Avoiding The Creation Of “Smoking Guns”

All litigants fear that an adversary will discover a “smoking gun,” a document that appears to confirm the litigant’s guilt. There are some people foolish enough to create a written record reflecting their nefarious deeds, and some “smoking guns” do indeed evidence actionable conduct.

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But many “smoking guns” are simply strangely worded documents that the author cannot effectively explain and that in the hands of a skilled opposing counsel, can be incorrectly characterized as evidence of wrongdoing. Two of the more common sources of this latter type of “smoking guns” are handwritten notes and electronic communications.

A Preliminary Thought Regarding the Use of Documents at Trial

The most probative evidence establishing your company’s case at trial will usually be the oral testimony of your witnesses. Only a small portion of the documents you produce during discovery can be effectively used at trial to support your position or to corroborate the testimony of your witnesses. Much of the remaining material produced during discovery becomes a treasure trove of information that opposing counsel can use: 1) to create his or her client’s theory of the case; 2) to cross examine your witnesses at trial; and 3) to undermine your company’s position. Your attorney will need to anticipate and counter the use of this material by your adversary.

The Problem With Handwritten Notes

Handwritten notes are a common method of recording the substance of meetings or telephone conversations and can be useful as a contemporaneous tool to refresh recollections regarding the substance of those meetings or conversations.

The danger associated with handwritten notes is that they are created “on the fly” and rarely reflect the care one would invest in creating, for example, a memorandum to the file. Handwritten notes typically contain bullet point notations, incomplete sentences, and even incomplete thoughts. Notes may be taken in shorthand

or in illegible script. For these reasons, handwritten notes are sometimes hard to interpret or to read, even by the author, years after they were created.

Suppose, for example, that your company’s vice president of sales created handwritten notes during a sales meeting years ago. During the meeting, a regional manager expressed concern that your competitor, ABC Corporation was using your company’s trade secrets. The vice president’s handwritten notes contain the following cryptic notation: “ABC Corporation - use of trade secrets.” Now, ABC Corporation has sued your company for trade secret theft. The problem is that the regional manager who expressed the concern is not identified in the notes and, in any event, is no longer your employee. Further, your vice president of sales who created the notes currently has no idea what he was trying to memorialize and, in fact, has no independent recollection of the meeting.

Unfortunately, your employee has created a potential “smoking gun,” a document that your witness cannot interpret, explain or defend and which has now been produced to the other side for use during cross examination. You can be certain that the opposing counsel will first highlight to the trier of fact how suspicious it is that the author of the handwritten notes claims not to recall the substance of this meeting and will then offer his or her own interpretation that your company was stealing ABC Corporation’s trade secrets.

The Problem With Electronic Communication

The first problem with e-communications is a function of their sheer volume. Today, e-communications are used as a substitute for telephone conversations or even face-to-face discussions. Many of these conversations and discussions simply do not warrant, or are otherwise inappropriate for, preservation in document form. Yet, e-communications are preserved and are readily reproduced in hard-copy. Thus, the advent of the electronic age has dramatically increased the volume of documents that are discoverable during litigation.

Moreover, authors often view e-communications in the same way they view telephone conversations and invariably fail to use the same care in crafting such com-

munications that they might use in crafting a letter. While the author of a letter recognizes that it will be viewed by the outside world, a person engaged in e-communication often does not focus on the fact that the communication is preserved and can be used in future litigation. Thus, the problem with e-communications is that your employees are creating a greater number of documents that do not necessarily warrant preservation and are using less care in crafting those documents.

The Best Advice You Will Ever Receive Regarding the Creation of Documents

To avoid the creation of “smoking guns,” you and your employees should heed the following advice: Always assume that every document you create will some day appear as an exhibit at trial, and never put anything in writing that you will not be prepared to effectively explain five years later on the witness stand.

How To Reduce The Risk

Obviously, forbidding the creation of handwritten notes or e-communications within your company is not an option. However, there are steps a company can take to reduce the risk that its employees will create troublesome documents. You can educate your employees, for example through internal seminars and training sessions, regarding the importance of ensuring that: 1) the creation of a particular document is appropriate under the circumstances; 2) the content of the document is appropriate; and 3) proper care and diligence has been exercised in crafting the document. In short, you can attempt to add discipline and discretion to the document creation culture of your company.

A. Is Creation of the Document Appropriate?

Employees should understand that there are circumstances under which certain categories of documents should not be created. For example, e-communications on your company’s system should never be used for trivial or personal purposes and should only be used to advance the legitimate business interests of the company. Even in regard to business activities, there may be times when it is more appropriate to place a telephone call instead of communicating electronically. Similarly, if the information discussed during a meeting or telephone conference is truly worthy

of retention, it might be preferable for the participants to prepare a written memorandum, reviewed and edited by all parties for accuracy, in lieu of separate – and potentially inconsistent – handwritten notes created by each participant.

B. Is the Content Appropriate?

Business documents should not contain frivolous or extraneous information that could be misconstrued in the future. If handwritten notes are taken during meetings or telephone conferences, the note taker should review, and if necessary revise, their notes immediately following the meeting or conversations to ensure that they contain no extraneous information and will be susceptible to interpretation after the author’s memory fades. Similarly, employees should be encouraged to review e-communications before delivery.

C. Was Proper Care Exercised in Drafting ?

It is absolutely critical that each employee understands the importance of exercising care, discretion and discipline in the creation of all documents. Each document created should be self-explanatory and complete so that it can be correctly understood and interpreted in the future without the benefit of the author’s independent recollection.

By taking these steps, you can better ensure that the employees of your company are focused on the risks associated with document creation and that the company is better positioned to avoid the inadvertent creation of a “smoking gun.”

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