




## 904:End It Before It Begins: Litigation Prevention in Today's Business Environment

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**Session 904 –End It Before It Begins: Litigation Prevention in Today’s Business Environment**

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The in-house bar association.™



**The Best Lawsuit is...**

- A) One your CEO wants to file to, “Get the “Bastards.”
- B) One in which you have a chance to “Make Law.”
- C) One you “know” is a slam dunk winner against a big money defendant.
- D)

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## What's Wrong With Litigation?

- High Cost of Counsel
- Use of Staff Resources
- Financial Statement Inclusion
- Adverse Outcome

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## How to Stay Out of Court

- We'll Talk about Ways to Avoid Litigation from:
  - Employees – Train Managers
  - Commercial Counter Parties – Train Sales Reps
  - Retail Customers – Train Service Reps

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## **Employment Law Training**

Develop Solid Policies

Train People Well

Keep Communication Open

Harassment Liability Avoidance Tactics:

Provide Multiple Ways to Report

Train Managers on Harassment Prevention

Thoroughly Investigate Complaints Promptly

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## **Audit HR Policies and Functions**



- They Must Be Current, accurate and applied consistently

- Don't be Afraid to Ask Tough Questions

Why are only 10% of Managers women or minorities?

Is Employee Promotion Process Applied Consistently and Fairly?

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## **Train Managers to Manage Within the Law**

- Document Promotions and ‘needs to improves’  
Train all Employees to Comply with Company Policies regarding Harassment, email and internet use  
Train to respect diversity, and eliminate bias.  
Get ‘buy in’ from employees that Company requires and deserves personal best practices

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## **When Dispute Does Arise...**

- Conduct Thorough Investigation -  
Advise all managers to alert HR and the legal department of a potential problem before a disagreement rises to the level of a full blown dispute.  
Require confidentiality of all parties involved  
Counsel the parties to avoid “polarization.”  
Preserve the evidence.

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## Keep Communication Open

- Listen carefully to the complainant's concerns-let him/her know they are being taken seriously
- Provide sufficient information to show they were treated consistently with other employees in similar situations and explain the business rationale for the decision

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## Avoid Retaliation Claims

- Continue "business as usual"
- Maintain Professionalism
- Take the High Road
- Consider mediation
- If warranted, consider settlement  
–ALWAYS get a release

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## Barriers To Early Dispute Resolution

- Informational
- Contractual
- Cultural
- Psychological
- Financial

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## Informational Barriers

- **Early Warning System**
  - How does your organization first learn of a potential dispute?
  - Is the legal department involved in this process?
  - The longer it takes a dispute to reach legal, the harder it is to resolve & the more likely that “bad” documents will be created
- **Early Case Assessment**
  - “Bad” Documents
  - Witness Issues
  - Liability/Damages—Does the case present unacceptable risk
  - Relationship with adversary
  - Key themes

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## Informational Barriers

### ● Addressing Opposing Party's Objections to an Early Resolution

- Early Mediation
- Limited Discovery
  - *Targeted Discovery*: Limited document exchange may facilitate early resolution
  - *Informal Exchange of Information*: Pre-litigation exchange of information may facilitate early resolution
- Early Use of a Neutral Expert
- Negotiation without Lawyers

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## Contractual Barriers

- **Informal Dispute Resolution:** Failing to include IDR procedures as a condition precedent to litigation
- **Ambiguous Terms:** Lack of certainty in contracts breeds costly and protracted litigation
- **Arbitration:** The perceived speed and efficiency of arbitration may discourage a quick resolution
  - **NOTE:** Pre-dispute waiver of a jury trial may be unenforceable. *See Grafton Partners LP v. Superior Court of Alameda County and PwC*, Cal.App., 1<sup>st</sup> App. Dist. 2004.
- **Business Torts:** Attempts to circumvent limitation of liability/damages hinders EDR
  - **NOTE:** While an integration clause usually does not preclude a fraudulent inducement claim, a nonreliance clause often does. *See Vigortone AG Products v. PM AG Products*, 316 F.3d 641 (7<sup>th</sup> Cir. 2002)

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## Cultural Barriers

- **Never Compromise:** Some cultures view compromise as a sign of weakness.
- **International Litigation:** Litigation in many countries is neither expensive nor protracted, thus reducing the advantages of EDR.
- **Reputation:** Litigation in some countries would so harm a company's reputation that it is an option of last resort. As a consequence, it can be difficult to reach a quick resolution.
- **ADR:** Some cultures view mediation as a waste of time and prefer litigation to arbitration.

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## Psychological Barriers

- **Corporate Crusaders:** Some decision makers take a "never say die" attitude toward disputes.
- **Historical Hostility:** Personal involvement in the events giving rise to the dispute can bias decision makers.
- **Lawyers Unnecessary:** Decision makers may seek a "business" resolution without legal involvement—"I do deals everyday; I don't need a lawyer to resolve this dispute."
  - **Actual E-mail:** "F'ing attorneys. What a waste of money!"

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## Financial Barriers

- **Outside Attorney Fees:** If attorney fees are paid out of the legal department's budget, the business unit may be less inclined to resolve the dispute early.
  - *Not an all or nothing proposition--Is the business unit willing to pay the fees if it rejects legal's advice on how to proceed?*
- **Judgment/Settlement Cost:** Who pays/receives settlement cost/gain and how does this impact the decision making process?