

## CYA & Assets From Former Employees And Damaging Information



### Cordon T. Baesel

Special Counsel - Luce Forward  
619.699.5459  
cbaesel@luce.com  
www.luce.com/cordonbaesel

*Cordon Baesel is special counsel at Luce, Forward, Hamilton & Scripps LLP, a prominent California law firm, and works with its action sports group which is committed to providing comprehensive legal services to action sports businesses worldwide and includes multiple specialties such as business, intellectual property, financing, tax and estate planning, labor and employment, product liability, general litigation and real estate.*

*For more information, please visit [www.luce.com/actionsports](http://www.luce.com/actionsports).*

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You have made the tough calls. Long-time friends, partners and colleagues have been let go. Under-performing accounts and business partners have been jettisoned. You are trying to stay positive and focused while awaiting the upturn. What can you do, at relatively low cost, to better reduce liability risks from downsizing?

### Turn Too Much Information (TMI) into Far Less Information (FLI)

Investigate your internal business information, organize it, analyze it and only keep what you really need...because what you don't know can hurt you in the future. With employee turn-over and business deals gone sour, do you really know what business information is lurking in your files and hard drives? The answer may have a profound impact on the future operations and potential liabilities of your business. In fact, management may be held accountable for the information generated, sent or deleted by employees.

To better profit when the economy recovers, you should know, understand and act upon the information created during these hard times – especially by former employees.

### Creating An Information Retention Policy

A more technical description of this concept is an “Information Retention Policy.” Businesses need written procedures in place for archiving or destroying information. With the proliferation of electronic data and portability of communications, companies should have a defensible rationale for why certain information was retained and other data destroyed. This can be critical when personnel, business or lending disputes become formal claims or lawsuits.

In fact, State and Federal law now requires parties in litigation to make their electronic data available to the other side. This is very risky because many companies do not know all the information they have on disputed topics. Facts are facts and relevant evidence or information cannot simply be destroyed. But before formal disputes arise, manage the information to identify risks and make strategic decisions.

A simple internal e-mail, complaining about working conditions or hard good production problems, could have adverse consequences in the event of business disputes. If such an e-mail is not needed for any business purpose, perhaps it should be destroyed. Likewise, internal documents summarizing business relationships should be handled differently. This is not earth-shattering business news. But the key is in implementation: Know your information, including what has been deleted, and address retention issues before disputes morph into legal action or claims.

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What about the e-mail from warehouse worker “Joe Loadie” to his bro, exclaiming “Dude, we got the first run of new snowboards in and I have been asked to test-ride them up at Mammoth the first week of the season! We have to cover up logos of course, but I have specific instructions of what tricks to try on the boards and how to evaluate them. Isn’t that sick! They must really know what a hot rider I am, huh?!”

What does this usually personal e-mail really say? For the soon-to-be-laid-off warehouse worker who fractured his leg riding the new board, it is a road map to liability for the company as it tends to prove the company asked him to perform certain “work-like” tasks and he injured himself, only to be laid-off shortly thereafter. Good for Joe, bad for company.

Or to the large retailer chain that is waiting for its (late) delivery, it indicates there may be production problems and the company is fearful that if it delivers faulty boards, it will have more problems that if it is a little late, but at least tests the production boards to determine just why they don’t match the specs of the prototype. Does Company X know more than it is letting on? Does Retail Chain Y have cause to cancel its order and seek damages? Perhaps, but without this e-mail floating around in cyberspace, it has a harder time piecing the puzzle together.

And what about the investor? Does this e-mail indicate that Company X knows it has a crappy product but wants to see if it will withstand Joe’s semi-pro amping so it can deliver boards anyway, recoup its costs and at least show the investor that product is being manufactured and delivered to retailers?

What if this email was discovered in your document retention review and determined to be of no worth to the company, with no legal requirement to keep it? Joe Loadie’s TMI becomes FLI and his innocent e-mail is less likely to hurt your business. While this example may seem silly, think of internal communications expressing frustration about business dealings between parties negotiating a contract that never happened. Such e-mails could contain far more damaging content in the event of a suit by the other company, and the internal communications may not be known to upper management until discovered in litigation.

### Organize, Review and Act

Information management begins with an investment of time. Organize files, both paper and electronic, and determine what you really need to run your business. Questions to ask about specific information include:

- Is it necessary for an ongoing business relationship?
- Is it needed for accounting/tax purposes or government filings?
- Does it involve performance under a contract or loan?
- Is it useful for ex-employee issues?
- Does it assist your company in warranty, quality control or product liability?
- Is it accurate?
- Is it confidential, privileged or otherwise protected from disclosure?
- Does it have to be retained for investors or shareholders?

When you perform this exercise, you will see how well your business can run without TMI. And if information appears to pose a risk to the company, consult your advisers and identify how to address problematic issues. Since lawsuits can be brought years after a dispute arises, proper management of information now is a sound business practice for the future. So when times get better, you will be able to focus more on business generation, and less on left-over problems from these hard times.