TERMINATION DO'S AND DONT'S FOR GENERAL COUNSEL

1. Know who is making the decision. Anyone having a role in the decision is a witness and potential defendant. Don't let someone who might be ineffective in court or who might get off the reservation be a part of the decision.

2. Know the basis for the decision. If you cannot articulate in simple, specific terms the reason for the decision, and recite undisputed facts supporting the reason, you likely have a problem. Everyone involved in the decision must be on the same page about this or the decision should be held until there is consensus.

3. Have the evidence support the decision. Termination decisions should not be made on the basis of supposition or what someone is confident about. Double check every fact that is part of the explanation.

4. Be sure it is documented. If there is a dispute about it later and it is not written down, it did not happen. Having it down on paper increases the chances that the employee will admit the accuracy of the information after litigation begins.

5. Is this what we always do? Consistency is crucial in avoiding the appearance of a thought crimes like discrimination or retaliation. Inconsistency is the first building block of liability.

6. Check the evaluations and personnel file. Before making a decision, consult the personnel file and your personnel policies or employee handbook, even if you disclaim its legal character. If you do not, it looks like a decision made without careful consideration. Review the performance evaluations to see if something there is inconsistent with the basis for the decision.

7. Think through the employee's side of it. Extraneous circumstances, such as a recent death in the family or the holiday season may caution delay. The jury will decide the case from the employee's point of view. If someone who has been told to concentrate on certain things is fired for not concentrating on others, for instance, that will be a problem.

8. Persistent problems require fair, documented warnings. Not a formal grievance form, a memo or e-mail message making clear the importance of the problem is sufficient. People should know what they are supposed to do before being disciplined for not doing it. Genuine extenuating circumstances cannot be overlooked, and you should anticipate that there will be an assertion along these lines. If the transgression is minor, progressively more serious consequences should occur rather than instant termination. This does not apply to misconduct, which roughly translates to conduct the criminal law describes as *malum in se.*

9. Keep it quiet. For a number of good reasons, information should be shared on a need-to-know basis only. Both before and after the decision. If the employee wants to be permitted to resign, permit it. Contest unemployment benefits for professionals only in extreme cases.

10. Act promptly. It won't be anymore pleasant a task next week than it is today. Don't fire someone for misconduct you knew about last month and did not act upon unless you have been investigating and just got the definitive information—preferably the employee will be notified that you are investigating. In employment contract cases, the doctrine is called condonation; in discrimination cases, stale events as the basis for termination reeks of pretext.

11. Have a witness at the discussion. This will be an emotional moment for the employee and you want no "he said-she said" over what you did or did not say. Errors in recollection about such discussions occur regularly. Consider having a script or outline, which can later serve as evidence. There are ongoing debates about the right time of day and the right day of the week and no consensus.

12. Communicate clearly and definitively. You have an explanation, and it does not play well with a jury if your answer to the inevitable "Why?" is "I am not required to give a reason." You will also feel a powerful impulse to pull your punches and say it differently. Resist.

13. Do not engage in a debate or try to justify. You are communicating a decision, not debating it. That should be made clear. It is cruel to open the floor to debate when the debate will not change anything. Have the final paycheck handy and run through a checklist of the benefits the employee will have available.

14. Do not offer ameliorating admissions. Cases are lost this way. The employee will not feel better no matter what nice things you say. Your nice words intended only to make the employee feel better will be taken as the truth by the employee and by the jury.

15. Consider outplacement and/or severance. Outplacement focuses the employee on finding a new job, which can render a great case worthless, or lead the employee to conclude that litigation is an unwise business move. Severance should be conditioned on execution of a release, and preferably as part of a regular program so that you minimize the risk of arguments that in asking for a release, you have admitted liability. Court's don't generally accept this argument, but is has happened on occasion and plaintiffs often make the contention.

16. Conduct an exit interview. But not on the spot, only after the employee has had an opportunity to absorb the decision. Not by the person who communicated the decision itself. The exit interview operates as a safety valve to blow off steam and be heard. It permits you to communicate post-employment expectations and document the communication. It is an opportunity to collect property. It provides the employee a chance to tell the story before a rehearsed deposition, and thus will be more candid and less guarded. If you hear something surprising in the exit interview, follow up and if you made a mistake, reverse course immediately and offer a return to work with an apology.