

The Texas Lawbook

2019 Houston Corporate Counsel Awards

The ACC Houston Chapter and The Texas Lawbook officially announced that they are accepting nominations for the 2019 Houston Corporate Counsel Awards starting Feb. 6 - Feb. 28, 2019.

Submitting a nomination for one of the 10 categories is easy.

Go to **TexasLawbook.net** to get information on submitting your nominations

**Awards will be announced at the Four Seasons on April 25, 2019
ACC members and their plus 1's are invited to attend complimentary**



HINDSIGHT IS 20/20 – ADVISING YOUR BUSINESS TEAM ON BEST PRACTICES TO AVOID LAWSUITS

TOTAL American Services, Inc. – Marcela Berdion-Straub

Haynes and Boone, LLP – David Ammons & Michelle Scheffler

haynesboone



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TWIN AIMS IN HELPING COMPANY AVOID AND BETTER-DEFEND AGAINST LAWSUITS:

Presenting the Company in the Best Light Possible



Safeguarding Confidential Communications



OVERVIEW OF TOPICS

- Pre-Litigation Disputes
- Things You Shouldn't Put in Emails (or Texts!)
- What Should You Paper?
- Dealing with the Media
- Investigations
- Educating Your Business Team

PRE-LITIGATION DISPUTES

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- Pre-litigation disputes are business- and industry-specific
- Identify business teams likely to encounter “repeat offender” pre-litigation disputes

REAL-WORLD EXAMPLE

TOTAL begins operating Barnett Shale assets (a *complex* environment):

- Land issues, owner relations (business interactions with non-business people), municipal issues
- Procedures and policies critical to management

PRACTICAL POINTERS

- Consider contractual provisions that add value when pre-suit claims arise:
 - Notice and option to cure provisions
 - Requirement for détente/tolling period or meeting of commercial personnel before claims can be initiated
- Develop procedure for accurately risk weighting exposure on frequently asserted claims; often a multi-disciplinary approach
- Attempt to resolve potentially meritorious claims on terms favorable to company
- Where complete settlement of claims is not feasible, consider partial settlement:
 - Award-modification agreement
 - Issue-modification agreement
 - Procedure-modification agreement

THINGS YOU SHOULDN'T PUT IN EMAILS (OR TEXTS!)

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If you can't say anything nice . . .

- Jokes
- Off-color language
- Statements about management, team members, products, clients/customers, counter-parties
- Legal positions



TEXTS, APPS, & CHATS

- Text messages:
 - Most casual written form of exchange, truly candid snapshots
 - Pervasive, some major deals done by text
 - *Scott v. Eglin Fed. Credit Union*, No. 3:16-CV-719-RV-GRJ2017, 2017 WL 1364600 (N.D. Fla. April 13, 2017) (noting “emails and text messages may be fair game for discovery in most cases”)
- Online collaboration tools:
 - Note apps and commenting tools
- Chat programs:
 - Catches casual conversations; almost as candid as texts; real time record
 - *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017) (noting instant messages are a data source for discoverable information)
- Expect to produce in both State and Federal Court:
 - *But see In re Sun Coast Resources, Inc.*, 562 S.W.3d 138 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (employer could not be compelled to produce employees’ text messages related to accident where employer handbook provided that company retained the right to confidential and proprietary company information on personal cell phones reimbursed by the company but not all information)

REAL-WORLD EXAMPLE

- Lehmann Bros. bankruptcy examiner's search terms included:
 - “breach”
 - “just between us”
 - “big trouble”
 - “too late”
 - “stupid”
- Goldman Sachs introduces language filter to cut out off-color, risky statements in emails

PRACTICAL POINTERS

- Implement policies regarding use of collaboration tools, texts, and chat programs for work purposes
- Instill to business teams that emails are evidence and never go away



- PICK UP THE PHONE (and call, not text!)



WHAT SHOULD YOU PAPER?

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- Identify frequent issues that do not get documented (procurement disputes, accounting disputes) – some of these never get documented until they are at the point of no resolution
- Documenting history of communications (or failure to communicate) is helpful; often useful summary-judgment evidence

REAL-WORLD EXAMPLES

- High A/R Balances
- Frequently communications are made via phone until things get really bad
- It would be helpful to have a paper-trail of communication or failure to communicate if the issue has to be elevated to litigation

PRACTICAL POINTERS

- For your “repeat offender” issues, work on policies to make sure your business clients are “papering” communications with your counterparties
- Anytime there is an “agreement” between your client and a counterparty, it should be papered
- As previously discussed, make sure they are leaving out legal opinions

DEALING WITH THE MEDIA

DEALING WITH THE MEDIA

- Reactive communications:
 - VP gets a call from a reporter; what does she do?
 - Refer media to media relations or legal



- Crisis-management plan:
 - Requires anticipation of likely sources of crisis
 - Train a *team* to address issues and avoid them
- Proactive communications (marketing/other information sent to public):
 - Make sure legal is involved to help think through managing company's image

REAL-WORLD EXAMPLES

- Negative impact on existing litigation:
Philip Morris releases study with press release in 2001 purporting to show the positive financial impact of smoking-related deaths for the Czech government:
 - Study is largely ridiculed, general PR nightmare
 - Becomes rhetorical lynch-pin in litigation-not only does PM admit that their product causes deaths, but they are cavalier about it, attempting to positively spin it
 - Press release itself leads to new litigation:
Firing of Barnes and Noble CEO:
 - Company issues press release stating CEO had been ousted for “violations of company’s policies”
 - CEO sues for false news release, claiming that wording was designed to imply (at the height of the initial #MeToo movement corporate reckonings) dismissal for sexual harassment
- In re Dynegy, Inc. Securities Litigation*, 226 F.R.D. 263 (S.D. Tex. 2005):
- Purported fraudulent statement in a press release
 - Date of press release used as start date for class action

PRACTICAL POINTERS

- Take steps to preserve privilege when retaining media consultants:
 - *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (where Target’s outside counsel retained PR firm, court held that confidential communications between lawyers and PR consultants were privileged)
- All media calls or emails should be referred to designated media spokesperson
- Avoid “no comment” – it will be treated as official response and may be construed as company having something to hide
- Prepared statement vs. interview:
 - Pros – interview allows for a fuller, more contextualized response and best ensures responsiveness to reporter’s questions
 - Cons – risk of drifting off message in interview
- Determine key messages before any interview and steer answers back towards intended points

INVESTIGATIONS

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When to investigate:

- Formal complaint from whistleblower or victim
- Anonymous complaint
- Report to supervisor or management
- Government agency complaint or inquiry
- Civil lawsuit or criminal complaint
- Accident or injury
- Media reports or inquiries

REAL-WORLD EXAMPLES

FCPA Actions by Year

<u>Year</u>	<u>Department of Justice (criminal)</u>	<u>Securities and Exchange Commission (civil)</u>	<u>Total Settlements (\$)</u>
2018	15	13	2.19 billion
2017	28	8	936.2 million
2016	28	29	2.43 billion
2015	14	11	180.8 million

REAL-WORLD EXAMPLES

- Many of the largest FCPA settlements in history occurred in the last three years:
 - Petróleo Brasileiro S.A. – Petrobras (Brazil): \$1.78 billion in 2018
 - Telia Company AB (Sweden): \$965 million in 2017
 - Siemens (Germany): \$800 million in 2008
 - VimpelCom (Holland): \$795 million in 2016
 - Alstom (France): \$772 million in 2014

PRACTICAL POINTERS

- Investigation plan:
 - Stop any violative conduct
 - Identify the scope of the problem
 - Identify, secure, “lock down” and assemble relevant documents
 - Identify relevant witnesses
 - Identify key factual and legal issues; what is undisputed and what must be determined
 - Identify how investigative steps will be documented and reported
 - Prompt decisions and timeline
- Consider involving litigators as they have unique perspectives
- Protect privilege – document that investigation is directed and supervised by counsel for the purpose of providing legal advice and in anticipation of litigation
- Potential privilege risks associated with investigations performed in other countries

EDUCATING YOUR BUSINESS TEAM

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- GOAL: Enough information to identify when to call legal, not so much information that they are calling legal for everything
- Do Lunch and Learns; statistically people will do a lot for free food
- Use cheat sheets, hand-outs, no emails!
- If business gets a letter/email from a lawyer — STOP!



REAL-WORLD EXAMPLE

- Letters from landowner lawyers contacting owner relations on behalf of their clients. Figure out who you are talking to and elevate to legal if necessary

PRACTICAL POINTERS

- After figuring out how to best position your company in the event of litigation:
 - Identify business groups with whom you need to coordinate
 - Determine the best way to communicate with them

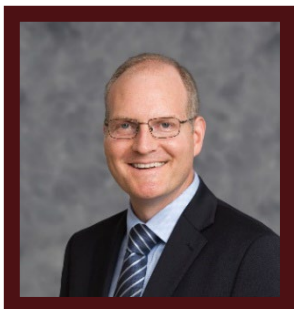
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- Manages TOTAL's litigation docket of royalty, title, and commercial disputes and claims in the Barnett Shale as well as various other U.S. litigation, and provides legal guidance and support for upstream onshore and offshore exploration and production affiliates.
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- Recognized in *Texas Super Lawyers Rising Stars*, Thompson Reuters (2017).



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