

Smart Docs: How to Keep Documentation From Spoiling Your Brand

Presented by:

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Employers & Lawyers. Working Together



Why?

Why A Presentation on Documents?



Why?

- They are often the most important evidence:
 - Documents are given *absurd deference* by judge and jury
 - For better and for worse
 - Good or bad documents can completely invalidate witness testimony and credibility
 - Or they can confirm the truth of witness testimony

Why?

- **Juror's Poll:**

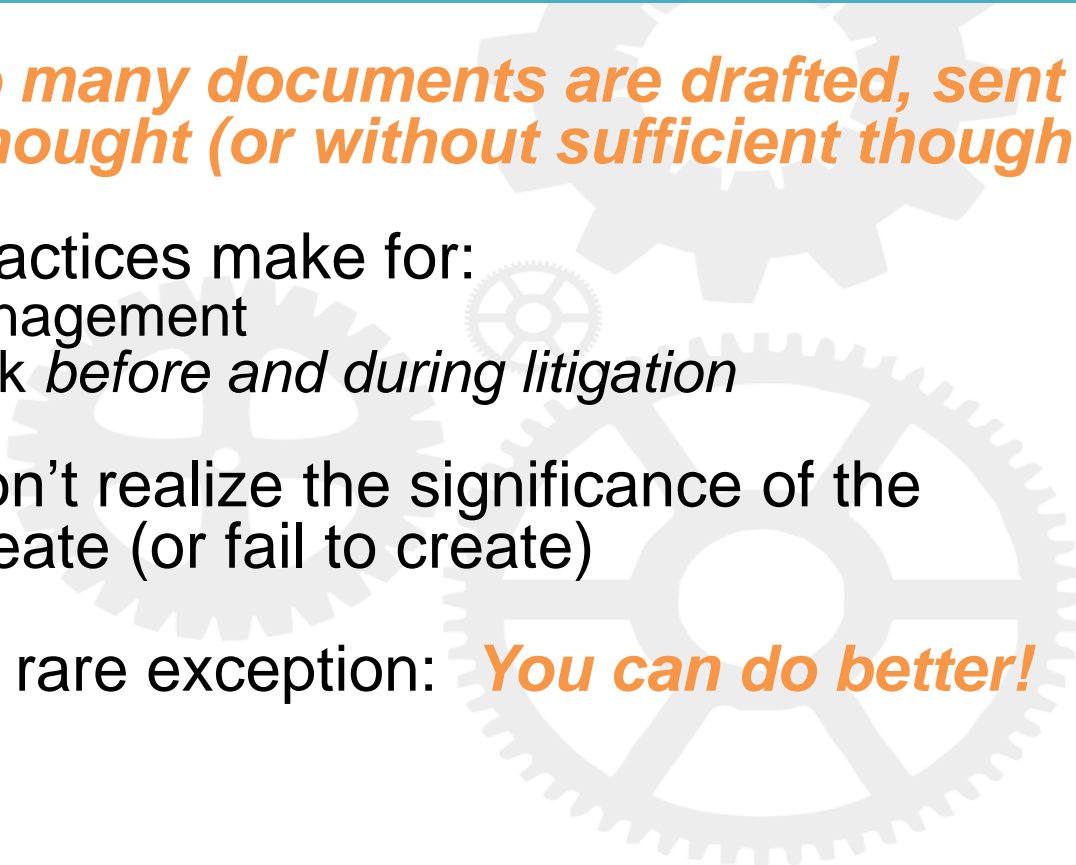
Is the best evidence of an employee's work performance the employee's performance evaluation?

- 61% said YES

Is the company negligent if it does not properly document an employee's performance problems?

- 91% said YES

Why?

- What we see: ***Too many documents are drafted, sent or deleted without thought (or without sufficient thought)***
 - Good document practices make for:
 - better people management
 - lower litigation risk *before and during litigation*
 - Most associates don't realize the significance of the documents they create (or fail to create)
 - Unless you are the rare exception: ***You can do better!***
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Thus . . . Our Objectives Today

- Discuss how documents are used in litigation
- Help you create thoughtful, intentional documents, and document practices and improved HR practices
- Help you consider and address each likely *audience* for your key documents
- Help you recognize and effectively respond to dangerous documents and bad document practices

Litigation Discovery = Disclosure

- **The general rule:** Each side in litigation is entitled to force the other side to disclose all relevant facts
- **Exceptions** to these disclosure obligations (i.e., privileges) are narrowly construed to preserve the public policy interest in fair resolution of disputes

Discoverable Documents

- E-mail correspondence between HR and manager about (almost) **anything**; plus each draft of each such document, including metadata
- Documents in sealed envelopes in locked drawers with 50 **“confidential”** stamps on the envelope
- **Most** workplace harassment investigation reports (and all investigation notes and/or draft copies of that report, including metadata) prepared by the human resources department or other company or third-party investigators, even if attorney directed
- Chats, text messages, Instagram posts, snapchats, and other documents saved on your phone and computer are all potentially discoverable.

Discovery = Depositions, Including Yours

Dance like noone is watching.

Email like it may one day be read aloud in a deposition.



somee cards
user card

Discovery = Depositions, Including Yours

The worst day of your life!

- your documents suggest you are not being honest or don't know what you are talking about!
 - “Were you telling the truth then, or are you telling the truth now?”
 - “Are you *seriously* trying to tell me that you can't understand your own notes from a meeting that formed the basis of your decision to fire a 25-year employee?”
 - “So you fired her for being ‘unprofessional’ in a meeting with you, is that your testimony? Excellent, so how about if you give me a nice, concise definition of the term “unprofessional?”

Attorney/Client Privilege is Narrow

- Protects attorney/client communications that were conducted for the purpose of obtaining or providing legal advice
 - Adding an attorney to the communication means **nothing** unless . . .
 - The use of a *privilege* label means absolutely **nothing**
- Applies regardless of whether the communications are labeled
- Privilege does not protect *facts*, only *communications*

The “Myth” of At-Will Employment

- In most all states, including Florida, employment is “at will” unless otherwise agreed to by the parties
- Either party may terminate the employment relationship for any reason or no reason at all . . . *unless* this is being done for an unlawful reason
- So what? ***You had better have a good and lawful reason for dismissal or any adverse action***
- And **documents** which provide compelling evidence of your reasons

Litigation Words of Wisdom

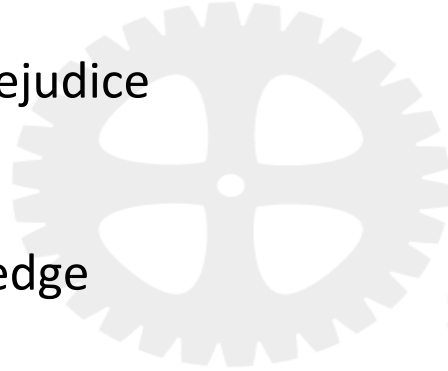
- **The outcome of litigation will not necessarily be determined by the facts as you know them**
- Party and attorney credibility is paramount
- Party and attorney credibility, once lost, is tremendously difficult to regain
- Employer credibility is suspect from the outset
- Everything you have said and done (or failed to do) can and will be used against you in a court of law
- A bad decision by a supervisor or manager is just a bad decision by a supervisor or manager, but ***a bad decision by HR is far worse because***

...

Litigation Words of Wisdom

In any matter that could potentially lead to litigation (i.e., in all matters), you want a ton of documents that create an accurate and compelling record of *the actual facts* and your:

- reasonableness
- objectivity
- fairness and lack of prejudice
- candor
- diligence
- subject-matter knowledge
- compliance
- truthfulness
- general wonderfulness



E-Mail Communication is Too Frequently a Gift to Plaintiff's Counsel

***Is your e-mail such a gift? Are you sure?
How about your management team's email?***

The background features a faint, light gray illustration of several interlocking gears of various sizes, suggesting a mechanical or industrial theme.

E-Mails Are A Gift . . .

- Consider the following e-mail string:

To Joni (HR REP): I've just about had it with this jwrk. He's been here three months, and he's constatnly messing thingsup. I'm not going to take this any more. I want him gone tomorrow.

To Jeri (Manager): That's not going to work. I checked his probationary reviews, and they're all good, so you must establish a record of poor job performance.

To Joni: This is nonsrnse. I can see now that this guy's an idiut, and I've already made my dcsn. Are you telling me I have to pretend Ive not made up my mind?

To Jeri: Yes. I understand you've already made the decision to manage him out, but you must take your time. Give him a set of things he must do or not do, and tell him you will fairly consider his performance in making any employment decisions. I'll help you get him out of here.

Discuss the Gifts . . .



- ✓ “Manage him out”
- ✓ “I’ll help you get him out of here”
- ✓ “Tell him you will fairly consider his performance...”
 - ✓ What else?
 - ✓ *How does HR’s involvement make things worse?*

Jwrky Documents

- ✓ When you see this stuff: **STOP IT! RIGHT AWAY!**
 - ✓ **Never really goes away, and it's discoverable**
- ✓ Pick up the phone or walk into somebody's office
- ✓ Get these communications offline (better yet, put a lid on the inappropriate comments and sentiments)



Performance Documentation

- You can't ignore the bad stuff because it will come back to haunt you.
- All such documents (periodic reviews; disciplinary letters; PIPs) can be **extremely important** in virtually every kind of litigation involving employment issues.
- Such documents must be **beyond reproach**: objective, thoughtful, thorough, specific, fact-based, honest, easy to read.
- Poorly written or inaccurate (or gutless) review documents are way **worse** than no review documents at all.

Best Practices: PIPS & Disciplinary Memos

- *Do not blindside an employee with a performance document*
 - Meet with the employee
 - Discuss, learn and consider the employee's story **before** you decide what to do
 - Take notes . . . good notes . . . in full view of employee
 - Obtain mutual agreement as to next steps (if possible)
 - In your notes, record employee's response
 - Make a record of the meeting and the plan, and send or hand it to the employee

Best Practices: Performance Reviews

- **Tell the truth!**

- If your review says she is a good employee, you will never be able to retract that statement!
- Don't be averse to confrontation (But don't forget to provide balanced feedback)
- Don't hold back to avoid hurting people's feelings! It is the only way to help an employee grow and flourish in their position (But, again, provide balanced feedback)

Best Practices: Performance/Disciplinary Documents

- Refer to specific, verifiable, objective **facts, dates, witnesses:**
 - No meaningless phrases unless accompanied by facts that give meaning:
 - *Not a team player*
 - *Not a good fit*
 - *She was unprofessional*
 - *Insubordinate*

Best Practices: Performance/Disciplinary Documents

- Present **facts** - not **your reactions to** or **characterizations of** these facts. Compare:
 - *“You failed to clock out for your lunch break in violation of policy”*
 - *“You are stealing time from the company.”*
- Be precise and exacting. Consider:
 - *“I was disappointed by your inappropriate language”*
 - *“When I asked you about your below-average performance metrics, you responded to me by calling me a ‘petty, vindictive b*tch’, which constituted insubordination toward your manager.”*

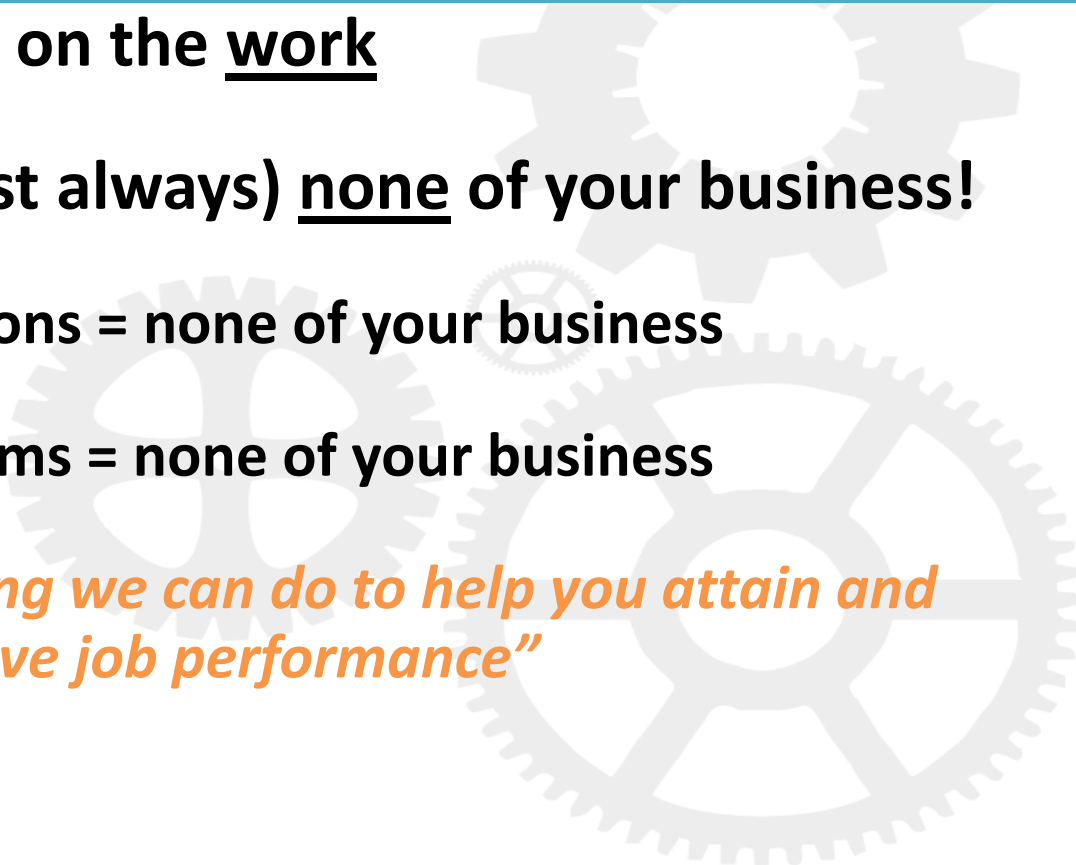
Best Practices: Performance/Disciplinary Documents

- *Address each likely or potential audience for your document:*
 - The employee
 - Every other employee
 - Every one of the employee's Facebook friends
 - Potential plaintiff's attorneys
 - The EEOC
 - The judge
 - The jury
 - The press

Document Worst Practices

- Loading your documents with hyperbolic, counterproductive clichés:
 - *“Jim, you are a great employee and we value you greatly as a colleague; however, we are going to conduct an investigation into allegations about egregious misconduct”*
 - *“Joan, we greatly value your many years of service to the company, but we are putting you on a PIP for poor job performance.”*

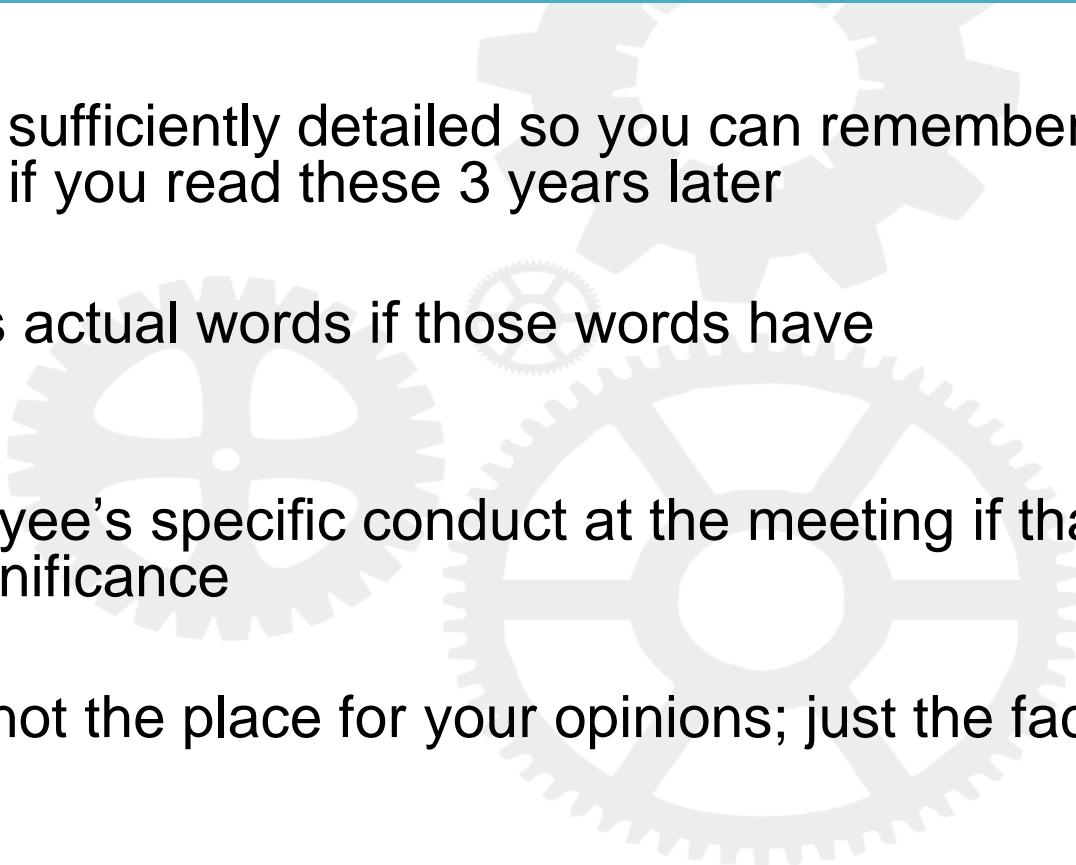
Best Practices: Performance/Disciplinary Documents

- Focus exclusively on the work
 - The rest is (almost always) none of your business!
 - Medical conditions = none of your business
 - Personal problems = none of your business
 - *“Is there anything we can do to help you attain and maintain effective job performance”*
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Disciplinary/Counseling Meeting Notes

- These are **your** notes (they are not for the employee) but you must assume they will be discovered by the employee
- They should not be a transcript, but they should capture key aspects of what was said and how it was said
- Type them in real time or have a witness do so
- Pause as necessary to make sure notes are complete
- Documentation, especially performance documentation, needs to be in the employee's file in HR; not in your desk. Remember, HR is your partner.

Disciplinary/Counseling Meeting Notes

- They should be sufficiently detailed so you can remember what happened if you read these 3 years later
 - Use employee's actual words if those words have significance
 - Describe employee's specific conduct at the meeting if that conduct has significance
 - Your notes are not the place for your opinions; just the facts
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Thank you!

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