

**“Going Beyond
What’s Legally Required”**

**A Discussion of the Impact of
Accountability and Complexity
on the Practice of Corporate Law**

PREMISE:

- *“What’s Legally Required” is fast becoming irrelevant* in many areas.
 - It’s like saying high-school high jumpers must clear a 4’ hurdle in order to be competitive.
 - The bar has been raised much higher.
 - Complexity, Speed and Accountability are changing everything [almost].
 - House counsel need to shift thinking to remain relevant.








What Has Changed?

- **COMPLEXITY.**
- **SPEED.**
- **ACCOUNTABILITY.**

“The Future, M’boy, is *PLASTICS!*”
[not]

- **From my “legal” vantage point, the future, my friends, is *INFORMATION.***
- **Accurate *information* is becoming an increasingly significant *value* generator for companies.**
- **Simultaneously, *information* will almost certainly become the single largest legal *liability* generator for many of us.**

What's Changed?

-  ***Information's* impact on Market Efficiency and Competition.**
-   **Using it to build customer loyalty.**
-   **Using it to “sell” product.**
-   **Using it to shape the future.**

What's Changed?

The degree of collaboration grows exponentially in pursuit of:

- Design for manufacturability.
- Design for testability.
- Design for revise-ability.
- Design for compatibility/standards.
- Design for environment.

Information **is Pivotal**

- **It's Key to Customer Loyalty.**
- **It's Part of the "Product."**
 - ***Exact same hardware* with different "paperwork" is a different product.**
 - **It's used for different purposes.**
 - **Even "PERFECT" hardware with inconsistent data erodes trust.**
- **The total information conveyed by a company Determines Personal Credibility.**

Companies' Communications are *personalized*.

Customer “Loyalty”

- According to a Conference Board study, decreasing defections by just 5% can boost profits 25% to 95%.

- WHY DEFECTIONS? 68% are because:
“supplier doesn’t care.”

- So, what drives Customer “Loyalty”?

Customer consciously and systematically directs business and referrals to your company.

- “First look”
- “Last look”

- “Information” (e.g., fact that competitor is sending a

If We Really “Care...”

- We'll give 'em what they need.
- We'll show 'em more useful data than competitors show 'em.

The “Market” for Supporting Data

- **There’s increasing pressure from customers to disclose non-public information about:**
 - **Specific products' MTBF.**
 - **Testing beyond rated limits.**
 - **Estimates of end-of-life performance.**
 - **Manufacturing process changes.**
 - **Real-time *errata*, etc.**

Increasing Pressure to Disclose:

- **Inventory Levels.**
- **Market Trends.**
- **Business Plans.**
- **Product Roadmaps.**
- **Product Obsolescence Charts.**

**ALL THESE TOPICS ARE MONITORED BY
THE INVESTMENT COMMUNITY.**

Investment Community Information

- Everybody is looking everywhere.
- No different standards for veracity.
- Insider Trading and Corporate Opportunity Doctrine issues pervasive.
- Web content must be channeled through “process control points.”

“Advertising” on the Web

- More “hits” on websites than readers in trade magazines.
- Statements of fact become “advertising” under the laws of some countries.
 - Comparative advertising is especially volatile in Europe.
- In all this, the key risk factor is **veracity.**

The “Market” for Supporting Data

- **It all relates to predictability.**
 - **And risk.**
- **There’s a lot at stake here.**
 - **Done well, providing such data can strengthen market position.**
 - **The legal, ethical and business consequences may not be evident at first look.**

The “Market” for Supporting Data

- ***Information*** increasingly seen as conferring **“peace of mind”** in a **volatile business world**.
 - To avoid bad surprises.
 - To add confidence to timing estimates.
 - To **shift blame** to the information provider.
- Specifications become **warranties!**
- Predictions can become **commitments!**

The “Market” for Supporting Data

- **Early Disclosure of Problems is necessitated by:**
 - **shrinking tolerances,**
 - **Accelerated “time to market” pressure,**
 - **increasing complexity of products and business systems,**
 - **skyrocketing development costs, and**
 - **(for public companies) close investor oversight.**

The “Market” for Supporting Data

Increasingly, “support” will be the competitive differentiator between companies.

- *Continuous Information IS support.*
- *Continuous Information builds confidence.*

An Odd Question for Lawyers

How do we “Sell” the
Trustworthiness
of Our Company?

NOT by Waiting Too Long To Communicate Problems

Example: When a supplier fails to notify a major customer *in advance* of an impending reduction in output, the reaction is often this:

“You don’t understand my business.”

- **Perfection is not required**
 - **But when we mess up, prompt and appropriate communication IS required.**

WORDS* and *REALITY

- It's not just about what we *DO*.
- We sometimes think that words are unimportant; only *ACTIONS* matter.
 - *“Of COURSE I love you; I help pay your bills!*
- Even if we do everything “*perfect,*” our failure to communicate *continuously* will convict us.
- We've got to begin thinking about *regular communication as value.*

Typical Questions to Lawyers

“How Much Overstatement is OK?”

- **What can I say *when we don't know for sure* that we'll be able to fix it?**
- **What if competitors overstate their capabilities, and so we will *“lose the opportunity if we tell the truth?”***

Typical Questions for Lawyers

2. Do we really need to “air the dirty laundry?”

The Answer:

Integrity and Ambition

- We always need to look at the circumstances.
- *Integrity*: Accountability to “promises” is *not optional*.
 - Excuses sound hollow when the data convicts.
- *Ambition*: Remember that *our employees are resourceful*. Don't sell us short.
 - Don't be too conservative.

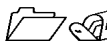
Another Question for Lawyers:


3. Can I selectively tell “preferred” customers, or those who complain?
 - For those you tell, it’s sort of like the expression, “to tell the truth...” or “let me level with you...”
 - For those you don’t tell, it’s like shouting “I don’t care about you!”

Not That Simple

- Millions of gates, & a few don't work.
- No indication of any failure in field.
- Some things are “noise level,” (i.e., insignificant).
- Is it more disruptive to disclose when you don't understand the problem or lack a solution?

Context: Increased Accountability

 ***Customers are insisting on Continuous data availability.***

 ***“Subscriptions” are given to special non-public items, under NDA obligations.***

 **Information increasingly conveyed through “low touch” software tools.**

 **Building relationship while lessening one-on-one involvement.**

Increased Accountability

- In the past:
 1. ***Nobody knew*** what a company was telling others on particular issues.
 2. It was even *hard to reconstruct* what was said to one company over time. Looked like unconnected, one-time glitches.
 3. Mistakes and *negative trends* were hard to aggregate and track.

The Internet Changes Everything

- Now, website data is available to vast numbers of customers, suppliers, INVESTORS and employees.
- It's often impractical (and unwise) to have one set of information for public consumption, and another for internal use.
- Collaboration requires communication which brings accountability.

Misuse of Data

Advise clients not to provide data when they know the recipient will misuse it.

Example:

- **UPRATING. Extrapolating performance expectations beyond company specs.**
- **TI: Uprating is extremely hazardous and ill-advised. We should not provide data for uprating. There are very few exceptions, involving major military OEMs covered by special agreement.**

“Not MY Problem!”

Misuse of data has these effects:

- **Erodes customers’ trust in your data.**
 - They’re less likely to trust your promises.
 - They’re less likely to “visit” your web sites before choosing a vendor.
- **Your excuses sound like you are shirking responsibility.**
 - Your “disclaimers” don’t inspire trust.
- **It all looks like you “don’t care.”**

What is “*Legally Required?*”

- Antitrust laws.
- Unfair Trade Practice laws.
- Contract law.
- Libel, slander, and other torts.
- Securities laws (Section 11 Misleading statements, 10b5 insider trading, etc).

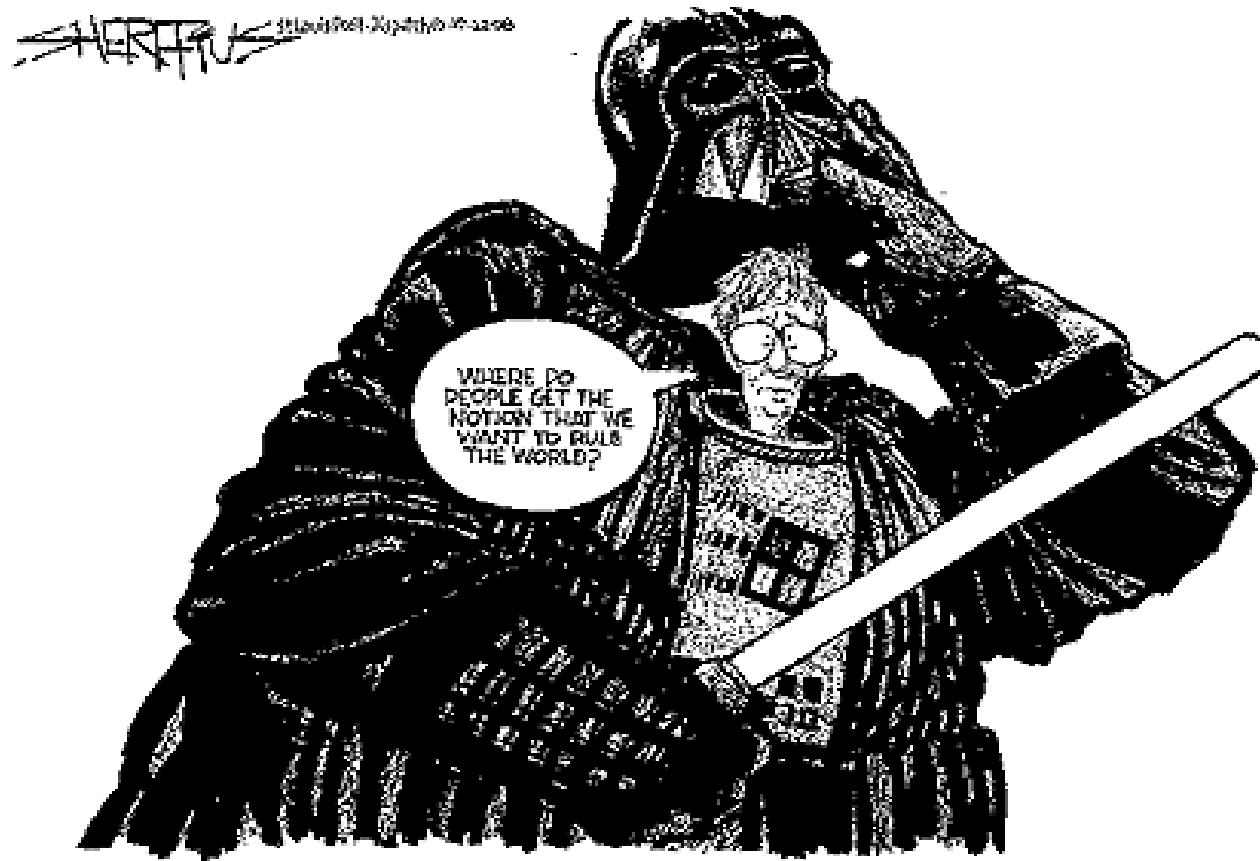
Exposure in all of these areas also impacts company image.

“Cleaning Up”

An arrogant tone in communications erodes loyalty. (For example, Microsoft)



“Cleaning Up”



John Sherffius, St Louis, MO -- The St. Louis Post Dispatch

THE *POSITIVE* SIDE




- **Plans are underway in many companies to create significant online “value.”**
- **The Goals:**
 - 📁👉 **In key markets, to make companies’ websites the “Last Look” sites.**
 - 📄👉 **To consistently support sales personal touch.**
 - 📄👉 **To demonstrate that your Co. Cares.**
 - 📄👉 **To win Customer Trust.**

“The *Old Fashioned Way*”

- How do we best counsel our companies in times like these?
- **WE’D DO WELL TO SEEK TO IMPACT THE COMPANY CULTURE.**
 - There is no place to hide.
 - The practice of corporate law is no longer mainly about avoiding responsibility.
 - There’s only one way to win trust: **EARN IT.**

Put a Challenge to Your Key Players: What Can **THEY** Do to Help?

Treat communications as product!

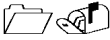


-  **Tell them not to tolerate significant error or sloppiness. Make noise until it's fixed.**
-  **Get it fixed everywhere, not just for “your” area of responsibility.**
-  **Get out ahead of the competition with information.**
 - **Don't just provide dumb information; UNDERSTAND the purpose it will serve.**

What can our “Clients” do to Help?

- **“Make Noise”** – With discretion.
 - Some companies are characterized by presumptions of fault.
 - [e.g., the infamous “*HE LIED*” presumption].
 - Some companies run “two sets of books”
 - **One for auditors, one for operations.**
 - **One internal, one external.**
 - **One for top customers, one for others.**

A Call To Action

If we simply *let this evolve* ad hoc:

-  We will eventually end up disclosing the information anyway,**
-  Much of the value of the company's data will be lost inadvertently to intermediaries who do it well, and**
-  The risks will become impossible to manage.**

Loss of relationship.

  **Loss of credit for good data.**

  **If intermediaries are involved, loss of ability to promptly correct bad data.**

  **Loss of ability to frame the issues.**

  **Loss of identity.**

  **Loss of character.**

  **Loss of influence over our destiny.**

  **Loss of influence over industry standards.**

We Need A Change in Culture

- **FIRST, lawyers should *embrace* the new strategic openness.**
 - This does **NOT** mean we give away everything.
 - It **DOES** mean we appeal to personal integrity as the engine of customer loyalty.

How can Lawyers do THAT?

- **Appeal to people where they are.**
 - **87% of college students in 1993 admitted to cheating on written work** [Center for Academic Integrity]
 - **Most commentators indicate chronic cheating is on the rise.**
[<http://www.northwestern.edu/uacc/cai/research/highlights.html>]

**“I like to cheat I do it constantly its fun I dislike people that dont cheat there goodie goodies.”
Chad, 13, NE**

In light of these risks, how can lawyers embrace openness?

- We must impact our companies' cultures, or this house of cards will come crashing down.
- **“Getting ‘em off on technicalities”** reinforces bad behavior.
- Demonstrate how integrity “pays off.”
- **Win the hearts and minds** of your management team.

How Can Lawyers do *THAT*?

- Some people are motivated by:
 - fear of getting caught.
 - consistency with religious principles they espouse.
 - personal pride and integrity.

How Can Lawyers Motivate?

- Training, supported by management.
 - Real-life stories. [Why are we lawyers so hesitant to do this?]
 - CEO involvement (Video? Message? Example?)
- Example in the way we conduct our practice.

Not Just a Matter of “Opinion”

- To anyone who argues that this is imposing a particular worldview on the company we can argue:
 - Just as *shoddy products* heighten risk, *shoddy communications* heighten risk.
 - The stakes are too high for the company to play around at this.

A Change in Culture

- **SECOND**, we must understand that **there is *no place to “hide” our company’s big mistakes.***
 - 📁👉 They’ll haunt us until we disclose and correct them.
 - 📄👉 The question is HOW to disclose – with the interests of TI AND our customers in view.
 - 📄👉 Even our internal broadcast messages may come into customers’ hands.
 - 📄👉 There is no shortcut – we must BE Trustworthy.

A Change in Company Culture

- **THIRD, we must see that information, communicated, provides a value in its own right.**
 - **Words MATTER.**
 - 📁👉 **Words impact image.**
 - 📄👉 **Arrogance kills.**
 - 📄👉 **Trustworthiness SHOWS.**

The future, my friends, is

INFORMATION.

- **Let's get out ahead and shape the future.**