



The Importance of a Proactive Document Management Program

by **Kenneth Ross**

Documents are the lifeblood of any corporation. While employees come and go and change jobs within an organization, the design plans, engineering drawings, production procedures, safety memoranda, and marketing strategies they have created are an historical record of the activities of that particular entity. Documents can merely record this history or they can significantly help or hurt the manufacturer, especially in the event of product liability litigation.

Plaintiffs' attorneys try, through the discovery process, to identify and obtain harmful documents that they can use to achieve large settlements or verdicts against manufacturers. Some manufacturers are harmed because they failed to create documents showing their concern for safety. Perhaps even more frustrating, documents reflecting safety activities were created but then destroyed before the litigation arose. Yet, despite what some litigators think, documents can sometimes even be very helpful in defending product liability cases.

This article will discuss the importance of documents in doing business. It will describe court decisions where the existence of or lack of drawings, plans, and other records has hurt manufacturers, as well as cases where documents have helped manufacturers in their defense. Then, the article will discuss document management systems, legal requirements to create documents, and ways in which employees can affirmatively create helpful documents—and not create unnecessarily harmful documents.

Importance of Documents

During the design, manufacturing, and marketing phases, a manufacturer's goal is to make a product that reasonably balances the risk of injury from use of the product against the product's utility, durability, price, and other attributes. If accidents do occur and product liability claims and litigation result, the manufacturer hopefully has evidence that it did undertake sufficient measures to make a product that will be considered reasonably safe. Thus, the manufacturer should have



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retained a record that evidences its interest in and procedures for evaluating that the product is reasonably safe.

Since the conduct of the manufacturer may be admissible and used by either the plaintiff or the defendant in proving its case, documents that describe and memorialize the steps taken by the manufacturer are necessary to present an effective defense and to prove the manufacturer is careful and prudent. On the other hand, many lawyers feel that documents that describe design, production, and marketing processes only hurt manufacturers and never help their case. Therefore, they do not encourage manufacturers to create or retain documents, especially those that deal with safety. Invariably, in the mind of such lawyers, these documents will come back to haunt the manufacturer.

The potential for creating a record that can hurt the manufacturer is especially important when engineers challenge and question safety during the product's development phase. This dilemma was described as follows:

The existence of a questioning memo from a designer concerned with safety aspects of a new product, combined with evidence that the designer's point of view was adequately considered, is probably better in most situations than a "blank record" suggesting that safety-related areas were never considered at all, or that the records have been sanitized to prevent embarrassment in court.

Kolb & Ross, *Products Safety and Liability: A Desk Reference*, at 91 (1980).

Each manufacturer must decide how to balance the risk of retaining documents that hopefully will be helpful but could, in the wrong hands, be misconstrued, taken out of context, and used against the manufacturer in a product liability lawsuit. Perhaps the following discussion can shed some light

on how to create helpful—and not harmful—documents.

Documents that Hurt

Instances where manufacturers have suffered substantial losses because of "bad documents" are well known to all lawyers. Not only can such documents result in significant liability, they can also lead to widespread negative publicity and notoriety, and may be used in later claims and lawsuits against the manufacturer.

Until recently, the most infamous document in product liability history was the document created by Ford Motor Company in connection with the development of the Ford Pinto. This document compared the cost of potentially improving the safety of the product by complying with a proposed federal motor vehicle safety standard (which would increase the product price to consumers) against the projected benefits to those same consumers from lives saved and injuries prevented based on government values. The memorandum concluded that the cost was \$137 million, while the "benefit"—the cost the government would have projected for the subsequent deaths, injuries, and property damage—was only \$49.5 million.

In the subsequent litigation, despite popular belief, this memorandum was not allowed into evidence because it was unduly prejudicial. However, the jury presumably heard enough evidence of cost-safety trade-offs and concern about the fuel system's integrity to conclude that Ford should have made the product safer. As a result, it awarded the plaintiff substantial damages, including \$125 million in punitives. The trial court reduced the punitive award to \$3.5 million and the California Court of Appeal upheld this verdict. *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981).

More importantly, in the court of public opinion, Ford was criticized by, among others, Mike Wallace on the *60 Minutes* television show in 1978. Wallace and others used the excluded memorandum as justification for the large punitive damages award because it was presumably proof of Ford's callous attitude toward the safety of consumers.

While there are many good reasons why these documents were created and why Ford felt they were appropriate, the result in

Grimshaw shows the difficulty in making a trade-off between cost and safety, especially when the manufacturer assumes that claims and litigation will occur. A leading scholar of product liability law, Professor David G. Owen, recognized this dilemma and said:

Manufacturers necessarily create massive documentation of their design and production processes, sometimes amounting to millions of pages of notes, memoranda, and correspondence over the life of a product. Especially during the initial design of the product, but also as information returns on the product's performance in the field, reports of many instances of one problem or another will be documented, acted upon, and filed away. In fact, the more a manufacturer is truly concerned about its product's safety, the more it will encourage self-criticism and "negative" analyses of the product within the company.

Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U.Chi.L.Rev. 1, 17 (1982). Professor Owen went on to say, at page 24-25, that:

Cost-benefit analysis is fundamental to the design engineer's trade. . . . Many hundreds of such choices are made by design engineers in the production of a single complex product, and each such decision involves a range of trade-offs between cost, weight, appearance, performance capabilities. . . . and safety in one type of accident versus another. . . . Although much of this decision making involves the application of proven scientific principles, much is art, and some by its nature can be little more than trial and error.

Despite the wisdom of Professor Owen's observations, juries still get mad at corporations who consider the value of lives. On July 9, 1999, a jury in Los Angeles awarded \$4.9 billion (including \$4.8 billion in punitive damages) against General Motors to six people who were badly burned when the gas tank of their 1979 Chevrolet Malibu exploded after the car was rear-ended by another vehicle. *Anderson v. General Motors Corp.*, No. BC-116926 (Cal.Super.Ct., Los Angeles County) (on August 26, the trial judge reduced the punitive portion of the award to \$1.09 billion, but let stand the \$107

million compensatory award; General Motors has announced that it will appeal the punitive award).

According to the newspaper accounts of *Anderson* (see N.Y. Times, July 12, 1999), a 1973 "value analysis" written by an Oldsmobile engineer was central to the case. This memorandum calculated that fuel tank fires after accidents were costing the company \$2.40 per vehicle. Plaintiffs used this document to argue that General Motors did not

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design safer cars because it would have cost the company more than it spent on settlements with accident victims.

General Motors responded that the "value analysis" memo was the work of a junior engineer and was never used in design. In addition, the defense attorney said that there was no evidence that any engineer who worked on this vehicle or any other vehicle at GM had used the information in the memo or had used that approach in making design decisions. The *Anderson* case illustrates clearly how an arguably innocuous and irrelevant memo from many years ago can be used to support a huge damages award.

One troubling aspect of a jury's reaction to such memos is that product liability law and safety engineering principles *do* allow manufacturers to consider cost when determining how safe to make a product. See Restatement (Third) of Torts: Products Liability, §2, comment f. However, what juries apparently don't like is that the documents do more than consider cost and safety and instead associate product cost with the value of human life and the value of settling cases for presumed future incidents.

In *Bowden v. Spalding & Evenflo Cos.*, 591 So.2d 936 (Fla.App. 1991) (table), a Florida jury awarded \$7.54 million to the parents of a two-year-old who strangled to death after becoming entangled in a baby exerciser. Accord-

ing to an article in *Inside Litigation* (March 1991), the plaintiffs had obtained a letter from Sears, Roebuck to the defendants, warning that a customer had complained to Sears about a child becoming entangled in the toy's straps. Defendant conceded that they never tested the product for strangulation risk. Documents were also discovered indicating that Sears' engineers had recommended various changes in the design of the seat. Some changes were made and others were not because they were too costly.

The lesson to be drawn from cases like *Grimshaw*, *Anderson*, and *Bowden* is *not* that manufacturers should avoid creating or retaining documents concerning their design and manufacturing processes and procedures. Rather, the lesson is that employees need to be trained about what to write and how to write defensively and follow up on documents where safety concerns are raised. This should be done, not for litigation purposes, but to record clearly and accurately the reasons for design and manufacturing decisions.

Lack of Documents Hurts

Next, let's examine a few cases where manufacturers have lost because of the lack of documents. In 1985, the Texas Supreme Court held that a shotgun importer's inactivity in the face of evidence that should have caused it to make greater efforts to inspect its products prior to sale and to issue warnings with each sale supported a jury's award of \$1.5 million in punitive damages.

In *International Armament Corp. v. King*, 674 S.W.2d 413 (Tex.App. 1984), *aff'd*, 686 S.W.2d 595 (Tex. 1985), the plaintiff's shotgun fired while the safety was engaged and without any pressure on the trigger, causing him injury. Although the safety design was a common one used for over 100 years, the shotgun as designed could fire with the safety engaged, if the other internal parts of the shotgun did not fit together properly.

The importer's director of engineering testified at trial that he had inspected the first two shotguns received from the foreign manufacturer and noted that the shotgun was not assembled with a high degree of care and that the internal parts were not meticulously finished. There were serious discrepancies in the sizes of moving parts and departures from sizing standards.

The engineer recorded his findings in an internal memorandum and noted that it would be more desirable if the gun's action were "softer" and more precise. Apparently, the importer's records did not contain any response to this memo. This violates one of the primary rules in defensive writing which is to "close the loop" on memos raising safety issues. [These rules will be discussed below.]

The importer had no systematic quality control procedure for the shotguns it imported. Of 550 shotguns it received, only two of each 25 were internally inspected for safety and mechanical defects. The importer did not prepare written reports for those shotguns inspected, notwithstanding the fact that each such gun revealed various internal defects.

Harmful documents, such as a printed brochure describing the shotguns as meticulously assembled and with all parts completely machined and highly polished, were admitted into evidence. These statements were false, the importer knew it, and yet it continued to distribute the brochure. This evidence was relevant in determining the importer's complete indifference to the welfare and safety of the people who used the shotgun.

The next case shows that the manufacturer that does not adequately document its design process courts danger. If it performs an adequate safety analysis in its design process, it should also create proper records so it can defend the process later in court. In *Rogers v. Ingersoll-Rand Co.*, 971 F.Supp. 4 (D.D.C. 1997), *aff'd*, 144 F.3d 841 (D.C.Cir. 1998), the trial court issued an opinion that, in part, criticized the design process of the manufacturer and made some general statements that should be considered by all manufacturers as they evaluate their own processes and documentation procedures.

In *Rogers*, the defendant's milling machine seriously and permanently injured the plaintiff. The milling machine operator, before putting the machine in reverse, looked back and saw the plaintiff to the rear and side of the machine. After going in reverse, he could not see the plaintiff because she was in one of the milling machine's blind spots and had been partially pulled under the machine track and severely injured. The jury returned a verdict against the manufacturer

for \$10.2 million in compensatory damages and \$6.5 million in punitive damages.

In the trial court's subsequent written opinion denying defendant's post-trial motions, the court discussed the most hotly contested issue—punitive damages. 971 F.Supp. at 12-14. The question was whether the design defects identified by the plaintiff's expert were the product of sound design judgment or whether the defendant's design process was evidence of a wanton disregard for safety.

The trial court used the risk-utility balancing test that considers the risks, costs, and benefits of the product in question and any alternative design, and compares the magnitude of the danger from the product to the cost of avoiding the danger. Plaintiff argued that the manufacturer should have added safety features that would have minimized the risks of this accident occurring. Ingersoll-Rand's engineering services manager testified that they decided not to use these alternative safety features on this model but did no testing since it would be a "complete waste of time." *Id.* at 12.

In discussing this testimony, the trial court said that the company cannot prove that it did not willfully or wantonly disregard human safety by "...doing nothing, but considering doing something." The court also said that "[t]hinking about, considering, or pondering doing something but then doing nothing is still *doing nothing*." *Id.* at 13.

In reality, the engineers at Ingersoll-Rand were very experienced in designing safe products and could quickly, and without testing, analyze these various alternatives and decide whether they might be appropriate or inappropriate for use on a particular product. In its appellate brief, Ingersoll-Rand said that its engineers rejected the alternative devices on this product after consulting with a human factors expert and pointed out that the devices would actually increase hazards. However, there is no discussion in the opinion of why no tests were done and why no documentation existed on some of these crucial points.

One message that can be gleaned from *Rogers v. Ingersoll-Rand* is that the manufacturer needs to adequately and carefully document why the product turned out the way it did. Appropriate testing needs to be

done and documentation needs to be created that describe the tests and results. Doing the tests in "your head" is not enough, especially when the design is challenged many years later. Even if the engineer can remember doing safety testing, the jury may not believe that the manufacturer performed the tests since no documents were created or kept. In addition, in many cases, there is no one left who remembers the reasoning. Assurances that whatever they did must have been correct may not sway the jury. See Kolb & Ross, *Products Safety and Liability: A Desk Reference*, *supra*, at 91.

One of the most significant defenses to a product liability claim is that there were no prior similar accidents involving the product. However, a lack of good documentation to prove the lack of similar accidents can be devastating in efforts to successfully have this evidence admitted. Let's examine a couple of recent cases that describe the correct and incorrect ways in which such documentation can be created and kept.

A majority of jurisdictions require a substantial showing on the part of a manufacturer to admit evidence of no prior accidents. Two criteria are generally used to determine if the evidence will be allowed. First, there must be proof that the lack of accidents pertained to products that are substantially identical to the one at issue and used in sufficiently similar settings and circumstances to those surrounding the product at the time of the accident. Second, the defendant must demonstrate that a communications system was in place whereby accidents could or would be reported or recorded.

Lau v. Allied Wholesale, Inc., 922 P.2d 1041 (Haw.App. 1996), involved a machine known as a "parts washer." A defense witness was allowed to testify that 14,000 parts washers had been shipped to one company, and 13,000 to another company—without any report of an accident. The trial court entered judgment for the manufacturer, and the plaintiff appealed. In reversing, the Hawaii appellate court held that the defendant failed to establish that it had implemented an accident reporting system whereby accidents would likely have been reported. Therefore, the evidence of no prior accidents was inadmissible and a new trial was ordered.

A similar result was reached in *Klonow-*

ski v. International Armament Corp., 17 F.3d 992 (7th Cir. 1994), in which a shotgun misfired when dropped even though the safety mechanism had been engaged. At trial, the importer/distributor attempted to put into evidence that since 1980, it had imported 50,000 shotguns of this type and had never received a report of a similar accident. The trial court refused to admit the evidence because the defendant failed to show that the shotguns were substantially identical to the shotgun involved in the accident. The manufacturer maintained very poor records of their design as well as their manufacturing process, and the defendant importer therefore could not provide the requisite proof to have the documents admitted.

The lack of documents also hurt a firearms manufacturer in *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988). Remington offered evidence that it had responded to customer complaints on the rifle that misfired and had formed a products safety committee to evaluate the complaints. Despite this evidence, the jury awarded \$400,000 in punitive damages and the manufacturer appealed.

The Eighth Circuit discussed the merit of the steps taken by the manufacturer. The response to customer complaints consisted of a form letter that basically blamed the customer. Also, the appellate court found it possible for the jury to view formation of a product safety committee and other steps taken by Remington as no more than “gearing up” for litigation. Overall, the court did not believe that the safety steps taken by Remington were significant enough to prevent a finding that it had consciously disregarded safety. Again, the manufacturer lacked good documentation of its efforts to make a reasonably safe product.

Documents that have Helped

Unlike the inadequate accident reporting program in *Lau* and *Klonowski*, Skil Corporation, the manufacturer of a disc sander, had a comprehensive post-sale safety program to help defend itself in litigation. In *Jimenez v. Sears, Roebuck & Co.*, 180 Ariz. 432, 885 P.2d 120 (Ariz.App. 1994), the trial court did not allow evidence of the lack of similar accidents and a jury returned a verdict in favor of the plaintiff. Defendant ap-

pealed and the Arizona Court of Appeals reversed the lower court decision and remanded the case for a new trial.

The appellate court held that Skil had easily satisfied the Arizona requirement that an accident reporting system be in place that would likely lead to knowledge of accidents occurring during use of a product. It discussed the numerous steps that Skil took to ensure that it had knowledge of any accidents involving its products. Without such documentation, the court would not have admitted this evidence.

While Skil had an extensive post-sale accident reporting system, a ladder manufacturer had a fairly low-tech system—which also led to a defense verdict. In *Spino v. John S. Tilley Ladder Co.*, 548 Pa. 286, 696 A.2d 1169 (1997), Tilley’s president was allowed to testify that over 100,000 Type 3 ladders had been put into the marketplace over the last 100 years, and there had been no prior claims similar to that alleged by the plaintiff. The trial court allowed this testimony on the basis of a “problems log” maintained by Tilley that showed no claims against the company for similar failures of a Type 3 ladder. The trial court ruled for the defendants, and this verdict was affirmed on appeal to the Supreme Court of Pennsylvania.

Another example of a manufacturer that successfully defended itself because of the existence of documents occurred in *Turney v. Ford Motor Co.*, 94 Ill.App.3d 678, 418 N.E.2d 1079 (1981). The plaintiff alleged that Ford’s tractor was defective because a “Rollover Protection System” (ROPS) was not incorporated into the tractor’s design. In its defense, Ford relied on its documented design process to argue against the imposition of punitive damages. It introduced evidence that its tractor division safety committee compromised with Ford’s marketing department so that Ford sold the ROPS at a loss in order to promote its use in appropriate situations.

The Illinois appellate court affirmed the defense verdict in *Turney*, specifically holding that Ford did not recklessly disregard the safety of others in designing and manufacturing the tractor. The court believed that evidence demonstrating Ford’s good faith attempt to create a safe product and the fact that Ford had sold the optional ROPS at a

loss would not allow an award of punitive damages. Therefore, Ford’s documentation of its safety analysis and processes led to a positive result.

Even when a manufacturer has conducted a comprehensive safety program, a plaintiff may argue that the manufacturer’s failure to require even more safety procedures justifies an award of punitive damages. Thankfully, a number of courts have resisted plaintiff’s attempts to second-guess the manufacturer’s efforts.

In *Lewis v. Envirotech Corp.*, 674 S.W.2d 105 (Mo.App. 1984), the plaintiff sustained injuries to his hand when it became caught in the belts and pulleys of a pump that he operated. The machinery turned abruptly due to a defective check valve manufactured and sold by Envirotech. The plaintiff based his claim for punitive damages on the fact that Envirotech had never tested the valves under simulated operating conditions at a hydraulic testing facility.

Envirotech had a comprehensive safety program in place. The manufacturer’s representatives were responsible to customers for service and installation; they learned of specific problems that customers experienced. Each valve passed several factory tests and specifications before distribution. The trial court refused to submit the issue of punitive damages to the jury, and the appellate court affirmed, finding that the evidence of Envirotech’s comprehensive safety program refuted the plaintiff’s charge that it consciously disregarded safety.

In *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603 (1983), the plaintiff sought punitive damages on the grounds that Michelin’s radial tire did not carry a warning on the tire itself about mixing radial with conventional tires. The plaintiff sustained serious injuries, including the loss of a leg, when she lost control of her automobile, allegedly because both Michelin radial tires and non-radial tires were mounted on her car.

There was evidence that Michelin had been aware of the danger of mixing tires for decades, and that it had undertaken a campaign against this practice. Its efforts included placing warnings and recommendations in literature distributed to consumers and to individual dealers who carried and mounted Michelin brand tires.

The trial court permitted the plaintiff to submit her case to the jury on strict liability for Michelin's failure to adequately warn the consumer about the perils of mixing radial tires with non-radial tires. However, the court struck plaintiff's claim for punitive damages, and the appellate court affirmed, citing Michelin's warning efforts. It explained that, although the warnings may have been inadequate to fully alert consumers to the hazards of mixing tires, Michelin's efforts to promote consumer safety clearly rebutted any allegation that Michelin willfully, wantonly, or maliciously disregarded the plaintiff's safety.

Document Management Programs

When a manufacturer is sued because its product was allegedly unsafe, the presence of a document that details the manufacturer's safety process can be a double-edged sword. It does subject the manufacturer to second-guessing by the plaintiff's expert. On the other hand, it can go a long way towards preventing an award of punitive damages—and perhaps avoiding liability altogether. On balance, the advantages of having a document management system in place probably outweigh the risks the manufacturer may encounter in litigation as the plaintiff nit-picks the program.

Here are some guidelines the manufacturer may want to follow in establishing an effective document management system. Document management includes the development of guidelines and procedures for determining what documents to create, what documents not to create, what words to use and not to use, how long to keep documents, when to destroy and how to destroy them, and in what form documents should be retained.

The document management programs of many manufacturers simply address when to discard documents. Such a program is inadequate; there are many other elements of a management program that, if not handled properly, can lead to liability. Any manufacturer concerned about the use of documents in future litigation should implement a comprehensive document management program as part of overall product liability prevention. For an excellent article on this subject, see "You can never find them when

you need them: Record Retention Techniques" by Emroy L. Watson of Yamaha Motor Corporation, contained in the coursebook for DRI's Product Liability seminar in 1996 (available from DRI).

It is helpful for each manufacturing entity within a corporation to establish a document management policy, which may include guidelines. This policy should confirm that employees are encouraged to bring to management's attention, orally and/or in writ-

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don't like is that the documents do more than consider cost and safety and instead associate product cost with the value of human life and the value of settling cases for presumed future incidents.

ing, all good and bad information about the manufacturing process of which they are aware. In other words, within the company, employees should be encouraged not to hide potentially damaging information, and instead bring it to the attention of supervisors.

The policy should also contain guidance on the kinds of documents to be created and guidelines on how they are to be written. It should contain schedules detailing retention periods for documents. The policy should be written in clear, unambiguous language so that all affected employees will be able to comply.

In addition to writing and distributing the policy internally, a periodic audit of compliance with the policy should be performed, so it can be shown that management is serious about compliance and so that problem areas can be identified and corrected. In some companies, activities that don't help get products out the door

may be slighted if management does not specifically audit to confirm compliance.

Another essential part of managing the document program is educating employees about the policy and how to comply. A manufacturer may want to consider videotaping its internal educational sessions so that the tape may be shown to subsequently hired employees. The tape may also be shown later to a jury to prove that the company was interested in learning about all good and bad information concerning its products, and that its documents reflect the concern it has for selling safe products.

Document Creation and Retention Requirements

There are well over 1,000 federal legal requirements for the creation and retention of documents. Several federal agencies, such as the Consumer Product Safety Commission, issue such regulations. For example, the CPSC requires manufacturers or importers of baby cribs to maintain records of sale, distribution, and the results of all inspections or tests conducted. These records must be retained for three years after production or importation of each lot of products. 16 C.F.R. §1508.10. The CPSC also requires manufacturers and importers of walk-behind rotary lawnmowers to maintain records showing that their design complies with the CPSC safety standard. These records must describe the tests performed and the test results, and must be retained for three years from the date of certification of each mower or each production lot. 16 C.F.R. §1205.34.

Another federal agency, the Food & Drug Administration, requires manufacturers and distributors to maintain a current written contingency plan for use in initiating and implementing a recall. This plan must be retained for a period of time that exceeds the shelf life and expected use of the product. 21 C.F.R. §7.59. Manufacturers of medical devices must maintain a master record of all finished devices and "critical" devices, including files containing written and oral complaints. These documents must be retained for the expected life of the device, but not less than two years after the date of release of the product for commercial distribution. 21 C.F.R. §820.180.

Many other federal document retention requirements pertain to product safety and quality assurance, and other areas. These requirements apply to all companies doing business in the United States. There do not appear to be any exceptions for foreign companies even if their manufacturing and engineering facilities are located in a foreign country.

Thus, any manufacturer doing business in the United States must be acquainted with the safety and quality-related document creation and retention requirements imposed by federal statutes and regulations. In addition, individual states where the manufacturer distributes its products may have their own additional requirements.

Aside from federal and state government requirements, voluntary standards or certifications (e.g., ISO 9000) must also be considered. Documentary evidence of compliance with such standards may strengthen the defense's case in any product liability lawsuit. Such evidence can be used to confirm that the manufacturer took steps to ensure that its products were reasonably safe and complied with all applicable laws and regulations. In other words, both the legally required and voluntary documents reflect that the manufacturer considered safety during the design and creation of the product.

Creating Defensive Documents

Documents relevant to product safety and liability generally fall into seven categories:

- 1) product design and development, including labels and instructions;
- 2) manufacturing and quality control;
- 3) merchandising and sales;
- 4) service and installation;
- 5) complaints and mishaps;
- 6) personnel; and
- 7) management and coordination.

Documents detailing a manufacturer's activities in the above categories will present a comprehensive picture or history of the entire manufacturing process, how and why the product was designed, and what decisions were made during the production process.

Each of these documents can be prepared in such a way that they do not increase potential liability in the event of claims or lawsuits. This method of preparation is usually called "defensive writing."

Writing defensively does not mean that the manufacturer is trying to hide bad information or evidence. On the contrary, a company's policy and educational programs must stress to employees that they should present all information, particularly information that calls into question the safety or quality of products, to the appropriate supervisor. However, if the content of some documents challenges or discusses safety, they must be written in a way so as not to

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create a misleading impression or written in a way that they can be quoted out of context and used against the manufacturer in litigation.

The documents must portray correctly and accurately the manufacturer's rationale for designing and making its product. A record of this rationale is necessary for designing future similar products and for good historical corporate recordkeeping.

Those employees who draft the manuals, plans, specifications, and other documents—the "writers"—should be encouraged to avoid legal terms that describe theories that may be presented to a jury in a product liability lawsuit. These terms include defect, negligence, hazardous, unsafe, misrepresentation, and reckless. Use of these and related legal terms by internal writers may lead a jury to decide that the company has admitted that its product is defective or hazardous or in some other way legally deficient. While the writer will have a chance to tell the jury why the word "defect" did not really mean defect in a product safety sense, the presence of such a loaded word in, for instance, a report on the development of a new widget, gives the plaintiff a "leg up" in dealing with the jury. Therefore, use of legal

terminology in documents that could conceivably fall into a future plaintiff's hands is dangerous. They will help to convince the plaintiff and plaintiff's attorney that they have a better case than they may otherwise have—and increase a case's settlement value.

Phrases and words in documents that can cause problems for the defense include overstated expressions, characterizations, or opinions. For example, if the writer says that there was a "terrible crack" in the manufacturer's product, the jury could envision a very large crack. In fact, the crack may be very small and the use of the term "terrible" is unnecessary and misleading.

Many times, writers overstate a product's shortcomings in order to get people's attention. For example, phrases such as "occurs often" or "occurs frequently" should not be used when the engineer has only noticed two or three occurrences. The word "catastrophic" should not be used in connection with a product failure; this may be a commonly understood term among engineers but may be too strong when heard by a jury.

Another term to avoid is "crisis." Writers trying to get the attention of their supervisors may want to call every problem a crisis. This is an unnecessary overstatement; it suggests that the company is having huge problems all the time. Similar terms are "smoking gun," "ticking time bomb," and "sitting on a powder keg." They are inflammatory and unnecessary.

In addition to being careful about choice of words and phraseology, companies must organize their flow of documents to ensure that bad reports or criticisms written by lower-level employees are read, analyzed, and responded to. This is called "closing the loop." Suppose a supervisor, such as an engineering manager, receives a memo from one of his employees that expresses concerns about the safety or quality of the product. The supervisor must analyze the problem and respond in writing to the employee. Then, the original letter and the response must be attached so that if these documents are obtained later in litigation, the original criticism and the response will be considered together. Otherwise, the criticism—without the response—might be discovered, giving the plaintiff the opportunity to portray the manufacturer as willfully disre-

garding safety by not considering or responding to concerns or criticism.

In sum, writers of company documents must observe the following precautions:

- Assume that what you write will exist forever.
- Assume that your document will be read on national television.
- Avoid unnecessary documents; provide copies to the minimum number of people necessary.
- Avoid documents that blame someone else in the company or describe internal disputes.
- Always close the loop.
- Do not discuss liability issues except when requested by the company's lawyer.
- Do not speculate, exaggerate, or editorialize.
- Do not make unsupported statements, conclusions, or opinions.
- Use data or facts to support conclusions.
- Do not be funny or humorous.
- Avoid drawing "funny pictures" or making handwritten notes in the margins.
- Be careful when discussing product safety issues in financial terms.
- Do not write documents outside your area of expertise or responsibility.
- Avoid using words or expressions (including legal terminology) that are ambiguous or could be misinterpreted (perhaps intentionally) by the plaintiff.

The Danger of Not Retaining Documents

Documents that describe a manufacturer's concern for and incorporation of safety into the design of its products are of little litigation value if they are not retained long enough to be introduced in a future lawsuit. In fact, the lack of documents might be used against the manufacturer by raising a presumption that the documents were incriminating and that is why they were destroyed.

Suppose, for instance, that during the design phase the engineers considered three alternative designs, each with differing levels of cost and safety. In selecting the final design, the company recognized that one of the other two may have been a reasonable alternative design, but it was nevertheless considered and rejected on other grounds.

When the final design is selected, the

manufacturer must document and justify why that design was selected and why the resulting product was reasonably safe. The fact that there were safer alternative designs that were rejected does not necessarily mean that the manufacturer is going to be liable in a subsequent lawsuit. Still, rest assured that the plaintiff will try to use the evidence of a safer design—as detailed in the document he has discovered—as evidence that the manufacturer disregarded safety.

Because of the potential for liability in this scenario, some defense lawyers would prefer that their clients destroy any written reports that discuss safety matters, within a year or two after product launch. If these documents do not exist, *ipso facto* they cannot be used against the manufacturer. However, with no documents on which to rely, the company witness will have to describe from memory what alternative designs were considered and rejected, what safety tests were performed during the design of the product, and how the company incorporated safety into the final product. Moreover, the company's liability may well rest on the company witness' credibility in front of a jury rather than on the actual facts of the design process.

Unfortunately, a jury may not believe that the company cared about safety if no documents are retained proving that such matters were considered. The jury might believe that if safety were so important, the manufacturer should be able to present written proof that safety was considered. See Kolb & Ross, *Product Safety and Liability: A Desk Reference*, *supra*, at 91.

In addition, a judge may even tell the jury that it can infer from the lack of certain documents that they would have been harmful to the manufacturer's case. For example, if a group of safety records from a certain period of time were destroyed or are missing from the company's files, a judge might instruct the jury that it can assume that these records, if they were still in existence, would show that the product was not safe. To prevent such a negative presumption, manufacturers should always try to have ready a comprehensive chronological history of safety procedures used in the design and making of the product.

A Document Retention System

Establishing an effective, rational, practical, and comprehensive document retention system is not easy. It is impossible within the limits of this article to propose a program that can be used by any specific company. In fact, each company must set up a customized schedule that is practical and effective for the amount of documents it creates, the places where they are kept, and the legal and technical requirements for retaining documents. See the National Safety Council's book, *Product Safety Management Guidelines* (2d ed. 1997), especially chapter 8, "Record Retention Requirements."

There are many sources for samples of document retention programs. These samples can be very helpful to the manufacturer that has not yet established its program. The samples contain extensive lists of the types of documents that are kept by a company, where these documents are to be stored, how long they are to be kept in the company's offices, and how long they are to be retained after they are moved to storage. The documents can also be classified as to their importance, and a description made as to the form in which they can be stored.

Each manufacturer must establish its own system and schedules in accordance with its peculiar needs. One schedule may indicate the method of destruction for certain kinds of documents. Some may need to be shredded if they could contain trade secrets or other business confidential information. Others may need to be burned, and some can merely be thrown out in the trash.

The document retention program should include procedures for the periodic moving of documents from the company's offices to a storage site. It should indicate the individual with responsibility for approving the moving of documents to storage and approving their eventual destruction. A record of what happened to certain documents, when they were destroyed, and who approved the destruction should be kept. For more detail and references on the content of a program, see Emroy Watson's article on record retention techniques, *supra*.

A comprehensive retention program should contain a history of the life of the product, from creation through destruction. Such a

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- Establish the legal position that the return of a general verdict is not a definitive resolution of all issues in a case involving multiple allegations, some of which may have been more vigorously challenged compared to others in the particular litigation.
- Be careful to examine the record in earlier litigation to determine if there was a difference in the availability of evidence or a change in the law that might have af-

ected the outcome relative to the case pending before the court.

Conclusion

The attack on offensive collateral estoppel begins with the first case filed against any product. Defense teams need to be visionaries with defense schemes that recognize they are creating the record which subsequent generations will be forced to live by. If

left with an adverse prior ruling or judgment, the battle should rage on all fronts, hopefully armed with a stock of information about the peculiarities of those matters that went before and a knowledge of the legal principles that led to adverse rulings in other cases. Absent a full frontal attack on offensive collateral estoppel, future generations are likely to pay the price for the sins of the fathers. **FD**

Document Management, from page 31

core history, to be developed after the development of each product or product line, will allow the manufacturer to prove that it complied with all safety and other requirements on a routine basis. The project manager could gather all documents from all sources within the company pertaining to the project, and organize them into a comprehensive, coherent file that tells the history of the product. Drafts and duplicates of documents should be destroyed.

Developing this product history file does not mean that potentially harmful documents, such as an internal memo that questions whether the company should continue developing a particular widget, should be destroyed. Juries and judges understand that there may be internal differences of opinion during the development of a product. All the manufacturer will need to explain is how this dissenting opinion was handled—that it was fully considered, and then accepted or rejected. Disclosure of dissension within a company is actually beneficial; it indicates that the manufacturer encourages varying opinions and does not try to hide bad or potentially damaging information.

There are no specific or universal guidelines on how long documents should be kept. The company does need to comply with certain legal requirements. Otherwise, documents that are necessary to explain a product's design should be kept as long as they might be needed to defend the manufacturer. Decisions on retention time must be made on a case-by-case basis; considerations include the life expectancy of the product, applicable statute of repose, and a prediction of the period of time after the product's life is over that claims or lawsuits might be anticipated.

Suppose a product generally lasts ten years in the field, and lawsuits can be brought in the particular jurisdiction up to six years after the accident. Documents pertaining to the initial design and manufacture of that product presumably should be kept at least 16 years. However, a longer retention period is probably advisable, because some products will last longer than ten years. Moreover, subsequent designs and redesigns are often based on the earlier design. Products evolve over time, and therefore the earliest product development documents may be needed to explain later designs.

As a result, it is possible that the product history file, if developed, should be kept permanently. Assuming that this file is organized and duplicates and drafts are discarded, the quantity of documents may not be so large that permanent retention becomes a problem. Even if the quantity of documents is large, they can be transferred to a computer file or microfilm so that storage is no problem.

Conclusion

In the history of product liability litigation, documents have proven to be helpful and harmful to both plaintiffs and defendants. Manufacturers must establish document management systems that ensure compliance with legal requirements to prepare and retain a variety of documents. The system must also include procedures that will minimize the creation of misleading and unnecessarily harmful documents.

Although such systems can be difficult to organize and implement, they can result in a significant reduction of potential liability and, more importantly, will clearly confirm the manufacturer's efforts to produce a reasonably safe product. **FD**

Fire Origin and Cause, from page 37

The case involved a coverage dispute arising out of a fire. The insurance company sought a declaratory judgment that coverage was excluded under the concealment and fraud provision of the policy. At trial, the carrier offered the testimony of a fire origin and cause investigator, who was expected to testify that the fire was intentionally set. The insured sought to exclude the testimony under *Daubert*. In response, the carrier argued that the testimony of the fire investigator was not scientific testimony, but was based solely on skill and experience. The trial court agreed with the insured, and excluded the expert's opinion.

The decision of the trial court in *Michigan Millers* was affirmed by the Eleventh Circuit on a *de novo* review. Both the trial court and the circuit court relied on the fact that the fire investigator held himself out as an expert in fire science, and on direct examination, the expert testified that he complied with the scientific method in determining the origin and cause of the fire. Under those circumstances, both courts found that the investigator was rendering scientific opinions. Thus, he would have to satisfy the requirements of *Daubert* that he be appropriately qualified and that he follow a scientific methodology. The courts analyzed whether

the expert had used a reliable methodology, and held that he did not. Although the expert stated that he reached his conclusions by ruling out all other causes, he was unable to describe how some alternate causes were excluded. He performed no tests, and took no samples. Therefore, his methodology was not satisfactory, and the circuit court affirmed the exclusion of the testimony.

Michigan Millers was closely followed by the fire investigation community. Some cautioned fire investigators not to suggest that they were scientific experts, and to avoid any mention of the scientific method or fire science, lest their opinions be subject to a *Daubert* examination.