HR's Other Legal Nightmare*
Liability and the Training and Development Function

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Summary

Human resource management specialists have been wrestling with legal issues since the passage of the Fair Labor Standards Act of 1938. Much of the work of HR specialists is tracking compliance with a variety of state and federal laws and administrative rules that govern employment in both the private and public sectors. The purpose of this article is to inform human resource management and training and development professionals about specific areas of potential liability associated with the training and development function.

Topics included are civil rights legislation and cases, OSHA work safety requirements, employer negligence as it relates to failure to train to standard in the workplace, experiential and adventure-based training. The article concludes with valuable information regarding general recommendations for reducing and preventing legal liability.

Human resource managers, along with their training and development counterparts, are experiencing change in the practice of their professional responsibilities. Environmental threats require continual adaptation to cultural, economic, regulatory, and more recently, the legal system (Clardy, 2003; Eyres, 1998; Feuer, 1985). No segment of our society is immune from the potential for litigation. And as our world of work becomes

*This chapter is designed to provide descriptive and illustrative material on general legal concepts as they may apply to human resource management and training and development programs in public and private sector organizations. While the information in this article is accurate and timely, it does not constitute legal advice to the reader. Consult competent legal counsel for specific advice on legal situations involving technical training.

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increasingly dependent on technology, the potential for litigious landmines increases, as Goldsborough (1994) warns, "In the fast-paced world of computers where technology races faster than the law's ability to keep up with it, you could get yourself in trouble simply because the law is unclear" (p. 18).

In more pristine times, the primary reason for providing effective training was to increase the probability of correct and consistent performance on the job. Human resource managers are now becoming concerned for a secondary reason that involves preventing or reducing the organization's legal liability. In this context, training becomes a defense to an allegation of failure to adequately train employees and their managers. If the primary reason was attended to by employers more consistently and effectively, the existence of the secondary reason would be significantly diminished.

Exhibit 1 outlines violations that training participants may recover damages for, and Exhibit 2 outlines who may be liable (Sample, 1993). Both exhibits represent the primary areas of potential liability for employers, and additional liabilities too numerous to list are within the broad stroke of potential liability. Exhibit 3 lists the ten most common legal issues in human resource development.

Purpose and Scope

The purpose of this article is to inform human resource professionals about specific areas of potential liability related to the training and development function. More specifically, the reader will be introduced to the following:

- Equal Employment Opportunity (EEO) and the Americans with Disabilities Act (ADA)
- Occupational Safety & Health Act (OSHA) work safety requirements
- Employer negligence as it relates to failure to train to standard in the workplace
- Nontraditional experiential and adventure-based training
- General recommendations for preventing liability

Each section will contain descriptive case law examples, as well as specific recommendations for avoiding liability. The article concludes with a discussion of general policies useful for preventing or reducing employer liability in training and development.

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Exhibit 1. Types of Violations That May Result in Damages

EEOC/ADA Violations

- Privacy and freedom of religion issues (nontraditional and "new age" training)
- Discrimination in selection of trainees for advanced and specialized training
- Training that results in a disparate effect on a federally protected class of employees
- Testing that unfairly discriminates against employees who are non-English speaking or culturally diverse
- Failure to provide assistive devices or to reasonably accommodate trainees with disabilities

Injuries to Trainees

- Training facility
- Unsafe simulation/laboratory equipment
- Unsafe workplace (OJT)

OSHA Regulatory Requirements

- General duty to train to standard
- Warning of workplace hazards and toxins

Recovering Damages

- State government
  - Workplace health hazards
  - Safety violations
  - Criminal negligence
- Federal government
  - OSHA violations
  - Industry regulations (Nuclear Regulatory Commission, etc.)
  - Environmental Resources Act

Loss of Benefits

- Anti Drug Abuse Act of 1988
- Workers' Compensation
- Third parties

Personal Injuries

- Training facility
- Workplace
- Off-site location

Property Damages

- Real or personal property in the vicinity

Used with permission from J. Sample (1993). *INFO-LINE Legal Liability and HRD: Implications for Trainers.* Washington, DC: ASTD.

Exhibit 2. Who May Be Liable

Trainers and Managers

- Negligent design of program, delivery of program, vendor selection, trainer selection, and/or facility supervision

Owner/Employer

- Negligent program design, supervision of training and facility, instructor selection, implementation of mandated training, and/or vendor selection
- Course content that is discriminatory
- Vicarious liability
- Invasion of privacy

The Employer

- Negligent program design, selection of instructors/vendors, supervision of training activities
- Failure to implement training mandated by statute
- Discriminatory course content
- Discriminatory selection of trainees
- Vicarious liability—intentional acts of supervisors or trainers
- Invasion of privacy

Outside Contractors/Vendors

- Negligent program design, supervision of training facility
- Misrepresentation of a safety record, credentials, experience, or other requirements, such as bond or insurance
- Contractual agreement—failure to meet specifications or breach of an indemnification agreement

Used with permission from J. Sample (1993). *INFO-LINE Legal Liability and HRD: Implications for Trainers.* Washington, DC: ASTD.

Equal Employment Opportunity (EEO) and the Americans with Disabilities Act (ADA) Requirements

In this section we will focus on two landmark pieces of federal legislation, the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, and the impact that they have had on training and development in organizations. As we will see in several court case examples, two prominent issues with EEO have to do with the testing of employees, insofar as testing relates to training, and the controversy regarding diversity training and its impact on employees and managers; thus, a discussion on diversity training is also included. Finally, a section on ADA requirements is included,

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Exhibit 3. Ten Most Common Legal Issues in Training and Development

1. Failure to provide compliance-required training (statute and government enforcement)
   - Safety
   - Violence in the workplace
   - Preventing harassment and other forms of discrimination
2. Failure to document
   - Routine record-keeping as documentation of performance
   - If no documentation, training never occurred, even if it did occur
3. Physical injury, emotional distress, discrimination (privacy and religious beliefs) attributed to new age training methods
   - Adventure training
   - New age experiential training
   - Radical psychology in the classroom
4. Discrimination in the design and facilitation of training programs
   - Diversity training
   - Unorthodox training design methods
   - Program designs that break the law to explain the law
   - Facilitation that invades privacy and religious freedoms
5. Failure to comply with trademark and copyright laws
   - Trademark infringement
   - Copyright infringement
6. Death or injury to employees or the public caused by failure to train to standard
   - Injuries from failure to perform a task correctly on the job
   - Injuries arising during training
   - Injuries attributed to inadequate facilities management
7. Equal opportunity and access to training and development opportunities
   - Disparate treatment
   - Disparate impact
   - Ignores requirements mandated by EEO and ADA
8. Inadequate program evaluation
   - Failure to identify design features responsible for injury, discrimination
   - Misstates program results and outcomes in violation of government or contractual obligations
9. Failure of consultant to honor contractual commitment
   - Professional malpractice
   - Misleading qualifications and experience as a consultant
10. Ethical issues
    - Participating in fraudulent or criminal acts with or without consent of employer
    - Failure to report unethical or illegal activities

Sources: Eyres (1998) and Sample (1995, 1997).

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as compliance with ADA requirements has impacted the training and development function, especially technical training.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an individual's race, color, religion, sex, or national origin. Any employer who employs fifteen or more employees for twenty or more calendar weeks in the current or preceding calendar year is subjected to the provisions of Title VII of the Civil Rights Act. Typical issues of concern to human resource managers include recruitment, selection, and performance appraisal; potential liability associated with training and development are often overlooked. Especially important are issues associated with selection and testing.

The reader may be wondering at this point what guidelines for employee selection have to do with employee training. A general guideline to remember is that any significant personnel decision, including training, should conform to requirements for fairness and due process (Cascio & Aquinis, 2004; Ledvinka & Scarpello, 1991). More specifically, Title VII of the 1964 Civil Rights Act regulates testing of personnel, and the EEOC Guidelines define a test as:

> "any paper-and-pencil performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, *training*, referral, or retention." (29 CFR, 1607.2; emphasis added)

A potential legal problem for an organization occurs whenever any measure used for a major employment decision is discriminatory, that is, if it "adversely affects hiring, promotion, transfer, or membership opportunity of classes protected by Title VII . . . unless the test has been validated and evidences a high degree of utility" (29 CFR, 1607.3). Such requirements for validity have been stringently applied in selection decisions for more than thirty years. In the landmark U.S. Supreme Court case of *Griggs v. Duke Power* (1971), it was held that an educational requirement of a high school degree was not job-related, thereby adversely impacting minorities.

If training and development programs are to be held to the rationale of the Griggs case, it would be necessary to demonstrate a relationship between training and actual job performance, as defined by relevant criterion measures. The Uniform Guidelines require that:

> "Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job." (29 CFR, 1701.14)

According to Bartlett (1978), "Unless training could be demonstrated empirically to make a difference in job performance, training requirements if showing adverse

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impact can be ruled discriminatory. Thus, measures of training effectiveness would be required to have a demonstrated relationship to later job performance before they could be used for any employment decisions" (p. 181). Human resource managers may have an occasion to establish criteria to validate the selection of trainees. The question to be addressed is: To what extent should pre-employment tests for entrance to training programs be based on successful completion of the program? or Should some other criterion, such as job performance, be required by test developers?

For example, in *Washington v. Davis* (1976), the courts addressed the use of a verbal abilities test to determine whether applicants possessed the minimum skills necessary to understand and succeed in the academic portion of police officer training. And in a case involving the teaching profession, the courts examined the validity of using national teacher certification examinations against academic teacher training programs, rather than against job performance (*National Education Association v. South Carolina*, 1978). In both Washington and the NEA, the U.S. Supreme Court held that successful completion of a training program was itself the proper criterion for validating a selection device to determine entrance to a training program.

Two subsequent cases modified the court's earlier position in Washington and NEA. In *Craig v. County of Los Angeles* (1980, p. 663), the court reasoned that "If employers were permitted to validate selection devices without reference to job performance, then non-job-related selection devices could always be validated through the same expedient of employing them at both the pre-training and training stage." A similar conclusion was reached in *Ensley v. Seibels* (1980), where the court addressed the use of a 120-item test developed by the International Personnel Management Association that was used to establish eligibility lists for police and fire personnel.

A recent case involving an apprenticeship training program demonstrates the power of court-enforced remedies. In two class action suits brought by attorneys and the EEOC for the eleven Ford employees, allegations were made that the auto manufacturer demonstrated disparate impact in the use of the Apprenticeship Training Selection System (ATSS). These suits allege that, since 1997, Ford discriminated against African-Americans on the basis of race in selecting apprentices. Also included in the suit as defendants along with Ford were the United Automobile, Aerospace, and Agricultural Implement Workers of America. The two cases were consolidated and heard by a federal district court judge in Ohio, and a settlement approved in December 2004 (*EEOC v. Ford Motor Company, Inc.*).

The settlement agreement requires that, without admitting to any wrongdoing:

- Ford is to immediately cease using the ATSS system for applicant selection into the apprenticeship program.
- Parties to the settlement must select a board certified industrial psychologist who will conduct a complete task analysis and develop a selection system for

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the apprenticeship program. (Ford Motor Company and the union will pay for this service.)

- Ford will select 276 members of the settlement class as well as three of the plaintiffs for inclusion in the revised apprenticeship eligibility list.
- Each of the members of the settlement class will receive $2,400, and the eleven original plaintiffs will receive $30,000 each.

Russell (1984) cites several conclusions regarding training as a criterion measure. The first has to do with strategies for selecting applicants for training by employers. One strategy is to validate training performance with job performance if training is a criterion for validation of the selection device. The second strategy would be to validate the selection device with job performance. A third strategy is to use tests that establish that candidates have minimum skills necessary to complete the training program. According to Russell (p. 266), the superior strategy is to validate training with job performance if training is used as a criterion for validating a selection device.

For example, an employer in a technical environment could correlate actual job requirements (i.e., job performance appraisals, work samples, etc.) with performance measures from the training program (i.e., post-tests, simulated task performance, etc.) if training is to be used as a predictor or an employee selection device. For more information on this issue, an excellent review of performance assessment methods for training can be found in Westgard (1999).

Diversity Training

Diversity training initiatives have received mixed and controversial reviews, resulting in confusion for human resource management and training and development professionals (Arthur & Doverspike, 2005; Hemphill & Haines, 1997; Sanchez & Medkik, 2004; Von Bergen, Soper, & Foster, 2002). Bisom-Rapp (2001) raises a very provocative question regarding judicially condoned diversity training and its intended purpose. Her argument stems from an observed incremental movement by the appellate courts to position training as an affirmative defense on behalf of a business. If the business establishes a proactive policy, communicates and trains to the policy, and disciplines as necessary, then the organization will reduce or prevent liability. The final lynch pin in her argument is that diversity training initiatives have not been shown empirically to have long-term effects in reducing discrimination in the workplace (see also Sanchez & Medik, 2004).

Some authorities conclude that unintended negative effects mar the credibility of the intent of such initiatives (Heilman & Haynes, 2005; Von Bergen, Soper, & Foster,

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2002). Employers are left with a dilemma: Should the business train for the sake of establishing a safe harbor that shields the business from litigation, or should the business invoke training and development as a means to make real differences in the way diverse populations work together? Or should they do both?

Increased liabilities associated with diversity training initiatives have been reported in the literature. According to several authoritative sources:

- Verbal remarks regarding racial, ethnic, or gender-based issues during a diversity training program have been used as evidence of discrimination litigation, and may be the basis for claims alleging extreme emotional distress (Eyres, 1998).
- Businesses may be forced through pretrial discovery processes to reveal the contents of a "culture" or "diversity audit" (Von Bergen, Soper, & Foster, 2002).
- Diversity training may result in increased litigation, either because of poor design and facilitation leading to egregious errors on the part of trainers, or because of a better understanding of the legal implications and remedies available for members of a protected group (Lubove, 1997; Sample, 1995).

The following examples underscore the liability potential with poorly designed and implemented diversity training:

- A California grocery chain paid $90 million in damages from a class action suit filed by female employees. Part of the evidence admitted during the trial were flip charts and participant notes from a diversity workshop attended by men and women managers. One of the exercises involved participants voicing stereotypes of women and members of other minority groups. Some of the recorded stereotypes mentioned women generally, and black women in particular. According to the source reporting this case, "The direct evidence of bias on the part of managers derived from their statements in the workshops contributed to the finding of widespread sex discrimination" (*Stender v. Lucky Stores,* 1992).
- A female faculty member in an academic setting was singled out and forced to stand in front of her colleagues as an example of the privileged white elite. Later in the same session, the consultant again asked her to stand, proclaiming, "We all know who the most beautiful woman [sic] in the room is [sic]. It's the woman with the three private degrees and the blonde hair and the blue eyes." His ridiculing tirade did not stop there. "Let's have her stand up so that

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everybody can look at her. Look at the pearls she's wearing, her clothes, her shoes." The woman remained in her seat, sobbing (MacDonald, 1993). This is a good example of a potential "infliction of emotional" distress allegation against a trainer or vendor.

- A "train the trainer" program was used to prepare and select diversity trainers and, during the program, candidates were asked to share an experience that led to their involvement in diversity training. One white woman shared a story about a long-term relationship she had been in with a black man. They had planned to marry, but she said several of his black female friends put pressure on him not to marry a white woman. The relationship ended. Someone in the group asked if she was angry with black women. She said no, only those who couldn't seem to accept the idea of interracial marriage. When the white woman finished talking, she looked up at one of the leaders of the program—a black female. She claimed she saw hate and anger in the program leader's eyes. When the white woman was not selected as a diversity trainer, she took the business to court, and she was awarded damages (*Fitzgerald v. Mountain States Tel. & Tel. Co.*, 1995).

An employer may take several steps to reduce liability associated with diversity training initiatives. Eyres (1998) suggests that organizational documents such as diversity or culture assessments can be protected under the attorney-client privilege. Seeking the advice of an attorney prior to the execution of such a survey may bring the results with this privilege. In view of *Stender v. Lucky Stores* (1992), one of the cases listed above, develop a policy that clarifies what happens with participant and instructional materials once the diversity training program has concluded. Based on the content of instructional materials, decide whether such materials should be destroyed or returned to the training unit for safekeeping.

Another effective approach is to use a standard instructional systems design (ISD) model to design a diversity training program (Dick, Carey, & Carey, 2004; Mathews, 2005; Roberson, Kulick, & Pepper, 2003). Begin with a needs assessment and a job and task analysis that identifies behaviors and attitudes appropriate for the workplace. Avoid experiential exercises that invade privacy or religious views or that may result in extreme mental and emotional distress (Eyres, 1998).

And finally, carefully selecting and training instructors is vital to successful diversity training initiatives. If contracted vendors are used, carefully investigate for any history of inappropriate behaviors resulting in complaints of harassment. Require internal and external trainers to follow instructor guides, and monitor for inappropriate behaviors (Sample & Hylton, 1996).

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The ADA and Technical Skills Training

Given the innovations associated with technology and computers, the expectation for technical skills training has exploded since the mid-1980s. Much of the person-machine interface associated with this type of training may require a reasonable accommodation.

The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination against persons with disabilities in employment, public services, transportation, public accommodations, and telecommunications services. The ADA became effective on July 26, 1992, for employers with twenty-five or more employees. Employers with fifteen or more workers were required to comply beginning July 26, 1994.

All aspects of employment are covered, including the application process and hiring, on-the-job-training, advancement in wages, benefits, and employer-sponsored social activities. In essence, the ADA protects qualified disabled persons from job discrimination (Cascio & Aquinis, 2004). To be considered a qualified disabled person, a job applicant or employee must be able to perform the essential functions of the job. Employers must accommodate the employees' known mental or physical disabilities unless that would impose an "undue hardship."

A qualified individual with a disability is a person who has a physical or mental impairment substantially limiting a major life activity, has a record of such impairment, or is regarded as having an impairment. A disability can include a physiological disorder or condition, cosmetic disfigurement, anatomical loss, or an emotional disorder or condition.

It is important to note that the ADA does not guarantee an individual with a disability the right to the job for which he or she is applying. The employer remains free to make decisions based on the particular skills or knowledge necessary for the job. The decision made by the employer regarding who to hire must be based on reasons unrelated to the existence of a covered disability. Nor is the employer required to give preference to an applicant with a disability over another applicant without a disability. The first step an employer should take is to determine the essential functions of a job. Technical trainers may be required to perform a job-task analysis that would meet ADA requirements for "essential functions" analysis. Second, employers must provide disabled employees with reasonable accommodations that are required to perform the essential functions of the job. Examples of accommodations include modifying work schedules, reassigning job duties, removing architectural barriers, and offering auxiliary aids, interpreters, or taped text.

Several implications for training and development in organizations impacted by the ADA are

1. *Interviewer training.* Many interviewers and recruiters will require "disability etiquette" training in order to feel comfortable interviewing applicants with

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disabilities. Illegal questions, such as, "Do you have any medical condition that would preclude you from performing your job?" or "Have you ever filed for Workers' Compensation?" are prohibited. Instead, ask, "Are you able to perform all of the tasks listed on the job description?"

2. *Recruiting and selecting disabled trainers.* Although affirmative action is not required by the ADA, human resource managers are encouraged to address the recruitment and selection of disabled trainers; this is important from a role-modeling perspective (Navran, 1992).

3. *Supervisory training.* Several aspects of the supervisor's job must be updated with training:

    - Current employees returning to work from disability leave may require a reasonable accommodation. Special issues arise where the return to work involves Workers' Compensation.

    - Fear of managing the qualified disabled worker must be addressed in supervisory training. All employees, including the disabled employee, are expected to perform the essential job functions to standard. "Reasonable accommodation" does not mean special (unfair) consideration at performance appraisal or for promotional opportunities.

    - Prepare to make reasonable accommodations for the disabled learner. Many accommodations are relatively inexpensive. Examples include magnifying glasses to aid reading, taped text for those who are visually impaired, and instructional materials with large lettering. Training seminars, off-site conferences, and meetings must also be accessible.

A case in point is *Goodman v. Boeing Co* (1995). Janice Goodman was employed at Boeing Company as a microfilm processor. During her three years of highly repetitive work, she suffered repetitive stress injury (RSI) in the form of carpel tunnel syndrome (CTS). She filed a successful claim for Workers' Compensation and, as a result, had to wear braces on both hands. Goodman was refused an alternative work assignment, and her supervisor assigned her to a demanding and deliberate processing schedule and subjected her to verbal harassment. Her condition deteriorated and eventually required surgery on both hands, resulting in long-term medical leave. Goodman sued Boeing in Washington State court for discrimination. The resulting $1.16 million judgment against Boeing was in addition to her Workers' Compensation claims!

This case strengthens the argument that linking Workers' Compensation and ADA-related claims is a smart risk-management strategy that should also include "educating and training all levels of management" (Lotito & Alvarez, 1993).

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OSHA and Workplace Safety

The physical safety of employees and keeping the public from unsafe working environments is a continuing public policy concern. During the 1960s, sufficient concern was raised about safety in the workplace, and in 1970 Congress passed the Occupational Safety and Health Act (OSHA). McWhirter (1989) explains that the act has two specific functions: "to provide an incentive not to hurt people and to provide funds to compensate victims" (p. 235). Under this act, an employer has a general duty to furnish to each of his or her employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

However, the wording of the general duty is vague, and because of this, it can be incorrectly interpreted and implemented, thus becoming a potential liability hazard. In order to provide more clarified guidance, Congress intended that the Secretary of Labor promulgate specific safety standards for each industry so that employers would know what was expected of them.

More to the point for technical trainers and their managers, a 1977 U.S. Appeals Court decision determined that the general duty clause of OSHA also "includes training of employees as to the dangers and supervision of the work site" (*General Dynamics v. OSHARC*, 1977). There are several areas of potential liability for trainers and their managers:

1. The actual training could result in personal harm or injury to a trainee and/or
2. Harm or injury was caused by "failing to perform a training responsibility on which the trainee depends," and/or someone else under the control of the trainer causes harm or injury to a trainee.

A search for examples investigated by OSHA determined that most reported cases involve the second area of potential liability, that of failing to perform a training responsibility on which the trainee depends. The following three case examples are illustrative of failing in this manner and point out the care that must be taken by training supervisors.

In the first example, a construction company was operating an 80-foot stacker-conveyor at a gravel pit within 10 feet of an energized 12,000-volt power line. An employee was electrocuted when the equipment was moved and contacted the line. Utility representatives had warned the equipment operator before the accident that the clearance was dangerous. No designated supervisor was at the work site when the conveyor was moved. The victim, employed for only two months, and other employees had received no training, and there was no record of discipline to prevent violations. Five days

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after this tragic incident, this same operator was found to be running a feeder-conveyor within 8 feet of a power line and had expressed an intention of completing a few more weeks of work before moving the machinery.

The president of the construction company was deemed individually liable. The argument that he was not present at the mine at the time of the electrocution was deemed no defense, as he knowingly authorized the moving of the machinery without ensuring that adequate precautionary measures had been taken. The operator received a $16,000 civil fine, and the president was fined $5,000 (*Steen Construction Co.*, 1992).

In the second example, an electric utility company was charged by OSHA for failure to provide fall protection to its utility workers. They were required to traverse high steel bridge structures during a training program designed to inoculate them against a fear of heights when working on electrical substations at a height of 110 feet. The training program was usually provided for apprentice workers, but in this instance, the workers were installers with three years' experience.

The installers had cross-walked at 33 feet without protection of safety belts or nets, but refused to free walk at 55 feet. They testified that the instructor was intimidating them into traversing steel beams and structures in an unsafe manner. They also testified that during their previous three years they had never had a problem coping with heights, and that they never were required to free walk the top of a substation structure.

OSHA determined that, if the purpose of the training was to reduce height anxiety, it should have been given to apprentice workers with such anxiety instead of to experienced installers who had no previous height anxiety, but who were needlessly exposed to serious fall hazards (*Cleveland Electric Illuminating Company*, 1994).

In the third example, The Tampa Shipyards, Inc., facility was found to have willfully violated the general duty clause by using an 80-foot tower crane to hoist a 33-ton load when the crane was set to lift no more than 21 tons. The crane collapsed when the load was being swung horizontally. The load exceeded the manufacturer's recommended load limit, and the "leadermen" (a first-line supervisor, according to a collective bargaining agreement) was aware of the potential for an "overlift" safety problem.

OSHA determined that, instead of operating the crane under written safety instructions, Tampa Shipyards' crane operators were subject only to a "use your best judgment" policy. There was no level of supervision between the lead workers and the superintendent, and the lead workers were responsible for informing the superintendents of potential safety problems reported to them. The shipyard could have made numerous feasible and useful improvements to its crane safety program that would have materially reduced the risk of operators attempting overlifts on the cranes. It was recommended that a written apprenticeship program and safety instructions be distributed to all crane operators, and that implementation of the program for monitoring compliance be instituted (*Tampa Shipyards, Inc.*, 15 OSHC 1533, 1992).

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One must keep in mind the importance of supervisors as first-line trainers in any organization. This point is important because supervisors can be held liable for failure to supervise and to train to standard. Sage (1990) and Mager & Pipe (1997) continuously advocate the importance of supervisors in changing workplace behaviors and attitudes. Sage states that the standard of care owed by trainers and supervisors to their adult learners is the duty of supervision:

> "If there is a failure to exercise reasonable care in performing this duty, either in the commission or omission of an instructional act or training activity, and that failure results in an injured trainee, the trainer or . . . [supervisor] is assumed liable." (Sage 1990, p. 10)

Federal statutory mandates such as EEOC, ADA, and OSHA (and extended in many state statutes) exemplify the powers of government to regulate and control organizations in the private and public sectors. These legislative requirements are steeped in public policy, executed by the executive branch of government, and interpreted by the courts for constitutional sufficiency. The next topic of this article, employer negligence, is often related to workplace safety and focuses on the rights of individuals to seek damages for unintentional or intentional harm committed by others.

Employer Negligence—Failure to Train to Standard

Negligence is generally defined as unintentional conduct that falls below the standard of care that is necessary to protect others against exposure to an unreasonable risk of foreseeable injury (Mann & Roberts, 2000). Negligence cases are initiated and resolved primarily in each of the states' civil courts. If a case of this nature is not settled, the plaintiff will present the case before a judge and jury. If the plaintiff prevails, the jury will award damages; if the defendant prevails, the plaintiff receives no relief. Both parties have the option of appealing to higher-level courts for review.

Prior to Workers' Compensation statutes, it was not unusual for an employer to be sued by an employee for injuries sustained on the job. Each case would be settled or litigated, at great cost to both the plaintiff and the respondent business. The advent of the Workers' Compensation alternative provides a no-fault system for indemnifying the injured employee. The employee does not have to prove an unsafe workplace on the part of the employer, nor will the employee be held accountable for carelessness or contributing to the injury. The employee receives partial wage payment and payment of medical bills, and the system is funded through insurance paid for by the employer. Under this system, employees are not eligible for pain and suffering or mental anguish,

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and are precluded from suing their employers except when gross or intentional negligence is the basis for the complaint (Steingold, 2002).

From a training and development perspective, the elements of a negligence action are described as:

- *A Legal Duty or Standard of Care*—which may be specified in a statute or part of the "common law" from judicial precedents
- *Breach of Duty*—the duty of a reasonable trainer in the industry
- *Proximate Cause*—the breach of duty was the legal cause of damage or injury
- *Injuries/Damages*—injuries resulting directly from the training or lack of training

For example, in *Stacy v. Truman Medical Center* (1992), several of the above-mentioned issues can be found. The Center had a legal duty to instruct their nurses in the correct performance of their work. Although the Center had a policy on fire evacuation procedures, the nurse in this instance was not trained on the policy. The breach of the duty was failing to remove the patient from a room on fire. A proximate causal link between the death of the patient (injury/damage) and the legal duty to adequately train the nurse on fire evacuation policy was argued successfully before the court. Truman Medical Center was held liable. As indicated above, negligence involves unintentional conduct.

Are there legal remedies when an employer intentionally harms an employee? Under certain circumstances, employees may sue their employers for an intentional tort. From a training and development perspective, the employer must have intentionally injured the employee by failing to train the employee (Eyres, 1998).

An employer may be sued by an employee alleging several wrongful acts that caused an injury. For example, it is not unusual to allege failure to train and to supervise to standard. In *Granite Construction Co v. Mendoza* (1991), the employer was sued for gross negligence. The court determined that the employer knew about the peril, but its acts or omissions demonstrated that it did not care. In *Granite,* the employer had policies and procedures and training programs on safety in general (indicating an awareness of a legal duty or standard of care), including monthly safety meetings and "tailgate" instruction prior to work assignments. Contrary to policy and training, the employee was not issued a safety vest (proximate cause) while working on a roadway and was struck and killed by an automobile (a breach of the duty). Although training had occurred, the employer was still liable for the gross negligence of lack of supervision at the roadway work site.

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and are precluded from suing their employers except when gross or intentional negligence is the basis for the complaint (Steingold, 2002).

From a training and development perspective, the elements of a negligence action are described as:

- *A Legal Duty or Standard of Care*—which may be specified in a statute or part of the "common law" from judicial precedents
- *Breach of Duty*—the duty of a reasonable trainer in the industry
- *Proximate Cause*—the breach of duty was the legal cause of damage or injury
- *Injuries/Damages*—injuries resulting directly from the training or lack of training

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Furthermore, there are instances in which an employer may be criminally responsible for failure to adequately train their employees. In these types of cases, higher levels of proof and state and federal constitutional guarantees for prosecuting and defending criminal cases apply. For example, in *State v. Shoreline Support Corp.* (1989), a Wisconsin employer was found guilty of reckless homicide of one of their bulldozer operators. The appeals court noted that a jury could have reasonably found that the lack of training and supervision of the employee were causally related to his death and that the employer acted recklessly in its failure to train and supervise.

In the Shoreline case, uncontested testimony established that the work site was inherently dangerous and was no place for an inexperienced bulldozer operator to be working unsupervised. The operator was required to maneuver an 8- by 20-foot bulldozer along a strip of land that measured between 16 and 75 feet in width. The operator scooped rubble in the bulldozer shovel, made a 180-degree turn, and dumped the rubble over the edge of a cliff. At the time of the fatal accident, the operator had approximately forty-nine hours of experience with the bulldozer. Since the accident was not witnessed, it was reasonable to assume that the operator was not being supervised at the time of the accident. Testimony established that bulldozer operators are normally provided 1,500 hours of training and supervision before working under the conditions described above.

A more recent example involved a tragic aircraft accident. ValueJet flight 592 crashed on May 11, 1996, in the Everglades south of Miami, Florida. All 110 passengers and crew perished in the crash. The resulting civil trial determined that, among other findings, SaberTech, the maintenance contractor, had been negligent in training employees on how to maintain oxygen containers stored on the aircraft (*U.S. v. SabreTech*, 2001). In addition to the civil action, SabreTech received a twenty-four-count federal criminal indictment that charged three employees with, among other things, failing to properly train employees.

Not all injuries due to negligence at work will be covered by the various state Workers' Compensation insurance programs. However, in instances of gross or intentional negligence, as was evidenced in some of the above-mentioned examples, the employer can be held accountable in both civil and criminal proceedings with damages in the millions of dollars.

A comprehensive approach for determining risk is recommended by Clardy (2004). This approach rests on a series of audits that "tend to be less on risks from direct financial loss (such as embezzlement) and more on indirect risks of financial loss in HRD practices due to fines, settlements, increased benefit costs, payments for medical services, operating waste, and inefficiencies, lost revenues, or losses of human or social capital" (Clardy, 2004, p. 131.) Exhibit 4 summarizes eight perils that may constitute a risk of loss to an organization.

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Exhibit 4. Summary of Perils Associated with Risk of Loss with the HRD Function

1. Noncompliance with relevant HR laws and regulations
   - Not providing required training
   - Not providing recommended training
   - Providing training that violates other laws
   - Conducting training that violates related human resources management laws (such as fair employment or compensation)
2. Excessive benefits costs from unsafe and unhealthy practices
   - Ineffective or nonexistent safety training, leading to preventable injury and associated costs
   - Unhealthy or medically risk-prone demographic and lifestyle characteristics in the workforce
3. Increased production costs from untrained operators
4. Losses to organizational reputation and good will
   - Negative publicity due to preventable discrimination of employees
   - Negative publicity associated with criminal activity or fraud by employees and managers
5. Direct financial loss
   - Lack of skill in handling cash and other financial assets
6. Managerial malpractice
   - Loss of productivity associated with inept managerial practices
   - Dysfunctional managerial practices
7. Not using professional standards in HRD planning, development, and evaluation
8. Ineffective administration of the HRD function

Source: Clardy, 2004.

Nontraditional Experiential and Adventure-Based Approaches to Training

One of the most creative approaches for unleashing human potential of managers and executives is known variously as non-traditional experiential or new age training and as adventure-based or outdoor experiential training. These approaches run the gamut from traditional classroom settings using highly experiential value-based exercises and activities to wilderness treks and off-shore sailing jaunts. Such experiences are presumably designed to instill self-confidence and promote team building.

There are two primary forms of this type of training. Adventure training involves a group of employees who participate in a number of physically and emotionally demanding exercises, which in some cases are accomplished in rural or wilderness settings. New age training may employ motivational sermons, hypnosis, transcendental meditation, encounter groups, and other techniques to instill a new value system and/or beliefs that will enhance a person's job performance.

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As with most areas of training, several areas of potential liability are possible (Mitchell, 1990; Vogel, 1991). In adventure-based training and new age training, liability issues run the gamut from personal injury to religious freedom to false imprisonment. In the following examples, several types of liability are reviewed.

Adventure-Based Training

For some participants, adventure-based training will be physically taxing and stressful. Participants will be away from their normal comfort zones and family routines. Under these conditions, a participant might suffer from intentional infliction of emotional distress. Such a situation could arise out of the participant's being humiliated or embarrassed, or unable to perform a training activity as directed. Personal injuries could occur, leaving the organization and its insurance company liable for damages due to negligence and for Workers' Compensation claims. Several employees from a Florida state agency received extensive medical treatment for compression fractures of vertebra, a broken collar bone, and a broken leg. These employees had participated in a mandatory "team building" program that utilized a National Guard training facility (Cotterell, 1999).

The following actual case is provided in some depth in order to emphasize the potential liability from these types of programs. A large telecommunications company contracted with an outside vendor to provide a team-building program. The program had an adventure-based format, and the contract trainer was well-qualified to conduct this type of program. The program had been offered several times before, and the incident in question involved two work groups from the corporation.

The trainer explained the parameters of the program and stated that any participant could "Challenge Out" of any exercise with no questions asked if personal safety or injury was a concern. One of the exercises utilized a swinging log that was suspended about 19 feet from the ground. Cables tethered the log to upright poles, and the swinging log was suspended from the poles. Team members had to strategize how to maintain balance on the swinging log. Two women attempted the exercise twice, and on the third attempt, one of the women fell over sideways and broke her leg. This participant was 59 years old and had worked for the corporation for 25 years as a craft union employee. Her attendance at this particular program was mandatory.

During the trial, she alleged that the swinging log had hit her leg, which was the cause of the fracture. The contract trainer was represented by the attorneys for the corporation, and he testified for approximately six and a half hours. Fortunately, he had followed the guidelines for managing this type of program and had also made a detailed report of the incident for the corporation. His testimony was persuasive and enlightening to the jury. This is an example of training and facilitation skills used to educate the judge and jury! As the trial progressed, attorneys for the plaintiff attempted

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to depict the trainer as a "Rambo type trainer" who bullied little old ladies into performing physically dangerous stunts. Attorneys for the defense had the trainer explain step-by-step his methods and procedures for ensuring safety of the participants.

The initial judgment by the court determined that the telecommunications company was negligent, and a judgment of $875,000 was assessed. The contract trainer was not found negligent by the jury. On appeal, the judgment was remanded for review, and a subsequent settlement was made by the corporation (Sample & Hylton, 1996).

New Age Experiential Training

In new age experiential training, liability concerns more frequently arise because of wrongful termination, discrimination, or civil claims based on negligence. Termination of employment for failure to participate in organizationally mandated programs could result in wrongful termination suits. Federally protected rights could be abridged if participants were not selected because of a handicap, or for reasons based on race, nationality, gender, age, disability, and so forth. Furthermore, stress-related illness may result in claims in civil suits for "emotional distress" or "intentional infliction of distress." In the following example, termination of employment resulted when an employee chose not to participate in a training that offended his religious beliefs.

In *Hiatt v. Walker Chevrolet Company* (1987), the plaintiff alleged wrongful discharge for refusing to participate in a new age training program. Hiatt attended a new age training course in February 1984. At first, Hiatt thought the new age motivational program was great. By the fourth day, however, his view had changed. At that point, he became convinced that the program was anti-Christian and conflicted with his Christian beliefs. Hiatt left the program.

He was scheduled to attend a business meeting in California following the new age training course. He continued on to that meeting without notifying his employer that he had left the training session on the fourth day of a five-day program. When he arrived in California, he called his employer and explained that he had terminated his participation in the new age course because the program was anti-Christian, and he could not participate in it.

Shortly after Hiatt returned from California, he was fired by his employer, Walker Chevrolet. Hiatt in turn filed suit against his former employer, alleging discrimination in violation of both state law and the Federal Civil Rights Act (*Hiatt v. Walker Chevrolet Co.*, 822 P.2d 1235). The employer denied the allegation and countered by saying that Hiatt's attitude, inability to communicate with management and his peers, his failure to implement his sales plan, and excessive absenteeism were the basis for his dismissal.

As a general guideline, the more outrageous and extreme departure from actual job duties an activity or exercise is, the greater the chance that the employee will be successful in alleging violation of civil rights for such an activity. Take, for instance,

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the following two cases in which trainers were held liable for poorly designed and facilitated training.

Both of the examples are attributed to the Federal Aviation Administration's use of new age training in their management development programs. In the first example, the CNN "Moneyline" television program obtained a copy of a secretly videotaped class session with a psychologist who advocated tying people together for long periods of time and having them take showers tied together. In one excerpt of the video, the psychologist was observed to say, "I want it to get so uncomfortable for all of you that when you hear one of your people in this room speaking like a snake, speaking indirectly, speaking like a victim, accusing, miscommunicating their personal truth or universal truth, I want it to grate like fingernails on a chalkboard. I want twenty-three voices in unison to go, 'Aaah, don't do that'" (Nontraditional Training, 1994, p. 5).

The second example involved a sexual harassment training program at the FAA. *In Hartman v. Pena* (1995), a male air traffic controller employed by the Federal Aviation Administration was required to attend a three-day CDW (cultural diversity workshop). One of the exercises designed for the workshop used a role-reversal exercise designed to simulate the work area in the Chicago Control Center. Two sets of chairs in rows were arranged so that the men would walk between the chairs, while female participants adopted the role of harassers. Men "walking the gauntlet" were subjected to cat calls, butt slapping, and other uninvited touching. According to Judge Norgle, "Following the gauntlet, the directors conducted a discussion. At the discussion, Hartman [the complainant] and the other men were numerically rated with their names on a chart subscribed to drawings of male genitalia. The chart illustrated human penises in various stages of arousal. The participants rated Hartman the lowest." Testimony of record indicated that the men were embarrassed and uncomfortable participating in the exercise. Hartman declined to participate, but finally acquiesced because of group pressure (*Hartman v. Pena,* 1995, p. 227).

Since the purpose of adventure-based and new age training may be change- and/or future-oriented, it may be difficult to link such training to specific job and work tasks. In some cases, trainers may believe that by going to extremes, they can "shake up" employees, and in so doing, initiate a change process. The question becomes one of balancing corporate mission and goals with employee rights. I believe that the ability to avoid potential legal difficulties may be increased with a focused analysis and design capability.

Before training is designed, a macro analysis of the organization's future intentions will assist the training manager in the analysis phase. Senior and line managers must communicate the direction and intensity of change to training managers. Robinson and Robinson (1991) say it best when they admonish designers of management training programs to help line managers meet their business objectives. Experiential programs that are directly linked to the organization's business objectives

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will probably survive legal scrutiny, so long as personal freedoms such as privacy and religion are not infringed upon.

The development of experiential exercises may become problematic at this juncture. How does the trainer who designs and develops experiential programs balance employee rights with organizational goals? Individual and small group exercises that focus on such human conditions as anger, affection, trust, and conflict have the potential for clashing with individual customs. Freely expressing anger may be a family trait with ethnic and religious overtones for one employee, whereas, for someone else, the expression of anger may be forbidden by his or her religion or culture.

Constitutional issues of right to privacy and religious freedom may be infringed upon when participants are forced to discuss personal values and religious convictions. Pressure to adopt values inconsistent with personal and religious convictions may place an organization legally at risk. Such was the case in *Kim v. DeKalb Farmers Market, Inc.* (1991), in which employees and managers were expected to reveal private information that infringed on privacy and religious grounds. Also, the vendor refused to excuse participants and allegedly bullied them into participating. Liability for false imprisonment or detention of a participant may be alleged if someone is coerced into attending a program off-site from the business.

This dilemma is often resolved by senior management in an arbitrary manner. One has no choice but to participate if he or she expects to get ahead! Another approach is to let the participant decide for himself or herself by opting out of participation. But this is not really an option due to the fact that certain developmental experiences may have long-term consequences for upward mobility, and there may be no alternative routes for the employees' development.

An approach to overcoming this problem is to determine specific change requirements in an organization, and to then design specifically to those requirements. If the analysis phase determines that trust and conflict are problems worth addressing, then the design team has a business-related requirement for specific experiential exercises that address trust and conflict.

This approach will impact internal HRD programs and external providers who have a "standardized package" to sell. It is incumbent on the HRD providers (internal and external) to make sure their design efforts are work- and organization-related. Failure to do so may place both the vendor and the organization legally at risk.

Recommendations for Nontraditional Programs

However, this does not mean that all nontraditional training programs should be scrapped. Nontraditional programs can be quite successful if care is taken in their planning and implementation. The following suggestions may help avoid litigation (Eyres, 1998; Sample, 1996):

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1. Review the organization's mission, strategic plan, corporate values, principles of service, operational goals, and objectives for sources of job-related training, at the macro and micro level.
2. Complete a job-task analysis and performance criteria for knowledge, skill, and attitudes at the micro level for training requirements. Review macro-level functional area goals and objectives (customer service, quality improvement, sales, manufacturing, new product deign, etc.) for job-related training requirements.
3. If necessary, use systems and process documentation, survey questionnaires, interviews, or observations to document training requirements at the macro level. This is especially important for moderate-to-long-range change requirements (i.e., corporate restructuring, downsizing, etc.).
4. Use a logically structured analysis, design, development, implementation, and evaluation approach. Link instructional methods and media to job-related requirements at micro and macro levels within the organization.
5. Make participation in extensive experiential or adventure-based training voluntary. Require a written consent that discloses the contents of the program. Any other type of consent may not be interpreted as "informed" and therefore be unenforceable.
6. Provide non-punishing alternatives for employees who do not wish to participate in experiential activities that may intrude on constitutionally guaranteed rights, such as privacy, religion, or handicap. Design alternative developmental approaches that result in the same learning and performance outcomes.
7. Never force an unwilling employee to continue an experiential activity or exercise, and make every effort to avoid embarrassing an employee, during training and back on the job.
8. Do not punish those who do not volunteer for such programs when their performance appraisals are due or when promotions are being considered.
9. Choose your private vendors/contractors carefully. Check their references, program content, and, if possible, observe one of their programs in progress for safety and emergency precautions. Clearly put in writing how you expect the vendor to handle instructional content and conflict. Based on job-related data, expect the vendor to modify the design and development of media and content of the curriculum to meet the work-related requirements of the organization. Consider requiring performance bonds for vendors and contractors.

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General Recommendations for Preventing or Reducing Litigation

Well-developed training and development programs have an additional usefulness beyond improving performance in the workplace. Documented existence of training becomes a legitimate defense to an allegation of failure to train to standard. In other words, not only do we train with the expectation of increasing the probability of correct performance on the job, but we also train personnel so that the organization and its personnel can defend against an allegation of failure to train to standard.

Reducing the potential for litigation is crucial, and fortunately many methods exist for doing so. One of the more straightforward strategies for preventing and reducing training liability is recommended by Gallagher (1990), whose "six-layered" liability protection system, originally designed for police agencies, can also be successfully adopted for other kinds of organizations. Gallagher's protection system contains the following six components: (1) the development of policies and procedures; (2) adequate training to the task; (3) competent supervision; (4) progressive discipline when necessary; (5) policy and training review and revision on a regular basis; and (6) legal support and services. For optimum effectiveness, Gallagher contends that each component must be well-developed, and that all six components must be tightly integrated.

In addition to approaches advocated by Gallagher and by Clardy, several sources exist that discuss practical measures training and development programs can take to prevent or reduce liability for failure to train to standard (Clardy, 2004; Eyres, 1998; Sample, 1997). An excellent reference text for instructional designers, trainers, and program evaluators is Ward's (1988) reference text, *High-Risk Training: Managing Training Programs for High-Risk Occupations.*

For purposes of this article, Gallagher's and Clardy's systematic approaches need not be discussed in detail. However, I do wish to present the following nine practical recommendations that have been distilled from these and from other sources:

1. *Develop comprehensive operational policies and procedures for identifying high liability tasks* (Clardy, 2004; Gallagher, 1990; Ward, 1988). Continually scan your organization's environment for legal and regulatory threats and opportunities. For example, does your organization have adequate written policies and procedures that are consistent with the training requirements for the Americans with Disabilities Act? It is important to remember that courts will hold organizations accountable for oral policies, as well as written policies. Also, it is one thing not to have viable policies, but it is worse when your organization has a policy, yet fails to follow its own dictates!

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2. *Conduct a legally defensible job-task analysis that identifies essential function and high-liability tasks.* Prioritize tasks suitable for training, beginning with high-risk tasks. Consult industry and craft standards for assistance in identifying high-risk tasks (Fine & Cronshaw, 1999).

3. *Develop measurable standards of acceptable performance for each task, beginning with high-risk tasks.* Tasks are generally regarded as "what" is to be accomplished, and performance standards (job performance measures) deal with "how well" a task is to be accomplished.

4. *Consider selection over training whenever possible.* Training is one of the most cost- and time-intensive modes for changing behaviors and attitudes used in organizations today. Effective selection of personnel who already possess necessary knowledge, skills, and attitudes is often more cost-effective than training (Cascio & Aquinis, 2004).

5. *Utilize a standard instructional systems design model* (Dick, Carey, & Carey, 2004; Rothwell & Kazanas, 2003). A rigorous and systematic approach to designing and developing instruction ensures that the correct tasks are selected for instruction, and that a tightly coupled linkage from one stage to the next exists for purposes of documentation. Development of job-related simulations and other tests of performance appropriate for the classroom and the work site should also be included (Westgard, 1993). Reasons of safety and ethics often preclude the assessment of performance under actual work conditions. This is especially true of high-liability tasks. Waiting until someone has a heart attack is a poor time for assessing the extent to which an employee can perform CPR!

6. *The training and development unit should certify individual competence on each high-liability task using pre-established job performance measures.* Additional training should be required when task mastery is not to standard. Require line supervisors responsible for employees who perform high-liability tasks to qualify their employees after training, and at regular intervals. To be qualified means that the employee has been observed in a work setting by a supervisor, and that the behavior on high-liability tasks is at mastery, given a job performance measure. Certification by training and qualification by management must be documented (Sample, 1995).

7. *Document instruction and supervision.* Many courts will rule that the absence of documentation equates to a finding of no training, even if the employee was trained (Barrineau, 1987). Document the instructional process (e.g., attendance, learning objectives, pre-test/post-test scores, observation of a task

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practiced to standard) and supervision (e.g., critical incidents, disciplinary action, on-the-job remediation, referral for additional training). Such documentation will also help guard against additional areas of litigation, such as negligent retention and failure to supervise to standard.

8. *Communicate in writing to your supervisor and, if necessary, to your agency or general counsel, any concerns that you have about high-liability tasks.* Part of your responsibility is to educate your agency personnel. Failure to do so may put the trainer at risk legally if a suit is brought at a later date (Eyres, 1998).

9. *Purchase individual liability insurance.* Liability insurance can be applied for through a professional association, such as the National Society for Performance and Instruction, or through a reputable insurance agency. This type of insurance varies in cost and provides reasonable security.

Conclusion

My intent with this article has been to educate the human resource management professional so that he or she is prepared to make informed decisions about the practice of the craft when potential areas of legal liability are involved. The probability a company or a training and development specialist ever has of becoming involved in a lengthy litigation suit is slight. However, if the occasion were to arise, defending one's professional competence and integrity will be costly, embarrassing, and time-consuming—even if one is not found liable!

Training personnel and their managers must learn to consider the potential for liability in their quest for improving individual and group performance. Although several general reference texts exists for the lay person, the best resource for advice on potential and real legal problems remains competent legal counsel. Most businesses and governmental agencies that have training responsibilities also have attorneys on staff or on retainer. Do not hesitate to use their expertise whenever necessary.

Unfortunately, attorneys at your disposal may not be familiar with the legal concerns of the trainer. Being ever the educator, human resource managers may find themselves in a position to frame issues and problems of a legal nature for their attorneys. Costly legal fees and judgments will be reduced or prevented when members of both disciplines work together to understand legal threats to their company's assets and to resolve them in a timely manner with due process.

There is a caveat, however! Employers will expect their training and development personnel to perform to the best of their capability. Meeting the vision and mission of a dynamic enterprise requires a certain amount of risk taking. Employees must not be

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frightened into non-performance of their jobs because of the potential for litigation. Remember that the courts do not expect perfection in people who inhabit our institutions and businesses. Reasonable and prudent behavior may result in mistakes of an intentional or non-intentional nature. For this reason, our country has a criminal, civil, and administrative court system to right wrongs and a risk management system to indemnify those who are covered by insurance.

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