

# CREATING DOCUMENTATION TO WITHSTAND THE SCRUTINY OF A JUDGE OR JURY

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SHRM Guam Breakfast Briefing

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# DISCLAIMER

**Dana and Genevieve are lawyers.  
But they aren't necessarily you or your company's  
lawyers. Therefore, please keep in mind:**

- Even though we are talking about the law, nothing we say here is legal advice.
- Nothing here creates an attorney-client relationship between us.
- Rather, we consider all of your questions to be hypothetical and assume that you are asking for a friend.

# Cost of Litigation

**318 days**

is the time it takes for the average claim to be resolved

**24%**

of matters resulted in costs for defense and settlement

**\$160,000**

is the average cost for cases that resulted in a defense and settlement payment

**76%**

of cases resulted in no payment by the insurance company, highlighting the nuisance potential of employment charges; even if they are unfounded, allegations are made and must be handled carefully.

Representative Hiscox claims data.

## The Cost of Employee Lawsuits

A representative study of 1,214 closed claims reported by small- to medium-sized enterprises (SMEs) with fewer than 500 employees showed that 24% of employment charges resulted in defense and settlement costs averaging a total of \$160,000. On average, those matters took 318 days to resolve.

The average employer's self-insured retention deductible for these charges was \$50,000. Without employment practices liability insurance, each of these companies would have been out of pocket by an extra \$110,000 on average.

<https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf>

# Employment Verdicts (2016)

- Rhode Island Federal Jury Awards Female Firefighter **\$ 806,000** In Gender Harassment And Retaliation Suit Against City.
- California State Judge Awards **\$ 1,742,690.94** To Dental Assistant In Her Action Against Dentist And His Practice For Sexual Harassment And Failure To Properly Pay Wages And Overtime.
- Judge Awards **\$ 1,882,217** To Teacher With Asthma Who Complained Of Classroom Mold In New Jersey State Action Alleging Disability Discrimination And Violation Of Whistleblower Law.



# Employment Verdicts (2016)

- Connecticut Federal Jury Awards Two Workers **\$ 3,422,074** In Hostile Work Environment, Racial Discrimination Suit Against Painting Company And Staff Members.
- California State Jury Awards **\$ 3.5 Million** To Four Sacramento Female Deputies Allegedly Retaliated Against For Complaining Of Discrimination.
- New Hampshire Federal Jury Awards **\$ 31.2 Million** To Wal-Mart Pharmacist In Her Action For Gender Discrimination And Wrongful Termination.

# *WHY DOCUMENT?*

# No Documentation

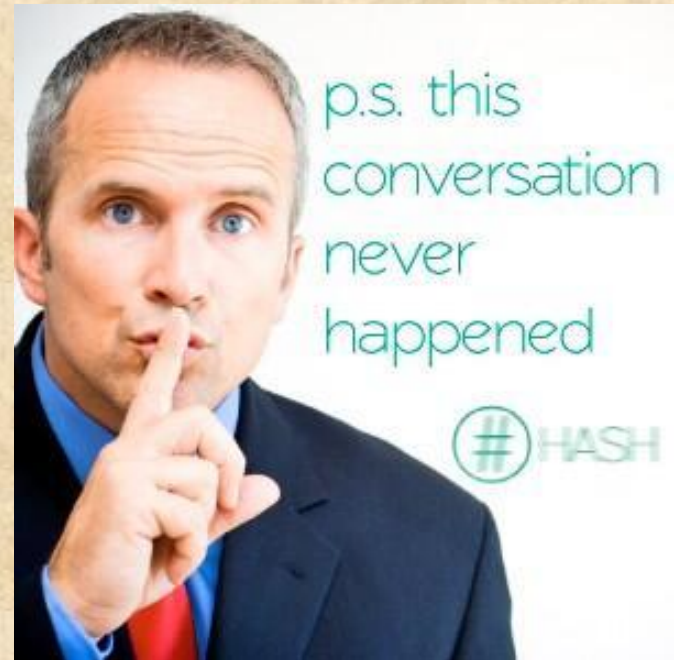
- Nada
- Nothing
- Highlights faulty memories
- He said, she said, he said, he said, she said, she said, on and on



# How is it Perceived?

*Did it even happen?*

*It must not have been  
important.*





# How is it Perceived (cont.)?

- How bad could the performance really be?
- No hard facts to back up feedback
- No proof
- Bias
- Papering the file
- Who is telling the truth?

# Why Prepare Documentation?

- Support your employment actions
- Memorialize conversations
- Increases manager's credibility
  - Caveat: so long as not biased!
- Helps with consistency
- Exhibit A at trial

# Best Practices of Documentation

- WHO
- WHAT
- WHEN
- WHERE
- WHY
- HOW



WHO

**WHO will be Reading the  
Documentation**



WHAT

**WHAT Events  
to Document**

WHEN

# WHEN to Document

WHERE

**WHERE to Maintain  
Documentation**

WHY

**WHY you are Preparing the  
Documentation**



HOW

**HOW to Prepare  
the Documentation**

# **Don'ts of Documentation**

- 1. Vague and Ambiguous**
- 2. Code Words/Phrases**
- 3. Absolute Expressions**
- 4. Unclear (or No) Expectations**
- 5. No Employee Explanation**
- 6. Snarky Tone**
- 7. Legal Conclusions**

#1

*Vague/Ambiguous*

# The Problem with Vague & Ambiguous

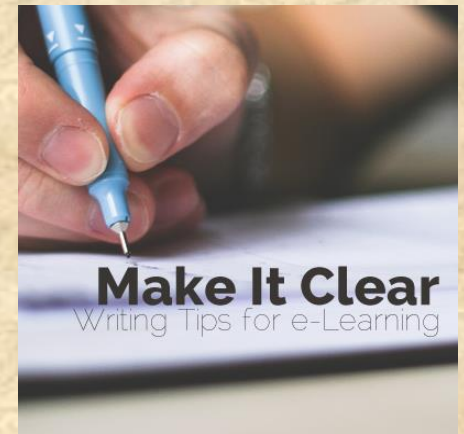
- The obvious
- If a third party has difficulty understanding the documentation, assume the employee will as well
- Whose interpretation wins?





# Be *Specific*

- Provide employee notice of the issues
- Employees can't fix, what they don't know is wrong
- Examples, examples, examples
  - Clear
  - Accurate
  - On point
  - Relevant



# Be *Specific* – even with positive feedback

- Nope:
  - Jennifer has strong customer service skills.
- Yep:
  - Jennifer is helpful and responsive to customers. She is patient and considerate when older customers ask her questions she has already answered. Jennifer maintains good customer relations by receiving complaints and attempting to resolve them in a timely manner, typically within 24-hours. Jennifer has the fastest problem resolution record in the department.



# Be *Specific* – even with positive feedback

## **Vague/Ambiguous**

- Inability to complete assigned tasks or produce deliverables on time.

## **Specific**

- On March 10, 2015 you were required to provide me with the list of first quarter objectives that have been met to date. I received the list on March 14, which only contained completed objectives in January 2016.

Dear HR –

I talked with Steve about what you wanted me to talk about.

The talk went well and I told him to keep up the good work.

Thanks,  
Andy



# Say it!

Bullet points – fine!

Provide enough detail so the reader knows

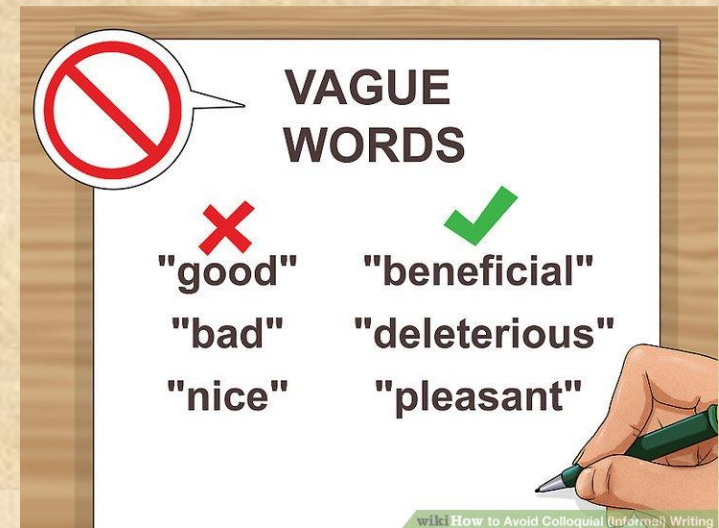
- what happened
- what was said
- when it was said
- who said it
- next steps

#2

*Code*  
*Words/Phrases*

# Stop writing (and talking) in Code

- Avoid words/ phrases that are vague, trendy, confusing
- Requires employees to spend time figuring out what you mean
- Significantly decreases manager's credibility



# Avoid

- Inflammatory Phrases
  - “You should know better.”
  - “At this point, I don’t think you’ll ever get it.”
  - “You really should get your resume in shape.”
  - “Everyone else on the team gets it but you.”
  - “You are dragging our department down by failing to meet your quota.”

# Classic Code Violation

- You are receiving this disciplinary notice because of your *insubordinate* behavior.
- How's this?
  - You are receiving this discipline notice because you have disregarded the direct orders of your supervisor on more than one occasion. For example, you left early last Wednesday despite the fact that your supervisor denied you permission.





#3

***Absolute  
Expressions***

# Don't Use Unless Completely Accurate

- Always
  - You're *always* late.
- Never
  - You *never* volunteer to work overtime.
- Every time
  - *Every time* I walk by your cubicle, you're on your cell phone.
- Invariably
  - Invariably you don't care.



# So, instead...

Be

- Evenhanded
- Fair
- Focused on the facts

Use qualifying language if you  
are not sure of the specific  
date/ time/ amount



#4

***Unclear (or No)  
Expectations***

# EXPECTATIONS

- Definition
  - a belief that someone will or should achieve something
- Manager's role:
  - Clearly, unambiguously, specifically define the “something”



# Expectations Are Everywhere

- Policies
- Projects
- Tasks
- Guidelines
- Clients
- Management

# Expectations Are Not

- Hopes
- Wishes
- Answers to your prayers
- Thoughts in your head

# NOT Expectations

- Show up on time.
- Turn in your reports on time.
- Be nicer.
- Be more efficient.

# Ah, Good Expectations

- Show up on time.
  - *Your job begins at 8:00 am at which time you should be at your desk ready to answer client calls.*
- Turn in your reports on time.
  - *In my email dated March 9, 2016, I stated the report must be emailed to me no later than 4:00 pm on Monday, March 14, 2016.*

#5

***No Employee  
Explanation***



# No Questions Asked

- You don't have all the information
- Looking at things from only one vantage point
- Close-minded

# Talk to Each Other

- Shows two-way communication
- You may be surprised what you learn
  - Circumstances may be out of employees control
- Provides opportunity for manager to help employee correct performance

#6

***Snarky Tone***

# Avoid

- Sarcasm
  - You might actually be the only person in the history of our company to never get a performance bonus.
  - Clearly, you don't care.
  - Do you *really* want to work here?
  - I am not surprised by the quality of your work product.

# WHY AVOID?

- Hurts the writer's credibility
- Simply unnecessary
- Firm tone is acceptable, snarky is not
- Shows bias
- Jury will wonder what is really going on



#7

# ***Legal Conclusions***



- “This is the worst case of harassment I have ever seen.”
- “John’s conduct violates the law.”
- “Joann was drunk.”
- “Joe made defamatory statements about Sue.”

***Email***  
***E = Evidence***

# The E in Email =

- Every word you write is *evidence*
- Every exchange counts as “documentation”
- Read it, proof it, read again before hitting send
- Tone
- Humor

# Remember

- Document for a third party review
- Proof your documentation
- Don't be afraid to edit
- It's not final, until...



# Remember

## *Specific*

Details –date, names,

Expectations

What employee is – and isn't - doing

## *Avoid Confusion*

Loaded words/ expressions

Absolute expressions

Legal conclusions

## *Factual*

Keep emotion out

Be objective

## *Evenhanded*

Positive and negative

Employee explanation

# Document Preservation and Records Retention

- Litigation Hold
  - A litigation hold is a written directive advising custodians of certain documents and electronically-stored information (“ESI”) to preserve potentially relevant evidence in anticipation of future litigation.
  - “Preservation Letters” or “Stop Destruction Requests”.
  - Advise of the possibility of future litigation and identify relevant documents and ESI which should be preserved.

***SAMPLE LITIGATION HOLD NOTICE<sup>1</sup>***

**IMPORTANT LEGAL HOLD NOTICE**

To:

From:

Date:

Re: Document Preservation for Pending Litigation in *Doe v. XYZ Co.*; Civil No. 1234

This is to notify you that you must retain and preserve all records, including documents, which may be relevant to the above-referenced lawsuit. This Notice relates to litigation pending against XYZ Co. ("XYZ") in the Circuit Court of the First Circuit for the State of Hawaii entitled *Doe v. XYZ Co.*; Civil No. 1234. In the lawsuit, Plaintiff John Doe ("Doe") alleges that XYZ discriminated against Doe by failing to promote him to a Manager position due to his national origin and sexual orientation, and that XYZ failed to pay Doe certain wages due and owing to Doe for overtime work. It is important that we continue to retain all documents and data that might assist us in our defense, or might be needed to satisfy our discovery obligations under the applicable Hawaii court rules. If you know of additional employees who should receive this notice, please send a list of names to me, and I will send them the notice separately.

**CATEGORIES OF DOCUMENTS, INFORMATION AND ELECTRONIC MEDIA TO RETAIN**

Until cancelled in writing by me, the following types of documents, information and electronic media (collectively, "documents") must be retained – even if it would otherwise be your normal practice to discard such items in accordance with XYZ's usual document retention policy:

1. The personnel file, if any, of Doe.
2. All written documentation, electronic information, or oral communications relating to Doe's employment;
3. All personnel evaluations or other documents or electronic information relating to Doe's work performance;
4. Any notes—taken in any format and however saved—that may have been taken during any conversations, meetings, or phone calls with Doe;
5. Any documents or information relating to any complaints Doe made during the term of his employment;

<sup>1</sup> This model litigation hold notice does not constitute legal advice. Employer's faced with litigation or a credible threat of litigation should consult with legal counsel before issuing a litigation hold notice.

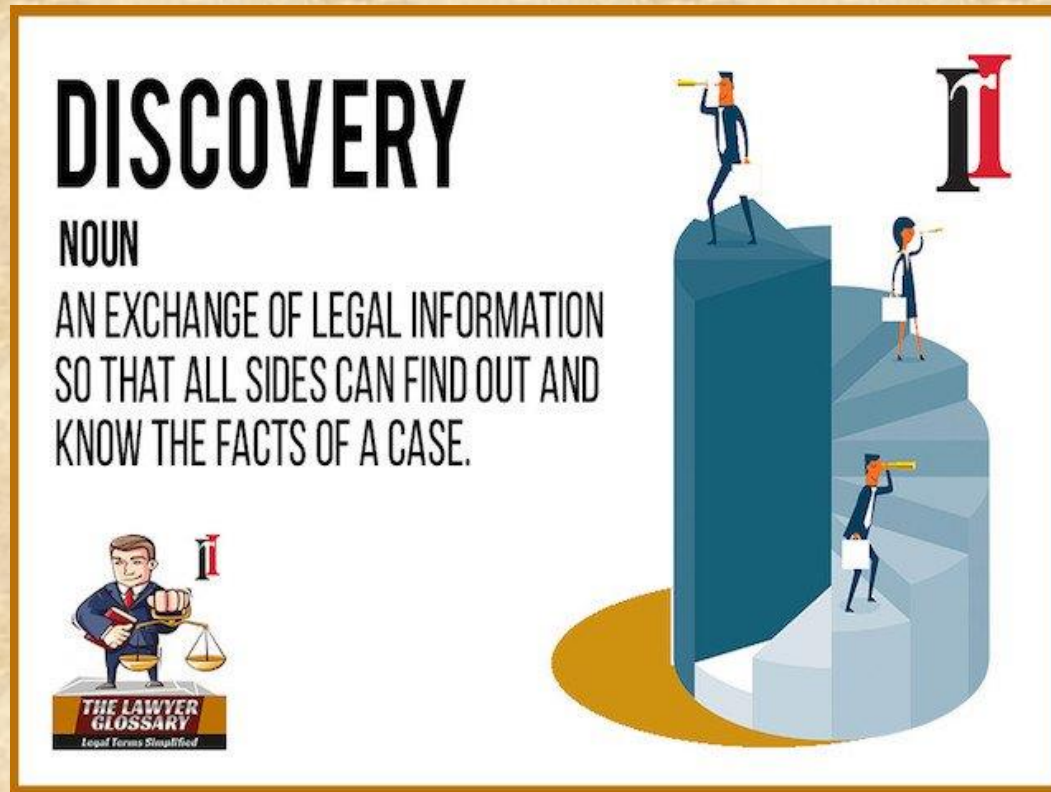
<https://www.torkildson.com/wp-content/uploads/2015/08/Sample-Litigation-Hold-Notice.pdf>

# ***Target v. EEOC (2006)***

- Employment discrimination case, where Court found potential liability for not applying its record retention policy and failing to retain proper documents.
- Evidence showed that employees responsible for retaining employment applications were (1) not aware of legal retention requirements and (2) permitted the destruction of applications that would have been relevant to the lawsuit.
- Paid a total of \$510,000 in legal fees to plaintiffs, agreed to revise document retention policies and provide employment discrimination and record-keeping training to supervisors.



# Discovery and Discovery Obligations





- **What are my discovery obligations?**

The discovery process requires each party to a lawsuit to disclose to all others, the existence of all and any documents which are relevant to the issues in the lawsuit, and which are or have at any time been in their “possession, custody, or control”.

- **What sort of documents must be disclosed in discovery?**

You must give discovery of all documents that relate to matters in question in the lawsuit

- **What about electronic documents and tape recordings?**

You must disclose relevant documents, regardless of what form or media they are stored in.

- **Must I disclose documents that are bad for my case?**

YES.

- **Must I search for documents? What if this is expensive or time-consuming?**

You have a duty to search for all relevant documents. Care should be taken to ensure that all documents possibly relevant to the lawsuit are identified at the earliest opportunity.

- **Discovery is not a “one-off” exercise – it is a continuing obligation.**

Your discovery obligations last until the end of the lawsuit.

# Common Documents



- Any complaints employee made internally or externally to, for example, the Equal Employment Opportunity Commission (EEOC);
- Any documents you have that support your actions;
- Personnel file (including performance evaluations, pay information, etc.);
- Other complaints of discrimination lodged against the employer;
- Any investigation the employer conducted regarding the discrimination complaint;
- Emails, memos, and other communications regarding your complaint;

**THANK YOU**  
**ANY QUESTIONS?**