

#### ACC Houston - Back to School CLE Symposium

#### Lessons Learned from the Trenches

Alistair B. Dawson Beck, Redden & Secrest, LLP Houston, Texas



An e-mail from an administrator within a pharmaceutical company regarding side-effects of a diet drug:

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"... Can I look forward to my waning years signing checks for fat people who are a little afraid of a silly lung problem?"



Bear Stearns executive's frank observation came while he and his boss were assuring investors that the subprime funds they ran were still sound

*". . . The entire subprime market is toast"* 

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Arthur Andersen lawyer emailed instructions to the Enron Auditing team leading to a massive document destruction

*"Remind the engagement team of our documentation and retention policy"* 

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# A UBS employee asked about debt securities UBS was selling to the public

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# "OK still have this vomit?"



#### American Airline CEO's instruction regarding his competitors Continental and Northwest Airlines

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#### "KILL THESE GUYS!"



# e-mail Education

- Inappropriate comments in e-mail will be grounds for discipline
- Follow Through a few examples will spread the word
- Train employees on what to say and what not to say
  - Treat as official letter
  - Don't spread rumors
  - Assume e-mail will be seen by upper management
  - Use personal e-mail accounts for personal matters



# Containing e-mail

- Set data quotas on e-mail
- Eliminate ability to archive e-mail
- Sweep and delete e-mail on regular basis
- Document an official document retention policy



#### Compliance With Document Preservation Policy

- Ensure the employees comply with regard to electronic documents
  - Audit compliance consequences for failure to comply
- What about text messages
  - Do not allow employees to save unless required
- What about back-up tapes



# Social Media Sites

- 57% of workers utilize social media sites while at work
- Posts can lead to liability
  - Sexually explicit comments
  - Threats
  - Harassment
  - Invasion of privacy
  - Defamation
- No Duty to Monitor
  - Unless put on notice –then must take corrective action



# Social Media Sites

- Company should have policy on social media
  - Inform employees that inappropriate comments grounds for discipline
  - Employee should report any problems
  - Investigate and take action where appropriate
- Consider denying access to social media sites



# Use of Websites at Work

- Inappropriate comments/photographs
- Have IT deny access to as many of such sites as possible
- Continually update
- Keep a record of your efforts



# Lower Litigation Costs

- Implement performance metrics
- Be actively involved in discovery process
  - Manage volume of document production and number of depositions
  - Consider using contract lawyers to review documents
- Work with outside counsel to streamline claims and defenses
- Discuss and agree upon staffing of case
- Avoid repetition when multiple firms are involved
- Flat fee per month- with possible true up
- Focus on winning the war pick your battles
- Bench trial as alternative to arbitration
- Mediation as early as possible



# What's the Strategy?

- Have an agreed upon strategy from the beginning
- Regular meetings to update case and revise the strategy
- Keep the case moving



# **Identify Your Witnesses**

- Who will be a trial witness identify early
- Take a direct of non-trial witnesses at deposition
- Identify your corporate representative early – needs to know the case



#### Too Many "I Don't Knows"





#### **Trouble With Leading Questions**





#### Think About Your Answer





#### **Keep Your Cool**





# Consider A Witness Coach





## Consider Jury Research Early

- Test theories that you might use in prosecution or defense of case
- Better to test before depositions are taken
- Can test again after discovery and before trial

