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Introduction

The world of smoking guns

“Gotcha!” That’s what a smoking gun says as it discredits you. You say it one way now, but what you said or did before makes it appear otherwise. As a piece of evidence, it doesn’t mean you’re guilty or at fault, but it provides an enormous advantage for your adversaries, who either use it “as is,” or manipulate it, to show you’re lying or, at least, not telling the whole story. To your opponent, the advantage of the smoking gun stems from its creator: YOU! It jolts you to the defensive, maligns your integrity, and intimidates your demeanor. If you want to save yourself or your company, though, from that predicament, this book’s for you.

The public’s familiarity with smoking guns comes mainly from the news media, as they cover stories involving known public figures, and giant companies. What about the internal

memo of a top executive at Enron Corp., the utility giant that filed bankruptcy in December, 2001, warning the CEO that the company would “implode in a wave of accounting scandals” if off-the-books partnership deals continued to go unreported? It took center stage as a smoking gun at a U.S. Congressional hearing investigating the activity of Enron officials. How could Enron officials claim not to have known about where the company was headed in the face of such a memo?

Can you remember when the dominant smoking gun in the world’s headlines was a DNA specimen on the now infamous navy blue dress worn by Monica Lewinsky? It incriminated a former U.S. President, and forced him to change his public denials of involvement with “that woman.”

We’ve heard and read about smoking gun memos and e-mails written by Microsoft Corp.’s top executives. During the prosecution of an antitrust lawsuit involving Microsoft’s *Internet Explorer*, the government used them as a strategy to discredit the executives’ denials of anti-competitive intentions. And another well-known company, General Motors, had its share of media attention. It was hit with a staggering verdict of \$4.9 billion in a product liability suit in Los Angeles, over an alleged faulty fuel tank design in its Chevy Malibu. The jury was inflamed by a smoking gun over 26 years old—an internal memo from one of GM’s engineers. (We’ll use this in Chapter 11 as an example of what not to write in your company’s internal reports.) Then, there’s Texaco, the oil giant, which paid \$176 million to settle a racial discrimination suit by employees after its smoking guns—tape recordings of senior executives—revealed casual conversations, allegedly filled with racially derogatory remarks.

Although the list goes on and never seems to end, this book could save you and your company from getting a place on it. “Smoking guns” in the workplace are a preventable malady. Neither you, nor the company, need suffer the repercussions

from the kinds of words, deeds, or actions that sabotage your career and the company's winning defense posture. By being alert and informed about the areas that breed smoking guns, you can avoid ever creating them. Everyone in the workplace from CEO to front-line is capable of producing them, and the headlines and stories we read about everyday confirm it. With e-mails and voice mails, the Internet, and everything typed on a keyboard stored as an electronic file, the opportunities for employees to say the wrong thing, do the wrong thing, or send an imprudent message to the wrong people are everywhere. And in the scheme of things, it doesn't matter if your company is big or small, public or private.

In the arena of civil litigation (where lawsuits are filed for money damages, not criminal penalties) smoking guns are found in writings as well as other actions of employees. The writings are usually memos, letters, reports, or notes and diaries, and they're stored in file cabinets, drawers, and archived storage boxes for later discovery. You can also find them in the pictures, notes, and other postings on walls and bulletin boards of offices and manufacturing plants. More commonly today, they're in electronic messages, such as e-mails and word-processed documents. When employees fail to respond to customers' complaints or regulatory compliance notices, and when they inadequately supervise or oversee a project, or get lax on security controls for access to data, they cultivate the breeding grounds for smoking guns.

I'm willing to bet you have smoking guns stored right now on hard drives, back-up tapes, floppy disks, and CD-ROMs. One back-up tape can hold the equivalent of 19 million pages of documents. That's astounding when you think of how many of these tapes you can fit into one file drawer. If you were to convert that drawer into paper files, you would have enough bankers' boxes to fill a storage warehouse the size of a football field. Can you imagine how many smoking guns await dis-

covery in such a drawer?

My mission is to be your straight-talking guide who will show you where the smoking guns are hiding, alert you to their dangers, and tell you how to avoid creating them. I'll focus on the traps that make civil lawsuits against you and your company lucrative for plaintiffs' lawyers. When you fall into these traps, and create a smoking gun that puts your company (and maybe your job) on the line, the stakes get alarmingly high.

Our journey will begin with an introduction to some of your co-workers whose behavioral traits foster the breeding of smoking guns. You'll be sure to find some familiar behavior here. Then we'll show you how the ground rules for civil litigation empower trial lawyers to invade your workspace, obtain your files, probe your work habits, and attack your hard drives, laptops, and even your personal home computers. To protect yourself from unwittingly creating documents that can backfire, you need to know how intrusive the discovery process is when the "other side" fires their cannons with a lawsuit. We'll also travel into the e-mail jungle, and show you nine traps that can catch you unaware, just by the way you send, receive, and store e-mails and e-files. Beyond e-mails and e-files, we'll explore much more in the breeding grounds for smoking guns, from your use and handling of cell phones, voicemails, faxes, copy centers, and print stations to how you write reports and personnel evaluations, and how to deal with certain risk management issues, including the kind of access you give to outsiders like janitorial crews. And we don't stop there, because we'll visit your own office area and talk about the dangers lurking in your paper shuffle world, how you handle confidential documents, and the ease and dangers of accessing company secrets on the company's database network.

I'll also review real-life examples of the best and worst of corporate crisis management. Sooner or later most companies

will face a newsworthy crisis, and if you bungle the media and public relations portion of one, you'll open the floodgates for smoking guns and lawsuits. Chapter 9 will show you what happens "when it all hits the fan." I include a 20-Point Guide for managing your public relations during a major crisis event, and my own pronouncement of Eleven Commandments your spokesperson should follow when dealing with the media. We'll also talk about how and why companies get nailed with huge punitive damage verdicts that are all avoidable. I'll demonstrate, by example, what went wrong in two celebrated cases—one involving the ubiquitous, number one fast-food chain, McDonald's, and its hot cup of coffee, and the other, the car company, General Motors,—where juries "punished" the companies with punitive damage verdicts. You'll discover how your company can avoid making the same mistakes and how you can avoid contributing to them.

You don't have to let trial lawyers take advantage of blunders that you or other employees make. You CAN root out this invidious occurrence which, with little doubt, is firmly rooted in *your* company, too. I'll give you what you need to know to "*Gain the advantage before the other side takes it!*"

Throughout this book, I'll also provide you with personal suggestions or techniques (each named a "Tapper's Tip") to help you avoid becoming prey to the plaintiff-predators who have your company in the cross-hairs of their lawsuit scopes. They're reminders for some of the things you need to know. Before long, you'll realize how effectively you can reduce not only your own risk of liability, but the company's, too.

I'm not saying that what you learn here will eliminate lawsuits against your company. Anyone with the power to do that should command far greater than the price of this book. Realistically, in our litigious society where thousands of lawsuits are filed every day, you can't really control who files them, or what they allege you did. But you CAN control which side

wins! You have the power to strengthen your defense arsenal—your readiness—for the inevitable attack, and eliminate the handicap of a smoking gun.

To achieve the best results, and the most rewards, for these efforts, your company must become proactive. If, instead, it's in a "wait and see" mode, you'll always be on the defensive, circling your wagons for each onslaught. The plaintiffs and their trial lawyers will come knocking on your doors, serving their lawsuits and handing you subpoenas for documents that will "smoke 'til you choke." But if you jumpstart your company into a proactive posture, you can, in time, curtail the production of smoking guns so the plaintiffs' trial lawyers come up dry on their search through your records—not because you're hiding anything, but simply because you're smarter, and wiser, about what you write, how you write it, and what you do and say amongst colleagues. You'll be working from a position of strength which will save those hard-earned revenues from getting sucked down the litigation drain with drawn-out legal battles and hasty, costly settlements, caused by words and actions that backfired.

No cover-ups here

Be cautioned that you don't misinterpret my message. This book is not a how-to book for covering up misdeeds. You don't "clean up" smoking guns with a "cover-up," as you'll only create newer, and more devastating ones than those you try to eradicate or obscure. These pages will show you what you need to know to protect yourself and your company from creating smoking guns, and how to keep your words and actions from backfiring. If you heed the wake-up calls, you shouldn't be worried about what you're putting in your files anymore. As to what's already in the company's files (to which you've contributed), there are legal ways and means of purging old docu-

ments and messages. The most common is by initiating and enforcing a “document retention” program (where you clean out old documents, according to a detailed and formal timetable that identifies categories of information and tells you how long to hold on to documents, as well as when to discard them). This program is usually integrated with E-mail and Internet usage policies your company should also have in place. Chapter 12 will show you how these programs and policies work, and the points they should cover, if you want a strong, aggressive, and legally effective operation. Although the Enron scandal gave “document retention” a bad name when the untimely (and criminal) shredding of documents took place under the guise of the company’s retention program, the fact is these programs, when run legitimately, and in good faith, are not only a legally recognized way of keeping up with the overload of paper and electronic messages, but a good business practice.

Plain-talking, straight-shooting—no “legal jargon”

Many of the issues I discuss have origins in complex legal doctrines, but no need to wince; I have simplified them for discussion. This is not a law book; it’s a business book, and I have painstakingly kept that in mind, so there’s no legal jargon here. I’ve kept my writing style colloquial because I want this to be between you and me.

This book is intended for all of you in the business world who face the myriad (and often confusing) concoction of laws, rules, regulations and policies that can trip you into a smoking gun without your knowing it—until it’s too late. What you’ll discover in these pages will put you giant steps ahead of those colleagues who haven’t been enlightened by its contents. And if you’re a shareholder in any corporation, you can benefit from what you learn here if you use it to assess whether your com-

pany is doing what it should to reduce its vulnerabilities, and thereby, protect your investment. After all, almost everything that happens, from smoking guns to backfiring words, will eventually have a financial impact, so it's really everybody's business to stay alert.

To my lawyer colleagues: this book is not intended for you, although I welcome your indulgence if you're either an outside or inside counsel, on the "defense" side. Perhaps, you'll also see the value of buying a copy for each of your business clients, and suggesting it as "required" reading. It will make your job easier when they understand the issues you face when you find their smoking "gems" during the arduous process of pretrial discovery and document production.

So, let's get started on the journey through the world of smoking guns. It's time to open your eyes, my friends.