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Clear, Written Policies Communicated To Employees Can Reduce Employer Liability

The Editor interviews ***William F. Maderer****, Partner, Saiber Schlesinger Satz & Goldstein, LLC.*

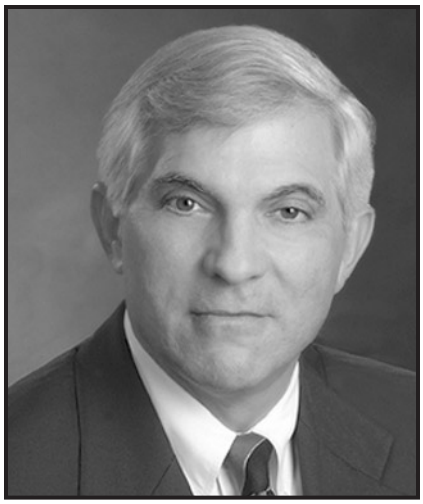
Editor: Would you summarize your professional background?

Maderer: After graduating from N.Y.U. Law School in 1973, I joined the firm of Weil, Gotshal & Manges LLP where I spent about a year and a half as a litigation associate. I had always been interested in being a federal prosecutor, so I applied for and obtained a position as an Assistant United States Attorney in the U.S. Attorney's Office in New Jersey. I spent six years in that office, the last two as chief of the Special Prosecutions Division, which prosecutes all types of white collar crime, including cases of political corruption. I was there in the mid 1970s, and there was no shortage of work for that unit.

I left the U.S. Attorneys Office in 1980 to join Saiber Schlesinger Satz & Goldstein. At that time, the firm included six attorneys. We now have 54.

Editor: Can you describe your practice?

Maderer: As a member of a mid-sized firm, I have practiced in a variety of substantive areas of litigation. Most of my practice now centers in the area of employment litigation. I usually defend companies or individuals against allegations of unlawful termination, discrimination, hostile working conditions and other types of cases. I also handle a number of complex business disputes, such as business fraud, and professional liability cases, such as accountant and attorney malpractice. I also practice in the area of white collar criminal defense work. I am usually aligned on the defense side.



William F. Maderer

Editor: Do you work with in-house counsel in a counseling capacity?

Maderer: While I represent most of my clients in litigation, I do counsel some clients, particularly on employment-related matters with respect to difficult employees or potential claims. Typically, clients call me in those situations to ask advice on how to best protect the company.

Editor: Technology has offered terrific promise in terms of access to data but at the same time presents a number of dangers. Can you give us some examples of the risks that arise either from the improper use of or insufficient planning for technology?

Maderer: Yes. We have identified three areas where we see significant risks for employers. The first of those three areas is that of employee abuse and misuse of e-mail. Second is employee misuse of the Internet, and third is cell phone liability. Another area of considerable concern, though of a different nature than creation of liability, is the increased vulnerability of employers with respect to electronic document retention policies.

Editor: How important is it for in-house counsel to plan for the use of technology to avoid or at least minimize some of these risks?

Maderer: It is very important. In particular, we believe that companies need to develop written policies and procedures that are clearly communicated to employees. Further, employers should make certain that the employees acknowledge that they understand such policies.

It is also important that companies follow up to make sure not only that the policies and procedures were correctly promulgated and that employees

acknowledged those policies, but also that compliance with the policies is properly monitored and the policies are enforced.

For example, companies should have Internet use and e-mail use policies. They need to be monitored and enforced so that employees are not misusing the Internet or e-mail in ways that hurt the company or hurt other employees. One increasingly prevalent form of e-mail misuse is the transmission of harassing or sexually provocative e-mails to another employee. If the employee who is affected complains that nothing is being done about it, the employer might be liable for harassment. We have seen that, instead of face-to-face harassment, e-mail is used as the method of communication.

Employees also use e-mail to communicate with third parties without realizing that an e-mail can constitute a legally binding contract. Both federal and state statutes might apply to create a binding obligation for a company where employees use e-mail to effectuate or enter into a contract. The company should take precautions by training its employees and inserting disclaimers at the bottom of e-mails that limit the company's liability in such circumstances.

Editor: Another issue for in-house counsel of great concern is that of records management. Can you give our readers any good advice in respect of records management in an electronic domain?

Maderer: While many companies have developed document retention policies for written materials, most companies have not taken the next step and determined how electronic data should be maintained, by whom and in what form. We know that e-mail can be saved in a variety of ways by both the sender and the recipient, and the latter can forward e-mail very easily. A company needs to have written policies or procedures to know how e-mail is created, where it is stored, how long it should be maintained and by whom.

We frequently see, in litigation, document requests that force companies to conduct very substantial, expensive searches of their e-mail systems in order to respond. Companies have been embarrassed by e-mails that they have uncovered in such searches because they had not developed effective policies in that regard.

Editor: Document discovery is a nightmare. What sort of preventative steps can companies take to try to eliminate some of the risk on the electronic side?

Maderer: The first and most important step is to prepare a written document retention policy that effectively covers electronic communications. Second, that policy has to be communicated to the employees, monitored and enforced in a way that employees are not criminally deleting e-mails that should be maintained pursuant to statutes, such as some provisions in the securities laws, including Sarbanes-Oxley, or some tax statutes. Most importantly, the company must communicate to the appropriate personnel the existence of any requests for documents or information when received in litigation or in certain other situations so that there is no intentional or inadvertent destruction. We saw in the Enron litigation where what was purported to be an innocent instruction by a lawyer to employees at Arthur Andersen became the basis for a criminal prosecution, the result of which was a guilty verdict for Arthur Andersen.

Editor: Do you think the courts generally are sensitive to the impacts that discovery requests for electronic documents have from both time and cost perspectives?

Maderer: I think they are. We have seen over the last year a number of opinions where the courts have allocated between the parties the burden and expense of significant electronic document production. The rationale for such an allocation is that otherwise the producing party is put to significant time and expense in searching for and producing electronic files that may or may not be of use in the case. Judges have tried to fashion appropriate allocations of costs so the requesting party does not put an undue burden on the producing party.

At the same time, I think courts are more and more cognizant of the time it takes to produce such material and that a party may have difficulty knowing whether it has made a complete production because data can be stored and communicated to so many people by the mere click of a mouse button. You have a huge domain within which to search. People create e-mail much more frequently than they would written memos. The other thing is that the confidential information going by e-mail can be disseminated to a much larger group of people than what might have been possible or likely in a hard copy.

Editor: You mentioned cell phone use. Do you have any caveats with respect to that technology?

Maderer: The use of cell phones by employees while driving is becoming a very difficult area for employers. Not only do employees use them in cars during the business day, but they are more and more often using them during "off" hours. Plaintiffs are trying to make employers responsible for misconduct by employees while using cell phones. We are seeing a growing number of lawsuits against employers because the purpose of the call was work-related, even though during evening hours. In one closely watched case in Virginia, an attorney caused a fatal auto crash driving in the evening while on the phone. Employers need to make clear that they do not sanction the use of cell phones while driving. Policies must be in easily understood language and communicated to their employees.

Editor: Is there anything you would like to add?

Maderer: The only thing I would add is that technology has allowed us to do things faster and more productively, but at the end of the day you must place a great deal of trust and confidence in your employees as to how they use technology. It is only proper that you also provide them guidance on how to use that technology properly and what limitations govern their use.