



# 2024 Product Liability & Complex Torts Practice Group Seminar

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What Can We Learn from Blunders Made by Athletes?  
*Strategies to Mitigate and Avoid Risk  
Through Employee Communication Training*

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### A. Introduction

It is extremely easy with social media to reach hundreds, thousands, or even millions of people with a simple press of an icon. Obviously, this is a great way to get important messages and information out to a broad group quickly. On the other hand, if a message is sent before giving it the proper thought, the result could be disastrous to the sender. As we push the team theme with this Seminar, and because they typically have a social media presence and at least somewhat of a following, athletes fall into the group that can get reactions from large groups with their social media. There are countless examples of famous and not-so famous athletes posting messages and photos that sink their careers. Companies can learn from these blunders and hopefully use those lessons to teach their employees how to avoid those blunders.

### B. Why Training is Needed

Employee training is a preventive measure that can significantly reduce the frequency of product liability lawsuits and the exposure in the legal claims that are inevitable. In-house and outside counsel can provide immense value to the company through training and education.

Training significantly minimizes corporate risk. Not only can you reduce regulatory risk by ensuring safety-related issues get escalated, but you can reduce litigation risk by ensuring documents are preserved, emails are carefully worded, marketing materials are consistent with warnings, and sales representations are clear. It is quite common for outside counsel to conduct a post-settlement or post-verdict meeting to evaluate changes that can be made within the company to minimize the risk of future litigation. That often presents an opportunity to consider additional training that could be done to improve the company's defense position.

When training non-lawyers, you need to understand that non-lawyers likely do not know the full scope of the legal department's role and likely are unfamiliar with past and present legal claims. It is a good practice to schedule time with new hires and key internal departments to provide an "Introduction to Legal" overview.

Training can also promote relationship building within the organization. The legal department can be viewed as a group that restricts what the other departments are allowed to do and can thus be viewed in a negative light. Training provides the legal department an opportunity to explain what they do and how they can help promote the organization's goals to increase profits.

As more people have entered the remote work environment, the number of emails and instant messages generated has increased significantly. This increases the need for training regarding document creation and retention, and highlights the importance of helping non-lawyers understand how their actions (or inactions) can have legal ramifications for the company.

### C. Which Non-Lawyers Should Be Trained

The legal department is in the best position to determine who should be trained on product liability-related issues. There is value in training all new hires on at least a limited number of topics. Beyond that,

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the company can consider which targeted training makes sense. This may include engineering, quality, customer service/call center, marketing, sales, parts/accessories, and others.

### D. Training Topics to Consider

There are some training topics that are relevant across the organization, including document creation and preservation and regulatory requirements that apply to the company. It is also important to provide non-lawyers with a roadmap for internal reporting and to emphasize the importance of not sharing sensitive information outside the company. Non-lawyer employees need to know what issues should be escalated to the legal department versus to their supervisors. They also need to know which issues are time-sensitive and require immediate reporting.

#### 1. Making the Connection Between an Employee's Daily Tasks and How They Might Later Be Relevant in Litigation

Many companies decide to conduct an "Introduction to Legal" or product-liability training. This gives the legal department or outside counsel an opportunity to explain the types of legal claims the company faces, identify which specific claims are asserted, and describes how the company defends the claims. This helps employees make the connection between their daily actions and the extent to which they can help the company defend a lawsuit. When employees understand how their positions and responsibilities relate to the greater corporate goals, they are more likely to heed the guidance they are given.

#### 2. Training on How Documents Come into Play

Document-related training should include an overview of how company documents come into play in litigation. It will be helpful for employees to understand that the documents they are creating today could be considered relevant evidence to an incident that occurs years in the future. Best practices include training employees on the document types requested in litigation, i.e., design and testing documents, customer complaints, warranty claims, and recalls, and then providing them with examples of how certain documents, especially emails between employees, have resulted in multi-million-dollar verdicts against corporations. It will also be helpful for employees to understand that the lack of documentation can complicate the company's defense strategy and that, accordingly, it is important to be aware of the company's document retention policy and ensure it is followed.

#### 3. Verdicts Related to Bad Emails or Salespeople Representations

One of the most powerful techniques when training non-lawyers is to provide them with examples of verdicts and other adverse litigation outcomes. While it is one thing to caution an employee against sending emails that speculate, provide commentary, or blame others, it is quite another thing to provide the employee with an example of a company paying a multi-million-dollar verdict in part because bad emails were sent between employees.

#### 4. When to Contact the Legal Department Versus a Supervisor

Another important aspect of training relates to helping non-lawyers understand the role of the legal department or outside counsel or both and to identify the issues that should be reported to legal. It is common for employees to ask questions such as: If I become aware of a product issue, should I tell my

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supervisor or should I tell legal? What if I think a product recall is necessary – who should I tell? Should I copy the attorneys on my emails?

While the process and protocols will vary from company to company, it is important to provide guidance so that non-lawyer employees understand when the legal department should be aware of issues. If the company has a Safety Compliance Plan in place, it can be used as a tool to illustrate the expected reporting chain.

### **5. Customer Support/Call Center Training Tips**

When training customer-facing individuals, you can remind them of the importance of recording only the facts when providing a written document associated with a customer phone call. For example, they should record the name of the person making the report, the issue being identified, an admission of misuse (if applicable), and when and where the incident occurred. They should be trained not to comment on whether they believe the customer is right or wrong or whether the company did anything wrong. Again, when training employees, it is very helpful to provide the employee with specific examples of customer complaint documentation that was harmful to the defense in a prior legal matter.

### **6. Marketing Training**

Marketing and advertising materials are commonly requested during discovery in product-liability actions. This presents an opportunity to train the marketing department on how their work overlaps with litigation issues and demonstrate how they can help the company minimize risk in future legal claims. Some of the training topics for marketing departments may include:

- i. Ensure that depicted activities are consistent with product warnings and instructions;
- ii. Wear safety equipment/occupant restraints;
- iii. Perform pre-ride checks;
- iv. If applicable, have each operator and rider sign the Release/Waiver;
- v. Follow footage retention policy (raw vs final product).

### **E. Considerations for Virtual Versus In-Person Training**

The move to virtual working environments has resulted in companies looking for ways to facilitate learning and personal development for their employees in an engaging way.

The popularity of online education has skyrocketed over the past few years. There are countless eLearning platforms and employee training systems to choose from. While all learning-management-system solutions may seem similar initially, each one comes with unique offerings. Many companies are turning to online learning-management systems, or LMS, to provide accessible, high-quality training for their employees.

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Corporate LMSs (as opposed to academic LMSs) tend to allow for easier content management and service flexibility, with more participants allowed to join. They offer a streamlined user experience and are optimized for remote employees and mobile use. Many platforms allow you to host corporate events, conduct employee onboarding and offer video lessons. Some examples include:

### 1. BeaconLive

BeaconLive offers cloud-based solutions that are intuitive for both users and facilitators. The expansive LMS features allow you to provide training at every step of the employee journey, from onboarding to ongoing training. You can design online courses using webinars, webcasts, or live virtual events. This means video lectures and multimedia content is safely stored to be accessed on-demand.

### 2. Udemy

This platform appears best suited for small to mid-sized businesses looking to help employees learn new skills. It can be accessed from a mobile app and participants can create questions for the trainers through the “Udemy for Business” platform, which offers interaction between the trainee and trainer.

### 3. LinkedIn Learning

LinkedIn Learning is applauded for offering a modern learning experience, data science-driven course recommendations, and a seamless desktop and mobile experience. Course completion certificates are automatically added to your personal LinkedIn profile. However, these certificates are not accredited, meaning they do not hold any value outside the eLearning platform.

Companies are also using virtual reality training. According to one source, a custom VR training program typically takes around 8-10 weeks or more to develop. Cost-wise, a VR program costs \$20,000 to \$150,000 or more on average depending on whether 360° VR or full VR is used. VR training pushes the boundaries of traditional learning by simulating any world you can imagine. With VR, learners are given opportunities to develop their skills and encounter true-to-life scenarios without facing real-world risk. VR creates an environment that uses pre-recorded video or is fully simulated.

## F. Why Training Is Not Enough

While training is highly important, the company should not assume it alone is enough to minimize risk. Depending on the issue, it is a best practice to put a policy in place to ensure that there is a company-wide formal process or protocol in place. Below are some examples of policies to consider implementing in addition to the training that is conducted.

1. Safety-Compliance Plan (sets forth the flow of information for safety-related issues)
2. Document-Retention Policy (spells out retention period for various categories of company documents)
3. Guidelines for Entering Contracts (may require indemnification agreements with third parties)

## G. CONCLUSION

Athletes not only make massive public relations’ blunders on social media, but they also post interesting

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and useful messages and pictures. Similarly, you want your employees to “post” messages in any of their written communications that portray the company in a good light and that do not become the key trial exhibit for a plaintiff suing the company.