

**Avoiding Litigation Landmines**  
*A Survival Guide For Managers*

Preview



**FACILITATOR'S GUIDE**

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**THE EMPLOYMENT & LABOR LAW SERIES**

## TABLE OF CONTENTS

*This guide does not constitute legal advice. Organizations with concerns about employment litigation are urged to obtain independent legal advice. No one can guarantee the prevention of employment litigation. Better prepared organizations may have fewer employment-related claims made against them and will be better prepared to deal with them when they do occur.*

### **PART I: TO THE TRAINER**

Background .....	7
Course Description .....	9
Preparing to Deliver This Training .....	13

### **PART II: CONDUCTING THE SESSION**

Introduction .....	17
Agenda .....	19
Goals .....	19
Introducing the Video .....	21
Show Video / Debrief .....	21
Litigation Landmines: Review and Discussion .....	21-45
Recording Performance Problems and Misconduct	
Elements of Strong Written Records .....	47
Exercise / paragraph .....	49
Exercise / video .....	49
Procedures for Reporting Incidents to the Organization .....	51
Conclusion .....	53

### **APPENDIX**

Biographical Information .....	56-58
Litigation Landmines: Agenda .....	60
Sample Memo .....	61
Litigation Landmines Transparencies .....	62-71

## **PART I: TO THE FACILITATOR**

Preview









## **PART II: CONDUCTING THE SESSION**

Preview

































## RECORDING PERFORMANCE PROBLEMS AND MISCONDUCT (cont'd)

### EXERCISE

**Facilitator Directions:** *Read the following paragraph to participants in the room. (You can have them read along in their workbook.) Ask participants to write a short report recording what happened.*

### Scene

You have begun to wonder about the behavior of a woman who works in your department. On two different occasions, you were unable to locate her for about an hour and fifteen minutes in the afternoon. Today she was missing again — this time for about 45 minutes. When she reappeared in her office, you confronted her about her absence. She said she had been meeting with another employee. But you happened to know that this isn't true as that employee had called in sick to you early this morning.

You ask her if she is having any problems at home. She says, no, that everything is fine.

**Facilitator Directions:** *Ask volunteers to read their documentation. Listen to a few, asking if anything's missing in their reporting.*

### EXERCISE

**Facilitator Directions:** *Ask participants to write a report based on an incident in the video that they have just watched. After they are done writing, ask them to share what they have written. Note how thorough the reports are and what additional details might be included.*

*Using a flip chart or white board, draw a line down the middle of the page, dividing the page into two halves. At the top of one side, write "facts:" at the top of the other write "opinions." Ask a few more people to read their documentation. List their observations in one of the two columns. Note that both of these kinds of observations are relevant, but that it is important to be able to distinguish between them.*





Appendix

**APPENDIX**

Preview

## BIOGRAPHICAL INFORMATION

### **GARRY MATHIASON**

Mr. Mathiason is a senior partner (shareholder) in the national law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason. The firm is the largest in the United States specializing exclusively in representing management in employment and labor relations law. It has over 300 employment law attorneys and 26 offices throughout the country.

Mr. Mathiason is a graduate of the Stanford Law School and the Northwestern University School of Speech. He served as an editor on the *Stanford Law Review*. He commenced his career as a litigation attorney with the National Labor Relations Board.

During Mr. Mathiason's twenty-five years with the Littler firm, he has concentrated on representing employers in discrimination litigation, wrongful discharge, unfair labor practice and representation proceedings. This litigation includes claims of sexual harassment, age discrimination, breach of the covenant of good faith and fair dealing, privacy violations and disability discrimination. In the course of his practice, Mr. Mathiason routinely counsels employers on preventive employment law policies and trends. Through his law firm, he has authored / edited 16 books on employment law and written over 50 articles on how employers can reduce their legal liabilities.

In 1994, Mr. Mathiason was co-chair of the American Bar Association's Video Law Review program on "Conflict Resolution in the Workplace." He is the former chair of the Labor Law Division of the American Bar Association's Forum Committee on the Construction Industry and serves as a frequent lecturer and writer for the American Law Institute, Practising Law Institute, Federal Publication, and American Management Associations and several other state and national organizations.

Mr. Mathiason is the founder of the firm's prevention law products company. This organization markets "Winning Through Prevention," a game used by managers to learn key employment law lessons. Mr. Mathiason routinely conducts preventive employment law programs for Fortune 500 companies.

## BIOGRAPHICAL INFORMATION (cont'd)

### **WENDY L. TICE-WALLNER**

Wendy L. Tice-Wallner is a shareholder of Littler, Mendelson, Fastiff, Tichy & Mathiason, resident in the San Francisco office. Ms. Tice-Wallner's practice focuses primarily on equal employment opportunity law and wrongful termination litigation. She has advised or represented clients in various areas of employment law including wrongful termination, sexual harassment, discrimination, employee privacy and preventative measures such as drug and alcohol policies. Ms. Tice-Wallner has briefed and argued several cases before the California courts of appeal, including precedential cases interpreting the state constitutional right to privacy and the right of California employees to expanded remedies under the California Unemployment Insurance Code. She has received the highest available rating by Martindale-Hubbell for legal ability and professional ethics and conduct.

Ms. Tice-Wallner has spoken extensively on wrongful termination, equal employment opportunity law and the law of individual rights in the workplace to professional associations, trade groups and attorney organizations. She has been a contributing editor to publications on age discrimination for the Practising Law Institute and has written on numerous workplace legal issues, including AIDS, alcohol and drugs, privacy and preventing and defending of wrongful termination and employment discrimination suits in state and federal courts. Ms. Tice-Wallner has been recognized by the National Law Journal as one of the nation's "Best Litigators in Employment Law."

Ms. Tice-Wallner has served as appellate counsel in employment discrimination cases before the United States Courts of Appeal for the Second, Third and Ninth Circuits and has litigated before courts in Alaska, Washington, Oregon, Nevada, New York and Utah.

After foreign study at the London School of Economics and Political Science, Ms. Tice-Wallner received her undergraduate B.A. degree from Tulane University in New Orleans, Louisiana, and her law degree, *magna cum laude*, from the Villanova University School of Law in Pennsylvania. She served on the editorial board of the Villanova Law Review and is enrolled in the Phi Beta Kappa Honor Society. Ms. Tice-Wallner has been a member of the California Bar since 1979 and is an active member of the Labor and Employment Law and Litigation Sections of the American Bar Association.

## BIOGRAPHICAL INFORMATION (cont'd)

### **JAFFE D. DICKERSON**

Jaffe D. Dickerson is the managing shareholder (partner) of the Los Angeles office of Littler, Mendelson, Fastiff, Tichy & Mathiason. Mr. Dickerson joined the firm in 1988 after 11 successful years as University Counsel for the California State University (CSU). A graduate of the College of the Holy Cross in Worcester, Massachusetts, and Boston College Law School, Mr. Dickerson is a member of the State Bar of California, including its labor law and public law sections, the Beverly Hills Bar Association, the National Bar Association, the American Bar Association and the National Association of College and University Attorneys. Mr. Dickerson served as member, Chair and Advisor to the Public Law section from 1989 to 1993. Mr. Dickerson currently serves on the California State Bar Labor and Employment Law Executive Committee, and recently as Secretary of the Labor Law Section of the National Bar Association.

A frequent author and lecturer, Mr. Dickerson has made numerous presentations on specialized areas of labor, employment and education law, including collective bargaining, workplace violence prevention, alternative dispute resolution, drugs in the workplace, employee personnel evaluation, sexual harassment, employment discrimination, wrongful termination and the Americans with Disabilities Act of 1990. Mr. Dickerson regularly represents public education employers and other public agencies before the California State Personnel Board, the Office of Administrative Hearings, the Public Employment Relations Board and the California courts. He currently serves as general counsel for three educational entities.

Mr. Dickerson's community activities have included *pro bono* services for the Constitutional Rights Foundation and its "Lawyer in the Classroom" program, the Corporate Board of United Way of Greater Los Angeles, and the California State Bar. Mr. Dickerson also teaches law-related courses for UCLA Extension and California State, Los Angeles Continuing Education.

## BIOGRAPHICAL INFORMATION (cont'd)

### **NANCY E. PRITIKIN**

Nancy E. Pritikin is a shareholder of Littler, Mendelson, Fastiff, Tichy & Mathiason, resident in the San Francisco office. Ms. Pritikin has extensive courtroom experience and specializes in employment discrimination, wrongful termination and sexual harassment matters. Her litigation experience includes high-profile cases and dealing with the media. Ms. Pritikin has represented employers in both state and federal courts in lawsuits involving issues such as age discrimination, sexual harassment, sex discrimination, investigation of employee conduct and wrongful termination. Her clients include financial institutions, airlines, real estate brokerage firms, food service organization and construction material companies.

Ms. Pritikin has counseled employers in aspects of the employment relationship, including avoidance of litigation, disability issues, drug testing, background investigations, sexual harassment investigations, reductions in force and the development of personnel policies and procedures.

Ms. Pritikin received her law degree with honors from the University of Florida College of Law in 1978. She is admitted to practice in California, Florida, and Georgia. Ms. Pritikin's background includes work as an attorney for the National Labor Relations Board (Region 10) and the Federal Labor Relations Authority. Prior to joining Littler Mendelson, she was a partner in the law firm of Lillick & Charles in San Francisco, specializing in labor and employment law.

## LITIGATION LANDMINES AGENDA

- Setting the Stage
- Show Video
- Debrief Viewer Reaction
- Review Litigation Landmines
- Break
- Recording Performance Problems and Misconduct
- Reporting Incidents to the Organization
- Close

## SAMPLE MEMO

“On three prior occasions, I verbally brought to your attention your failure to complete a work assignment. This occurred on Monday, January 14, and involved the XYZ account; February 18, involving the Sally Larson project; and again on February 24, concerning the McClain order. In each instance, you had miscalculated the number of units necessary for manufacturing and failed to include the proper account codes. Following each of these situations, we discussed the problem and you agreed that corrective action would be taken. Today, a fourth incident occurred on the Comdex account. You failed to include shipping costs or the proper coding. Accordingly, I have no choice but to provide you with this written warning that such conduct is not acceptable, and unless it is corrected immediately, it could result in disciplinary action up to and including termination.”

- PERFORMANCE DOCUMENTATION**
- Do It Regularly
  - Be Objective
  - Give Examples
  - Review with Employee
- Landmine #1: Failure to Document*

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# LITIGATION LANDMINES

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## GOALS

1. To make every organization aware of the biggest mistakes that increase the risk of employment related claims.
2. To increase the ability of managers, top leaders, and supervisors, to recognize the sometimes subtle parts of their jobs that can result in costly and embarrassing claims.
3. To show how each potential mistake is an opportunity to implement a positive management practice.
4. To show how to record — and in some cases how not to record— incidents of misconduct or poor performance.
5. To understand how human resources can be an ally in solving certain management problems.

*Landmine #3: Failure to Keep Evidence*

**EVIDENCE**

- Recognize It as Evidence
- Make a Copy
- Share with Employee
- Use as a Teaching Tool

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# LITIGATION LANDMINES

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# LITIGATION LANDMINES

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*Landmine #2: Failure to Train*

**EMPLOYEE TRAINING**

- Provide Opportunities
- Confirm Training Occurred
- Evaluate Training
- Review with Employee

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# LITIGATION LANDMINES

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## *Landmine #4: Grade Inflation*

### EMPLOYEE EVALUATIONS

- Be Timely
- Be Honest
- Consider Full Evaluation Cycle
- Review with Employee

## *Landmine #5: Failure to Consult Human Resources*

### HUMAN RESOURCES

- View as an Ally
- Consult Early On
- Use Their Expertise

*Landmine #7: Inconsistent Treatment*

**CONSISTENT TREATMENT**

- Be Objective
- Treat Like Situations Alike
- Justify Exceptions

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# LITIGATION LANDMINES

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# LITIGATION LANDMINES

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*Landmine #6: Inappropriate Electronic-mail*

**ELECTRONIC MESSAGES**

- Use as Though Public
- Assume It Can Be Retrieved
- Consider How You Say It
- View as Evidence

*Landmine #9: Uncontrolled Statements of Reference*

**ORAL & WRITTEN REFERENCES**

- Follow Company Policy
- You Speak for the Company
- Assume Remarks Are Public
- Consult with Human Resources

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# LITIGATION LANDMINES

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# LITIGATION LANDMINES

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*Landmine #8: Inappropriate Talk About Ex-employees*

**WHEN AN EMPLOYEE LEAVES**

- Keep Situation Confidential
- Even with Peers
- Respect Privacy
- Refer Questions to Human Resources