

Documenting Employee Performance and Behavior Problems

Presented by:

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1

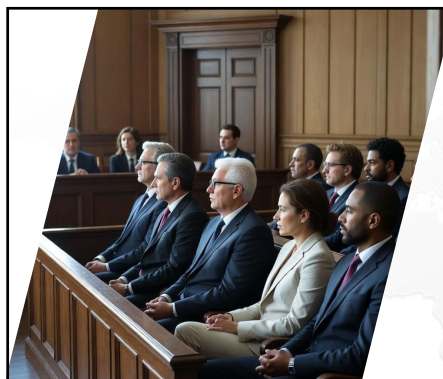
Overview

- The theme: fair to the employee, credible to the jury
- Why documentation is your first line of defense
- Laying the groundwork before problems arise
- Documenting performance
- Documenting behavior and misconduct
- Investigations and special situations
- Bringing it together: a practical checklist



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The Theme: Fair to the Employee,
Credible to the Jury

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Two Audiences, One Document

The Employee, Today

- Notice of the problem
- A real chance to improve
- A fair process

The Jury, Years Later

- The only proof of what happened
- Read without hindsight bias
- Judged for fairness, not legal jargon

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Juries don't know employment law.
They know what's fair.

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Why Contemporaneous Documentation Persuades

- Written before anyone had a lawsuit in mind
- Not reconstructed or rehearsed
- Juries trust records over memory
- Credibility grows with detail and consistency

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The Cost of Thin Documentation

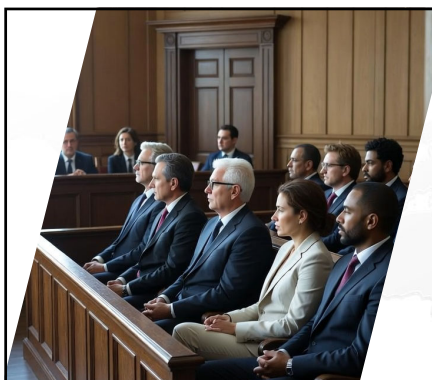
- Vague or late records look unfair, even when the decision was legitimate
- Silence invites the jury to guess at a motive
- Absence of paper becomes its own kind of evidence



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Why Documentation Is Your First Line of Defense



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The Real Legal Question

Not "did you
discriminate"

But "can it be
made to look like
you did"

Plaintiff's counsel
builds a narrative,
not just facts

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How the Narrative Gets Built

- Circumstantial evidence and comparison to other employees
- Timing near protected activity
- Departures from stated policy
- Inconsistency across documents and witnesses

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Protected Classes and Activity, A Quick Refresher



Protected Classes
Race, sex, age, disability,
and more



Protected Activity
Complaints, leave,
workers' comp



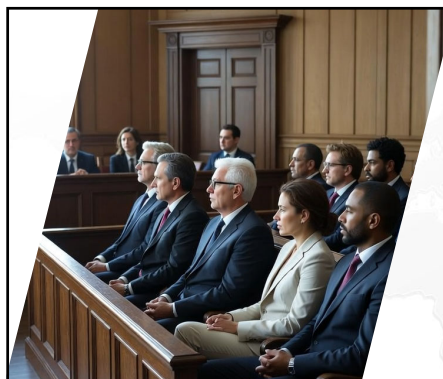
Adverse Action
Discipline, demotion,
termination



The Link
Was status or activity a
motivating factor

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Laying the
Groundwork Before
Problems Arise

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Clear Rules and Consistent Application

Written policies employees actually know



Uniform enforcement across managers and teams



Flexibility built in, without becoming arbitrary

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Two Prerequisites to Good Documentation

Clear Expectations

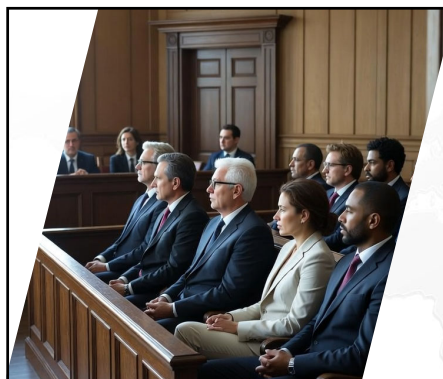
- Rules
- Training Materials
- Job Descriptions
- Performance Metrics
- The "Why"

Manager Training

- How to document, not just discipline
- Consistency starts with the people writing the record

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Documenting Performance

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Performance Review Best Practices

- Job related, objective criteria
- Candid and accurate, not softened
- Consistent over time and across employees
- Room for employee comment



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The glowing review that contradicts the termination is the plaintiff's best exhibit.

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Performance Improvement Plans, Building the Plan

- Use uniformly, according to the handbook
- Objective standards tied to the job
- Clearly identify the deficiency
- Propose a reasonable path to improve
- Reasonable time period to achieve

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Performance Improvement Plans, Following Through

- A 60 day PIP does not guarantee 60 days
- Be prepared to follow through either way
- Periodic check ins and documentation on progress along the way
- Retain the employee who meets the plan
- Reserve PIPs for performance, not misconduct

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Documenting Behavior and Misconduct

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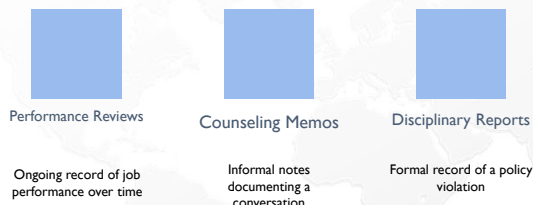
From Verbal Warning to Written Record

- Bad behavior can sometimes be difficult to articulate; avoid general "bad attitude" comments and focus on specific observations.
- An undocumented warning gives little real notice
- If it mattered enough to say, it mattered enough to write down
- Witnesses and file notes protect the record

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Types of Supporting Documentation



22

The 5 W's of Documenting Misconduct

- Who was involved, and who witnessed it
- What happened, specifically
- When and where it occurred
- Why it violated policy or expectations

23

Employee Comments and Acknowledgment

- Gathering witness statements can be a solid way to prove conduct happened.
- Give the employee a real chance to respond
- Document the response, even if you disagree with it
- Acknowledgment shows the process worked both ways

24

Common Documentation Pitfalls

Too lenient or
too harsh
compared to
precedent

Uneven across
employees

Late, vague, or
narrowly
focused

No employee
acknowledgment

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Investigations and Special Situations

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When to Investigate

- Possible harassment or discrimination
- Safety incidents and workplace injuries
- Serious misconduct
- Any termination decision

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Hallmarks of a Good Investigation



Prompt

Started and completed without delay



Thorough

Witnesses, documents, and follow up covered



Fair Conclusion

Supported by the evidence gathered

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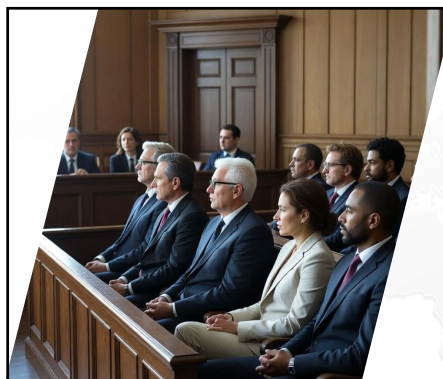
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When to Involve Counsel

- Attorney client privilege
- Attorney work product protection
- Preserve confidentiality of findings

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Bringing It Together

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Consistency Is the Throughline

- Across similar cases over time
- Between documents, witnesses, and stated reasons
- Inconsistency is what turns a good decision into a lawsuit

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Recordkeeping in the Digital Age

- Careless emails can undercut a careful paper trail
- Assume anything written may be read in discovery
- Contemporaneous documents carry the most weight

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The Two Question Test

Fair to the Employee?

- Clear notice
- Real chance to respond or improve

Believable to a Juror?

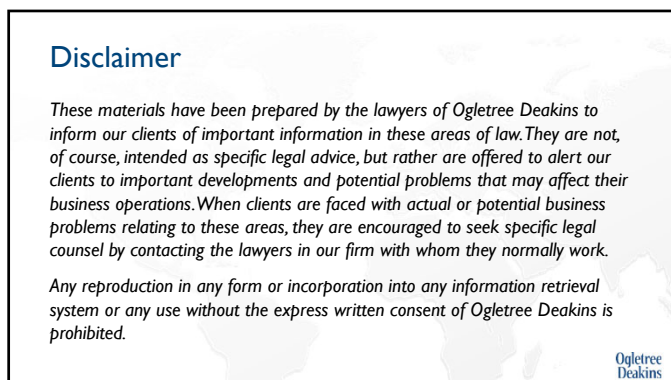
- Specific, contemporaneous, consistent
- Documented at the time, not reconstructed later

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33



34



35
