



Protecting Your Business Communications

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Association of Corporate Counsel Protecting Your Business Communications

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Litigation Preparedness

Enterprise Risk Management;
Defensive Lawyering; &
Managing a Claim – From the
General Counsel’s perspective



Enterprise Risk Management

Understand and Learn your Company's Business

- Until you understand the business, and know the landscape, it is extremely difficult to identify, assess, and prepare for potential litigation risks.
- Meet with the CEO, CFO, and all key executives on a regular basis (Come prepared with an agenda). Establish trust.
- Ask (many) questions. Get clarity and ask follow-up questions.
- Spend a significant amount of time listening (it's interesting what you'll learn).
- Learn your ABC's – what governmental regulatory bodies (e.g., DOT, FAA, IRS, etc.) oversee your business, and what regulations do you need to understand from a compliance perspective.

Enterprise Risk Management

Identify key areas of risk based on business operations, regulatory oversight, compliance obligations, and class-action trends.

- Consider creating an Enterprise Risk Management Team – include Legal, Finance, IT, and HR (potentially outside advisors).
- Meet regularly to identify and discuss key areas of risk, potential exposure, mitigation efforts, etc.
- Create a spreadsheet or heat map of key areas of risk.
 - How significant is each area of risk from a potential exposure and monetary perspective (red/yellow/green)?
 - Could the risk shut the company down? Is there insurance coverage?
 - What reputational risks are involved (if any)?

Enterprise Risk Management

Develop specific plans and processes for addressing key areas of risk.

- Some risks are difficult to mitigate – but you need to be aware of them and understand how the Company will address them if and when they do arise.
- It is not possible to identify each and every risk. Some things “just happen” and you can’t predict or mitigate against every potential claim.
- Need to understand your CEO’s and Board’s risk appetite to balance your approach.
- Dig into the Company’s most significant areas of potential exposure first, while also tackling some (potentially easier) low-hanging fruit.
 - How can the risk be mitigated (if at all)?
 - What insurance coverage (or increased coverage) is available?
 - What improvements in business operations can be made?
 - What processes/policies can be implemented to help with mitigation or a potential claim?
 - Bring in external advisors/consultants when necessary.

Enterprise Risk Management

Present and Discuss Enterprise Risk Management Plan with Executive Team and Board of Directors

- Communication and explanation of more significant risks and the Company's plan for mitigation (if possible) is key.
- CEO's/CFO's and Board of Directors don't want to be surprised. It is the responsibility of the General Counsel to keep them informed and updated.
- Update presentation and communicate progress at least 1x/year for Board of Directors and quarterly for CEO/CFO.
- NOTE: New risks can and do arise based on changes in business, new laws and regulatory requirements, and class action trends. An Enterprise Risk Management Plan is a fluid and ever-changing document.

Defensive Lawyering for the General Counsel

- Keep all policies and handbooks up to date, current, and compliant.
- Implement best practices and policies to promote internal compliance. (Signature Authority, Contract Review, Cross-functional sign-offs, etc.)
- Be proactive vs. reactive.
- Stay current on various federal, state, and regulatory updates that could impact your business (e.g., Lexology blog, subscriptions to blogs from knowledge leaders and class action defense firms).
- Provide cross-functional training and monitor internal compliance.
- Audit external vendors for compliance, particularly if their negligence could increase your Company's exposure.
- Consult with outside counsel/experts for areas of practice/risk outside of your expertise.

Managing a Claim

A claim/complaint has been made – Now What?

- Read it - Fully. Stay calm. Take control.
- Determine whether proper service has been made.
- Issue a Litigation Hold, and work with IT to ensure that all impacted documents, email boxes, Teams messages, Slack communications, etc. are preserved.
- Contact insurance company/agent – even if you're not sure if you have coverage. Defense costs are often covered even if the underlying claim may not be. Evaluate panel counsel vs. your preferred counsel.
- Conduct internal investigation (if applicable) to flush out additional facts and possible defenses.
- If the claim/complaint will not be handled in-house – research and interview outside counsel (a) licensed in the applicable state; (b) with specific subject matter expertise; (c) with significant experience; and (d) whom you trust and will work well with.

Managing a Claim

- Evaluate validity and severity of claim.
 - Understand strengths and weaknesses of claim and defense.
 - Assess monetary value of claim vs. costs of defense?
 - Settlement Options? Good facts vs. bad facts. Exit bad cases early.
 - Reputational risk?
 - Precedential concerns?
- Discuss claim with CEO & CFO
- If it is a high risk or substantial claim, you may need to provide a high-level review of the claim to the Audit Committee and/or the Board of Directors.
- Discuss Company's reaction (if any) to claims if picked up by media. Discuss any potential communications to Company's clients and vendors.
- Provide regular updates on status of claim, likelihood of success, outside counsel fees, and potential exposure, etc. to CEO & CFO

Managing a Claim

Interviewing and selecting outside counsel

- Licensed in state where claim will be adjudicated. Discuss option to retain subject matter experts (wherever they are located) and retain local counsel in applicable state.
- Deep subject matter experts in issues to be resolved.
- Interview several firms – understand fees and terms of engagement. Obtain solid references.
- Who will be your primary point of contact?
- Don't be afraid of discussing alternative fee arrangements, budgets, and/or discounts from standard hourly rates.

Managing a Claim

Consider pros/cons of alternative dispute resolution.

- Timeliness of potential resolutions, costs of litigation vs. ADR, etc.
- Many courts require ADR for litigation.
- Consider arbitration vs. mediation, etc.
- Be sure to review any applicable contract or terms & conditions that may require arbitration or mediation and prescribe the process for proceeding.

Questions?



So You Have Been Sued – Coordinating the Legal Response and Managing Communications

Jennifer L. Parent, Director
McLane Middleton's Litigation Department

Legal Considerations In an Email and E-Discovery World

- What electronic data must be preserved?
- Who?
- Where?
- When?
- How?



Legal Considerations – It's Not Just About Email Anymore

- Hard Copy Documents
- Common Sources of e-Discovery
 - Email (.pst)
 - Phone records
 - Text messages
 - Instant Messaging
 - Videos / Photos / Screenshots
 - Internal Messaging (Slack; Teams; Zoom; etc.)
 - Electronic files (word documents; PDFs; Excel; etc.)



The Basics of Litigation Hold

- Recognize Developing Legal Problems
 - “Reasonable Anticipation of Litigation”
- Litigation Hold Notices
 - Notify key players of preservation obligation, subject matter, time frame, and contact person
- Interview Key Players and Gather Data
 - Discover who, what, where
 - Work with IT Department on securing data
- Re-assess Key Players and Data
- Re-issue Litigation Hold Notice



Training

1. Point Person
 - Point person sends litigation hold – train on procedures
 - Appoint more than 1 point person

2. Managers/Human Resources
 - Often person making determination of “reasonable anticipation of litigation”

3. IT Department
 - Electronic data/devices
 - How secure

4. All Employees
 - What to do when receive a litigation hold
 - Company policy on computers/electronic devices – Employer owns and can access at any time
 - Appropriate use of e-mail

Legal Considerations – Preservation Issues

- Common Preservation Issues to Consider
 - Auto-deletion systems
 - Replacement of smartphones
 - Hard drive failures / no back-up
 - Videos on loop
 - Misplaced / damaged hard copies

Legal Considerations In an E-Discovery World

- Consequences of non-preservation or non-production (whether intentional or accidental)
 - Adverse inferences
 - Sanctions
- Procedures
 - Policy
 - “Litigation Holds”
 - Training



Legal Considerations - “Personal” Devices

- “Private” files, folders
- “Home” computers (downloading)
- “Personal” smartphones



Legal Considerations – Attorney Client Privilege

- Control Group Test (more on this)
- Providing legal advice or obtaining information to provide legal advice
 - Mixed topics – business and legal
- Waiver of Privilege
 - Failure to treat as confidential / privileged
 - “Inadvertent” waiver
- Work Product Privilege



E-Communication Nightmares for the Trial Lawyer



Choosing the Communication Media

- Does it require documentation?
- Why?
 - Casual
 - Spontaneous – no reflection
 - Illusion of confidentiality
 - Responsive – reactive, anger
 - Ease of dissemination – copy everyone / forward
 - Replies to “all” disasters
 - Ease of attachments



Jokes - Cartoons



Sinister – Devious Tone

- “Don’t tell...”
- “Keep this to yourself..”
- “This will kill us”
- “Can you believe what did



Deleting – Destroying – Shredding

“It’s not the Break-in – It’s the Cover-up



Maintaining Privilege: A refresher on the requirements and scope of attorney client privilege

- Every employee has a memory and likely created or had access to documents, including damaging ones.
- Every employee has access to facts—good and bad.
- Employees—current and former—may have been involved in confidential communications.
- How does a corporation protect against the disclosure of memory, facts, and confidential communications?

Attorney Client Privilege at play on a daily basis within a Company.

- Internal communications of employees – current and former
- Litigation – document discovery
- Litigation – depositions (current and former employees)
- *Ex Parte* contact with current or former employees during litigation

New Hampshire Rule of Professional Conduct 1.13

Rule 1.13 – Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

New Hampshire Rule of Professional Conduct 4.2

Rule 4.2 – Communications with Person Represented by Counsel

In representing a client, a lawyer shall **not communicate** about the **subject of the representation** with a person the lawyer **knows to be represented** by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order...

New Hampshire Rule of Professional Conduct 4.2

Ethics Committee Comment

When an organization – a corporation, governmental body, or other entity – is represented by counsel, *ex parte* communications with certain personnel of that organization will be prohibited by the Rule. Other jurisdictions have adopted a variety of tests for determining which personnel are off-limits, which include the “control group”, “managing/speaking”, “alter ego”, “balancing”, and “blanket ban” tests. As of this writing, the New Hampshire Supreme Court has not clarified which test applies in this jurisdiction and trial court opinions conflict. ...

Does contact with your employees fall within the ethical rule or the attorney-client privilege?

5 Tests for the Rule of Professional Conduct.

- 1. Control Group Test:** Prevents lawyers from ex parte contact with current employees who have responsibility for making final decisions and those whose advisory roles are such that a decision would not normally be made without their advice or whose opinions form the basis for a final decision.
- 2. Managing/Speaking Test:** Prohibits ex parte contact only to agents of the corporation who have the legal authority to speak for and bind the corporation.

- 3. Alter Ego Test:** Similar to the managing/speaking test but prohibits ex parte contact with agents of a corporation (a) whose acts can bind the corporation in the matter; (b) whose acts are imputed to the corporation for purposes of determining liability; or (c) who are responsible for implementing the advice of a corporation's lawyers.
- 4. Balancing Test:** Prohibits contact with employees whose statements are likely to be admissible against the company, and makes determinations on case-by-case basis.
- 5. Prohibition on contact at all.** Bars any contact with all current employees.

New Hampshire Supreme Court:

- No decision as to which test applies

Trial court opinions conflict:

- *Totherow v. Rivier College*, No. 05-C-296, 2007 WL 811734 (N.H. Super. Ct. Feb. 20, 2007) (applying the control group test) (Lynn, C.J.)
- *XTL-NH, Inc. v. New Hampshire State Liquor Commission*, No. 2013-CV-119 (N.H. Super. Ct. Dec. 31, 2013) (applying a modified managing/speaking test) (McNamara, J.)
- *Wallack v. Southern District YMCA et al*, No. 218-2013-CV-823 (N.H. Super. Ct. June 12, 2014)(applying control group test)(Delker, J.)

New Hampshire Rules of Evidence

Section 502. Attorney-client privilege

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "representative of a client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

...

(5) A communication is "confidential" if **not intended to be disclosed to third persons** other than those to whom disclosure is **made in furtherance of the rendition of professional legal services** to the client or those **reasonably necessary** for the transmission of the communication

New Hampshire: applies the “**control group**” test and therefore allows fairly broad ex parte contact with **current employees**, and arguably unlimited contact with **former employees**.

Current Employees in Control group:

- If in control group, corporation can represent them and opposing counsel cannot contact them.
- If in control group, corporation can represent them but need not do so. Is there a possible conflict?
- Consider how much to share—are they subject to the privilege?
- If not in control group they can be contacted by opposing counsel.
- Can advise that they don't need to talk with opposing counsel—but be careful that it doesn't appear that you are trying to shape testimony.
- Consider potential conflict of interest if corporation represents them—in many instances best to get separate counsel.

Former Employees

- They CAN be contacted by opposing counsel – any exceptions?
- Be very careful what you share. Are they potentially adverse? Anything you say may be shared with opposing counsel.
- Assume privilege does not apply—all conversations may be discoverable.
- Don't disclose facts post-employment.
- Establish if privileged information obtained in employment.
 - If so, corporation's lawyer can represent them if they want representation—as to employment issues and privileged information.
 - If not, advise them that the corporation's lawyer does not represent them—but can offer assistance from corporation's lawyers.
- Were they in the control group? If so, corporation may choose to represent, for matters while employed. But former employee need not accept representation.

Privilege issues with current and former employees

Can information in the possession of a current or former employee be protected from discovery?

Who has information protected by the attorney-client privilege?

Can the corporation assert a privilege to protect against disclosure in a deposition or discovery?

Questions

*Association of Corporate Counsel Seminar:
Protecting Business Communications*

Mark C. Rouvalis, Director

McLane Middleton's Litigation Department

Protecting Your Client Before a Dispute Arises: Issues to Consider for Dispute Resolution Clauses in Contracts

- Relationship with the other side: on-going business partner or vendor, one-time transaction, equality of stature and position; nature of contract (will opposing party get confidential company information, e.g.)

- Pre-suit negotiation, mediation or neutral evaluation requirements
 - Raise officer level of parties as a requirement of negotiation
 - Establish time limits for good faith negotiation
 - Establish time limits for mediator or neutral selection, and process completion

- Injunction or other equitable relief clauses
- Arbitration versus Courts
- Arbitration versus Business Courts—NH and MA business courts with specially assigned judges; timing in business courts
- Indemnity limitations

- Venue/consent to jurisdiction/the location's relationship to the dispute or the parties
- Jury trial waiver
- Governing law provisions
- Prevailing party attorneys' fees and costs

Arbitration versus Courts

- Cost considerations—filing fees, payment of arbitrator or multiple arbitrators; is arbitration less expensive than trial by jury or judge?
- Privacy—Courts ultimately are public, notwithstanding protective orders requiring confidentiality of certain documents; arbitrations generally are not public, at least until it comes time to enforce a judgment rendered in the arbitration

- Certainty of rules: Courts have well-developed rules governing discovery and trial; arbitrations less so; end up arguing about discovery scope
- Ability to conference with an arbitrator typically is easier than trying to get before a judge
- Partisan arbitration
- Enforceability of rules—deposition subpoenas, e.g.

- Reaching third parties—subpoenas; out of state witnesses
- Cases where principal parties are subject to arbitration, but third parties are not subject to arbitration; often proceeding in court and arbitration, unless waiver of court
- Injunctive relief exceptions to arbitration

- Jurisdictional challenges to arbitration
- Appellate limitations—fraud, evident partiality or plain mistake (usually not errors of law, and never weight of the evidence); second bite at the decision apple by losing arbitration litigants; entry of judgment at the trial court level, and then appeal to NH Supreme Court (or, in MA, the Appeals Court or Supreme Judicial Court)

Questions

Thank You!

Disclaimer: The information presented is for general education and no attorney-client relationship has been created hereby. You should engage and consult with counsel regarding the applicability of the concepts presented to your circumstances.



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