



Litigation Avoidance [How to Not Get Sued](#)

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Next time you write an email at work, imagine an aggressive prosecutor looking over your shoulder, ready to take your words out of context. His main aim: To besmirch you and your company.

"Before you hit send, pretend you have to read it on the witness stand," advises Nancy Singer, a compliance consultant who provides training to companies in industries that are heavily regulated (think... drug makers) and vexed by product liability claims (think... drug makers).

Land Mines

Singer, along with the [Medical Technology Learning Institute](#), is offering: "[Dangerous Documents](#): Avoiding Land Mines in Your FDA Records and Emails," part of [a Florida conference next week](#) for companies hoping to never face the sorts of massive, damaging lawsuits as Merck did over Vioxx. Singer, founder of [Compliance Alliance](#), is on a mission to get life science businesses to rethink how they do almost everything when it comes to documents.



Because, she says, it's the documents that take down companies in a lawsuit or an audit. She ought to know: she worked with FDA as a U.S. Dept. of Justice prosecutor.

"To survive in our litigious society, organizations need to have the right communications culture," Singer writes on her website. "Everyone needs to understand what they should, or should not, write in their emails."

Nancy Singer of Compliance Alliance
A land mine, in Singer parlance, is anything within a company that, if uncovered, explodes. Often, she says, the land mines don't emanate from out-and-out fraud—rather, it's carelessness.

Loose Lips

Take the Microsoft email embarrassment of 1996. The government, in its antitrust lawsuit against the technology monopoly, obtained an internal memo from an AOL executive. In that memo, the executive reported having been in a meeting with Bill Gates in which Gates said, "How much do we need to pay you to screw Netscape?" Ouch.

Another Microsoft example: executive Jim Allchin wrote to Bill Gates, in an email titled "losing our way...": "I would buy a Mac today if I was not working at Microsoft." The email was used in an Iowa antitrust case against the company.

Texts, Too

And then there are the text messages of former Detroit mayor Kwame Kilpatrick, who wrote explicit sexual messages to his chief of staff while publicly denying that he was having an affair with her. The messages were used in a case against him. He resigned as mayor last year.

Perhaps most frightening for those in the pharmaceutical industry: The trials Merck endured over Vioxx, during which plaintiffs' lawyers unearthed and trotted out damaging memos in which employees energetically debated clinical trial data and strategized about how to spin it to physicians. Eventually, Merck agreed to a \$4.85 billion settlement.

Singer has trained employees at Medtronic, Allergan, Sepracor, Varian Medical Systems and Siemens AG. She counsels companies to forge a culture of hyper vigilance about electronic documents, or anything that could be construed as documents, from internal memos produced by the CEO to text messages sent by the receptionist. "They need to understand that they work in a highly regulated society, and that they are an ambassador for the company," she says of each employee, no matter their position.

Training for employees should include discussing red flag words that should never be written in an email or internal document. She's talking about terms like crisis; illegal; defective; negligent; covert; attack; scheme; shortcut; liable. Also, Singer says, employees should be instructed to avoid inflammatory terms; obscenities; exclamation points; and sarcasm. All serve as red flags to lawyers pouring over large stacks of documents.

It's better to be vague and brief in memos and emails. For example, she says, don't write, "We'll meet on Thursday to destroy the documents." Instead, it's better to say, "We'll meet on Thursday to implement our document retention policy," she advises.

Documents As Diamonds

Additionally, she advises, keep opinions out of any work documents. Stick to the facts. That goes for meeting minutes, too, which should be kept short and fact-

based, focusing mostly on action items that came out of the meeting. No he-said, she-said, Singer adds.

One point she drives home time and time again: remember that nothing you write at work will go away. Ever. "Documents are like diamonds; they are very precious and they last forever," Singer likes to say.

After intensive training for employees and managers alike, Singer suggests that companies conduct internal audits of all employees' emails, every six months pulling out the messages that are the worst offenders and having all employees, perhaps at a lunch, rewrite them. Then, keeping it light-hearted and humorous, give awards to people who rarely or never have emails that stand out as potentially troublesome.

Outside Servers

Also, a good idea is to suggest that, if employees need to do personal emailing while at work—let's face it, we all need to do that at times—that they use a Yahoo, Hotmail or gmail account. That way, their emails are not kept on the company server.

At the same time that you want employees to say less, though, you also want them to document more. Says Singer, living in this age of heavy regulation, every product has to have extremely detailed documentation of its life cycle. If anything is left out—say, a signature or a date—that can also be used against the company. "The FDA will cite you if it's not perfect, and a liability lawyer can make any inference they want," says Singer, adding, "In God we trust. For everyone else, we require documentation."

How many companies tend to do all this? Very few, Singer says. Maybe five percent, she guesses. But more will, as lawsuits and public embarrassments continue. "Pretty soon, they all will," she predicts.

—by *Suz Redfearn*