



XL CATLIN

WHEN PERCEPTION BECOMES REALITY

Effectively managing your brand and minimizing your liability

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Learning objectives



- ✓ **Develop a better understanding** of what a brand is, how to manage your corporate brand, and the interplay between brand management and professional liability exposures
- ✓ **Learn from real life examples** in the media about how companies have tarnished or compromised their brand through perceptions of poor communications and conduct, which can increase professional liability exposures
- ✓ **Focus on effective communication practices**, including client communications, project documentation and social media usage in a way to minimize the frequency and severity of claims

What is a brand?



- Traditionally a name given to a product or service from a specific source
 - e.g., Scotch tape, drywall, or Coke
- “The intangible sum of a product’s attributes” - David Ogilvy
- Denotes quality, value, authenticity
- Applies to companies and individuals
- A company’s greatest asset
 - Conveys why you are special and unique, and reflects culture and core values
- Every employee is a brand ambassador



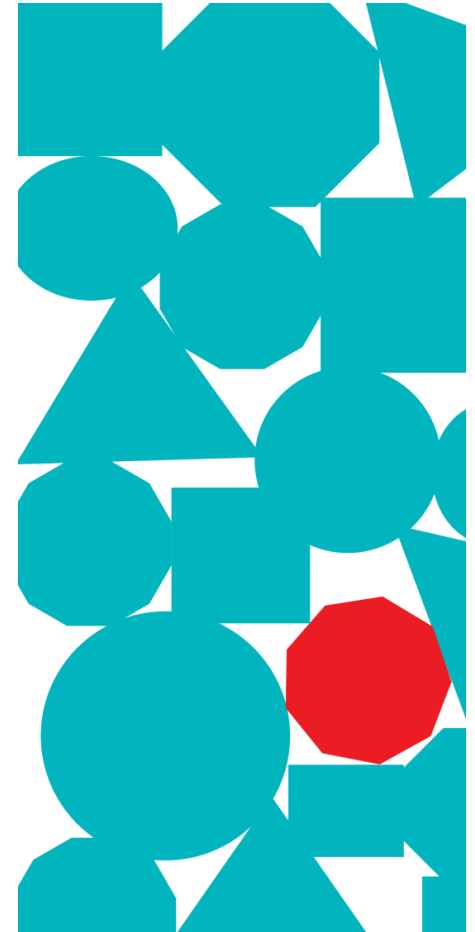
What is a brand?



In our business, your brand is how credible you are – your reputation

“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you’ll do things differently.”

– Warren Buffett



What is a brand?

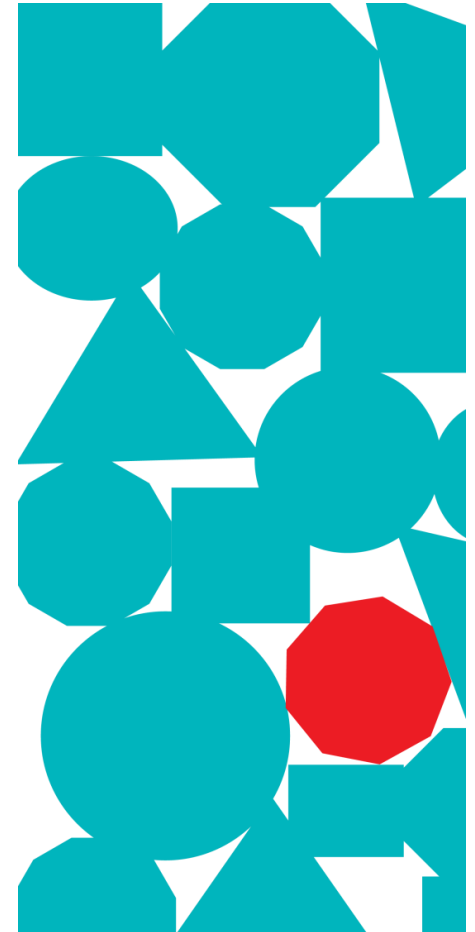


- Your brand exists objectively in someone else's mind

What is a brand anyway?

Jerry McLaughlin, Forbes /Entrepreneurs, Dec. 21, 2001

- Your brand is what a customer thinks of you
- The public perception of your brand becomes reality whether you share the same vision or not

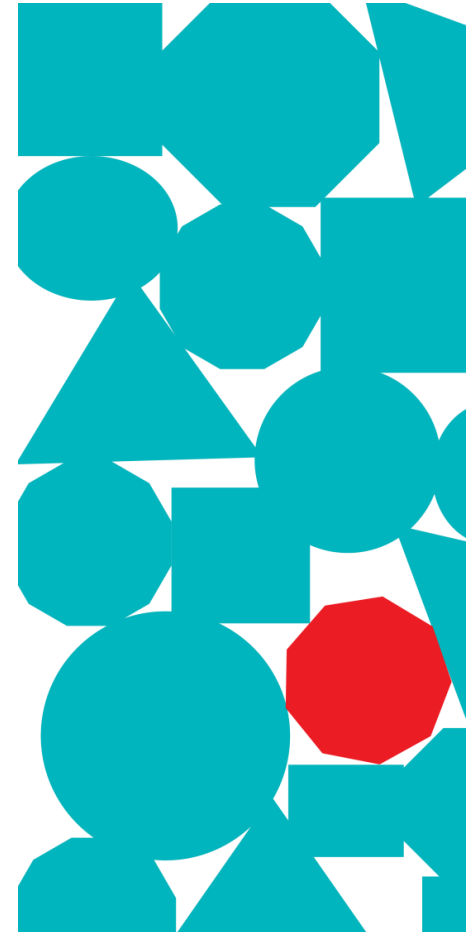


What is a brand?



Branding applies to all facets of your business

- Marketing, responding to RFPs, contract negotiations, professional services, construction phase services
- Driving to and from work, time away from work, interactions with the public, and social media (personal and work-related)

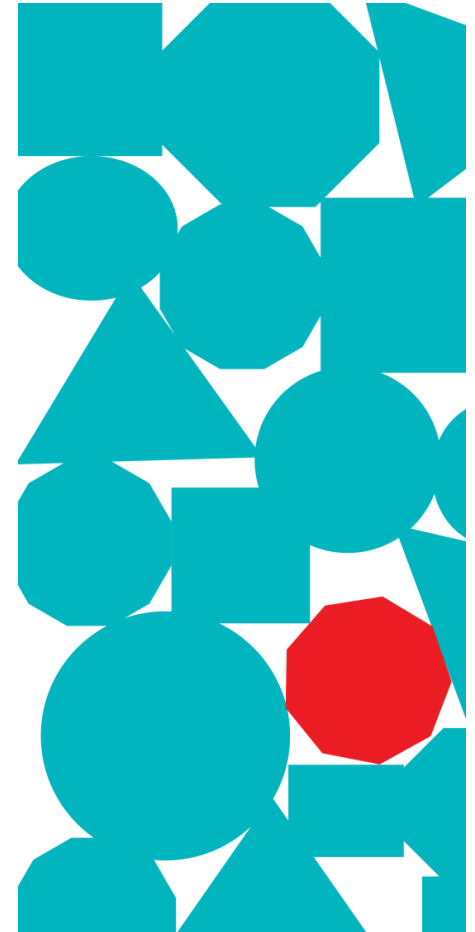


What is a brand?



Tarnished brands

- Well-intentioned but poorly executed marketing and business plans to cavalier remarks in e-mail or posts on social media
- Questions the legitimacy of your company and people
- Unauthentic and disingenuous



What is a brand?



Poor brand management can amplify professional liability exposures

The ultimate test of your brand is what a jury will think of you



Examples of tarnished brands



“It takes many good deeds to build a good reputation, and only one bad one to lose it.”

- Benjamin Franklin



Lance Armstrong



The story of Lance Armstrong and the Lance Armstrong Foundation

- The greatest cyclist of all time
- 7 time Tour de France winner
- Cancer survivor and founder of the Lance Armstrong Foundation
- A true American hero



Lance Armstrong

- Constant target of the French media
 - He must be cheating!
- The most tested athlete
 - Never tested positive for a banned substance*
- Speculation grows
- Armstrong files multiple lawsuits to protect his good name and is sued by a promoter



Lance Armstrong



Armstrong's sworn deposition testimony on
Nov. 30, 2005



Lance Armstrong



- Two key admissions:
 - Floyd Landis
 - Tyler Hamilton
- Dept. of Justice investigation – 2010
 - Dropped investigation
- United States Anti-Doping Agency (USADA) – 2012
 - Comprehensive report and lifetime ban



Lance Armstrong



The confession on Oprah Winfrey
Jan. 17, 2013



LIVESTRONG



Lance Armstrong Foundation changes its name to
LIVESTRONG

Lance Armstrong steps down* in 2012 (forced out)

L I V E S T R O N G™

Lance Armstrong



In one day, Lance Armstrong lost \$75M in endorsements, permanently ruined his brand, and left a worthy non-profit agency reeling in the wake of his destruction

LIVESTRONG will survive

L I V E S T R O N G TM

"The most hated man in America"



Martin Shkreli

- Arrested in Dec. 2015 for insider trading
- Bought Turing Pharmaceuticals and raised the cost of the drug Daraprim by 5,000%

From the Philadelphia Business Journal:
<http://www.bizjournals.com/philadelphia/blog/guest-comment/2016/02/silvermanformer-pharma-ceo-martin-shkreli.html>

Stan Silverman: Thought Leader on Effective Leadership

Silverman: Former pharma CEO Martin Shkreli tarnishes the image of his profession

Feb 17, 2016, 1:58pm EST Updated: Feb 18, 2016, 8:58am EST

On rare occasions, corporate leaders lose sight of a major principle in business and in life. When they take an action that in the eyes of the public, customers, government regulators or elected officials is unreasonable or egregious, or act in a way that is disrespectful or with disdain, their behavior will come back to haunt them and their company.



PETER FOLEY/BLOOMBERG
Martin Shkreli, chief executive officer of Turing Pharmaceuticals LLC, was arrested on Dec. 17, 2015 on charges of securities fraud related to Retrophin Inc., a biotech firm he founded in 2011.

Such is the case of Martin Shkreli, the former CEO of **Turing Pharmaceuticals**. This company acquired the rights to Daraprim, a drug used to treat toxoplasmosis, a disease that weakens the immune system of people who have cancer or are HIV positive. Turing increased the price of Daraprim from \$13.50 to \$750 per pill, pushing this drug out of the financial reach of many patients.

Shkreli resigned from his position as CEO of Turing Pharmaceuticals after being indicted on Dec. 17 for securities fraud committed prior to him joining Turing.

<http://www.bizjournals.com/philadelphia/blog/guest-comment/2016/02/silvermanformer-pharma-ceo-martin-shkreli.html>

1/4

The most hated man in America



- Called to testify before Congress in February 2016
- Asserted 5th Amendment right against self-incrimination
- Smirked, held back laughter and Tweeted:
 - “Hard to accept that these imbeciles represent the people in our government.”
- SEC case for insider trading is still pending
- Damaged brand?
- Fair trial?

Other examples



“Do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?”

- Email from company executive introduced into evidence at trial regarding the dangers of the diet drug Fen-Phen



Other examples



Chevron settled a lawsuit for \$2.2M that involved an interoffice email giving 25 reasons why beer is better than women



Other examples



Investment banker Frank Quattrone was convicted of obstructing federal investigations into his stock offerings at Credit Suisse First Boston. When learning of the federal investigation, he emailed his employees that it was “time to clean up those files.”



Other examples

Volkswagen's clean diesel cars fitted with defeat devices designed to cheat emissions standards

- 550,000 Volkswagens and 2.1M Audis
- Federal Trade Commission suit
- Individual state suits
- Class action litigation

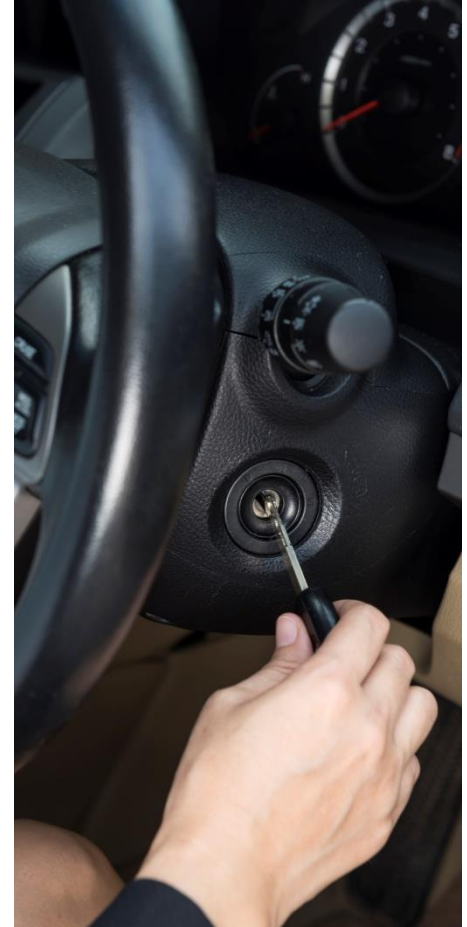


Other examples



GM ignition switch trial – jurors saw videotaped deposition testimony of fired engineer Ray DeGiorgio discussing his email to coworkers that he signed as “Ray (tired of the switch from hell) DeGiorgio.”

\$2,000 switch



Other examples



Customer service department of a large national homebuilder refers to a homeowner making a warranty claim as “the homeowner from hell.”

Senior engineer emailed internally:

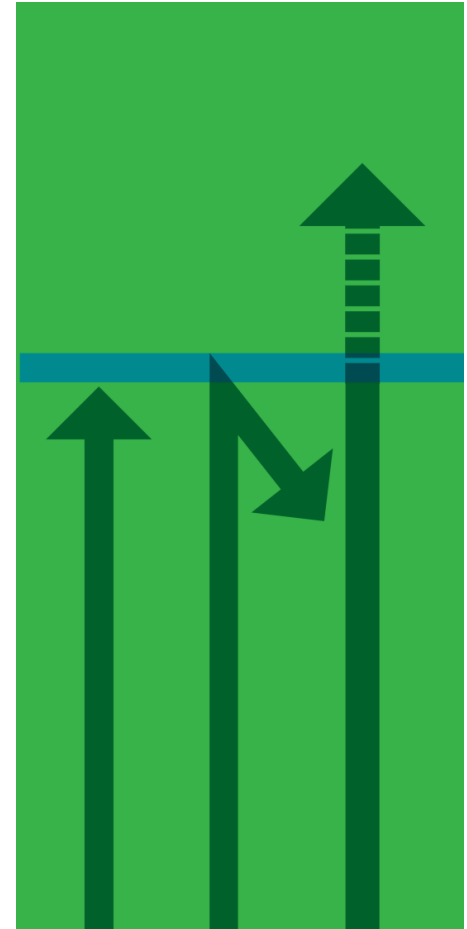
“We need to increase the value of these work scope variances as much as possible without getting caught.”

Other opportunities to damage your brand



Perceptions of

- Bid rigging, bribery, inappropriate favors, pay to play, fraud and deception, being anything less than honest and transparent
- Improper hiring and firing practices
- Inappropriate bias, racism or sexism
- Employees doing things on their personal time that contravene the company's core values



Poor Communication
remains the No. 1 non-technical risk driver



The curse of electronic communication and social media

- Volume of communication has increased dramatically
- The promise of efficiency is overwhelming many of us
- E-mail, text, instant message, social media* are conducive to being very casual
- Many Millennials do not know what the world was like when we wrote letters

Plaintiff attorneys are capitalizing on poor communication

Reptile Theory



- Plaintiff attorneys are seeking to make their case based on emotional connections with jurors
- The Reptile Theory: “the most powerful tool available to a plaintiff attorney seeking to secure a favorable verdict and a high damage award”*

www.reptilekeenaball.com

Advertises over \$6B

“in reptile verdicts and settlements”



*ALFA International, Charming the Snake: Understanding and Defeating Plaintiff's Reptile Theory Litigation Tactics

Reptile Theory



Key concepts

- Jurors have an inherent desire to expose and punish the existence of danger
- “By framing arguments in terms of the need for safety and security, proponents claim that jurors will instinctively choose to protect their families and community from needless danger by rendering a substantial verdict against the defendant”

One of three parts of the human brain

Reptilian complex – controls basic life functions such as breathing, hunger and survival



Reptile Theory



- Keenan and Ball develop case specific codes to subconsciously trigger jurors reptilian portion of the brain
 - Issues are converted to self protection
- Plaintiff attorney establishes through deposition testimony certain safety rules that the defendant agrees to
- Then that plaintiff chose to violate safety rules that unnecessarily subject the plaintiff and the community to danger



Reptile Theory



- Show that violation of rule was intentional or show that the deponent is stupid and reckless or dishonest for disagreeing
- Departure from the sympathetic “day in the life” videos



Reptile Theory



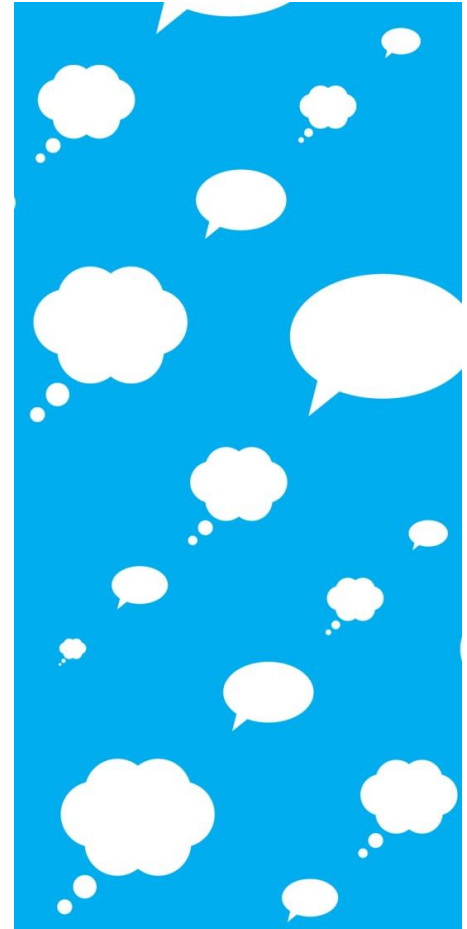
- High damage cases with poor liability
 - Bodily injury and wrongful death cases
- Standard of care
- Code violations
- Life safety hazards
 - Structural
 - Mold and water intrusion
 - Asbestos, Legionella and hazardous materials
- What about the dream home or the cash-strapped small town?



Rules of perception



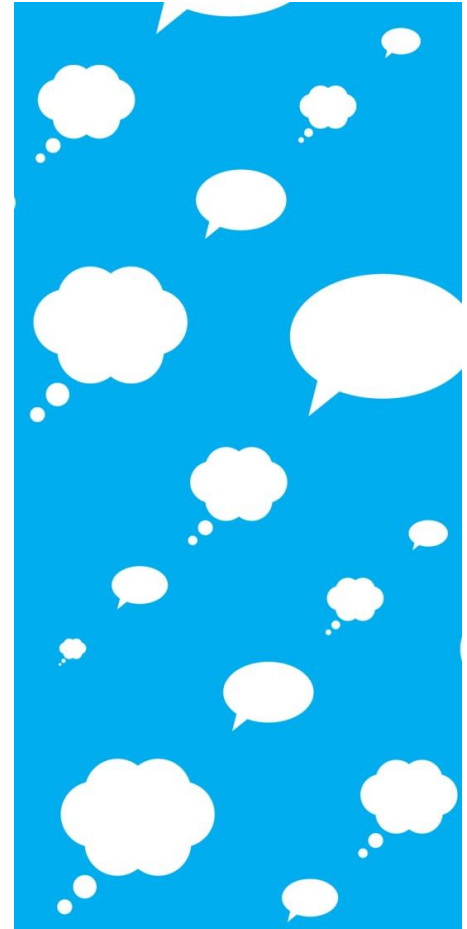
- Bodily injury and death are never funny
 - We don't ever celebrate the Darwin Awards
- People hate liars
- Arrogance is unacceptable
- People are concerned about their personal safety
- The kids always win



Rules of perception



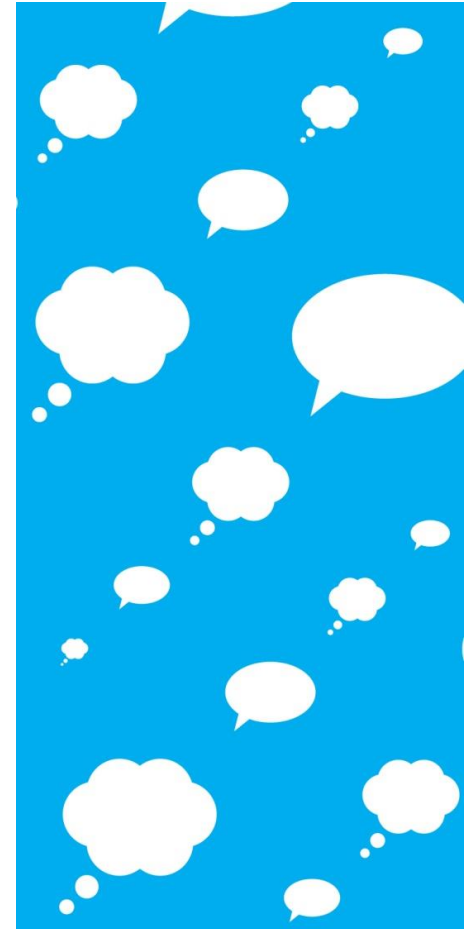
- Threats are bad – even the joking kind
 - “I’m going to kill her if I get one more e-mail about our work”
 - “kill him” – exhibit used in antitrust lawsuit written by former American Airlines CEO reacting to a food vendor’s menu choice



Rules of perception



- Nothing and nobody comes from hell
- Bias, it's not just for jurors (judges are people too)
- There is only one professional on a project, and that's you
- The standard of care is a moving target
- People believe in redemption

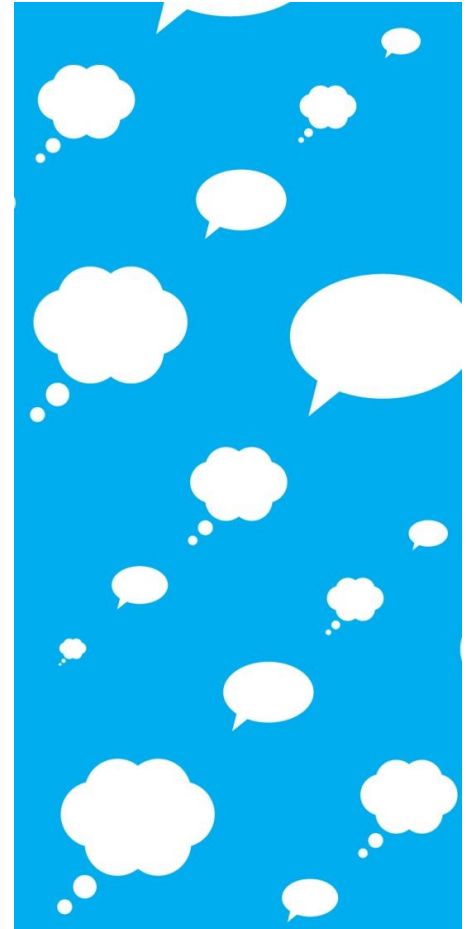


Rules of perception



People admire taking responsibility for one's actions

- Tyler Hamilton
- William LeMessurier and the Citicorp Building
- Responsibility v. admissions of fault

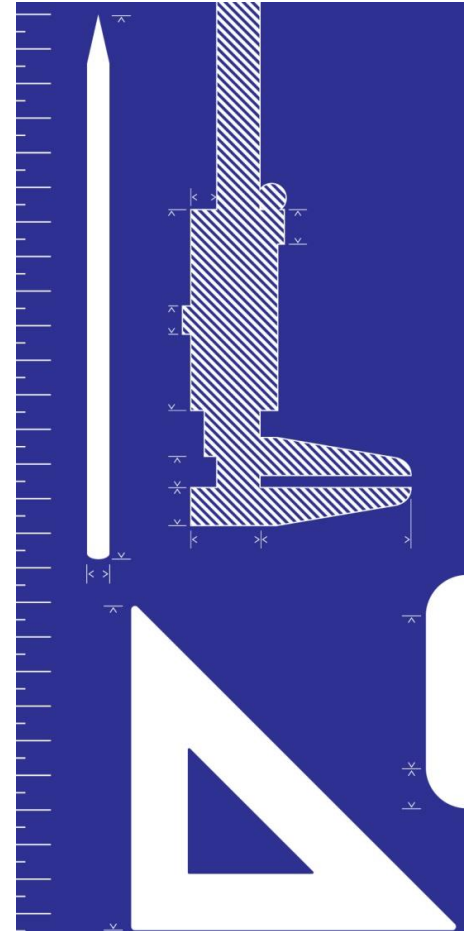


Best practices



“Every day that we spent not improving our products was a wasted day”

- Joel Spolsky, software engineer and Stack Overflow co-founder



Know how to write right

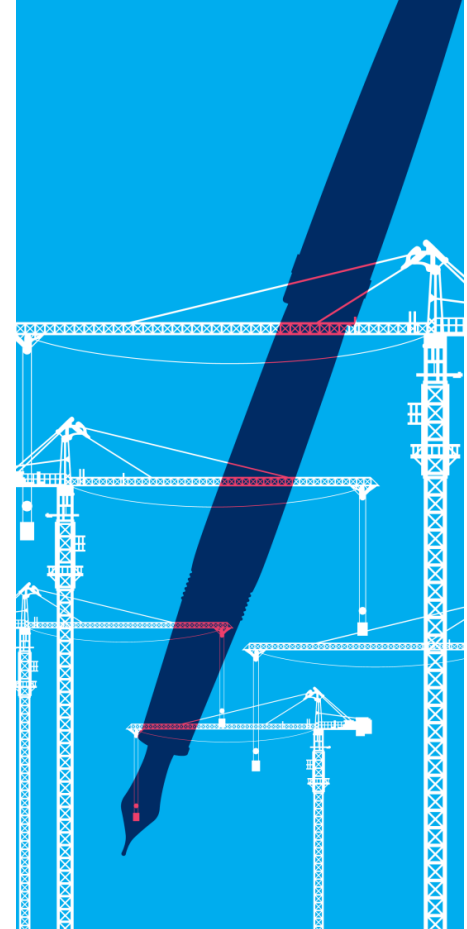


Think before you act / hit send

- Can this be accomplished with a conversation?
- Teach Millennials to talk to one another first

Stick to the facts

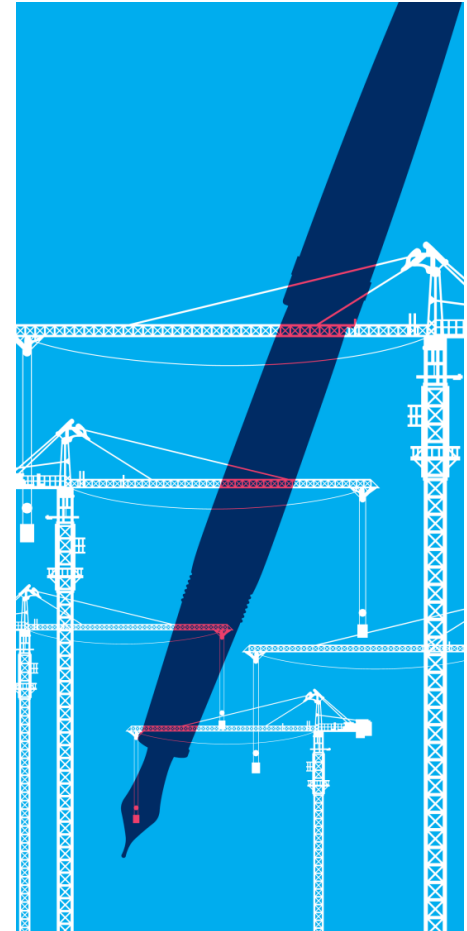
- be objective
- do not speculate
- Refrain from sarcasm and anger



Know how to write right



- Goal is to choose the right medium to convey the right message in the right tone to the right audience
- Do not assume that subsequent readers understand your job or business; i.e., a jury
- Review before sending when you can (facts, tone, wording)



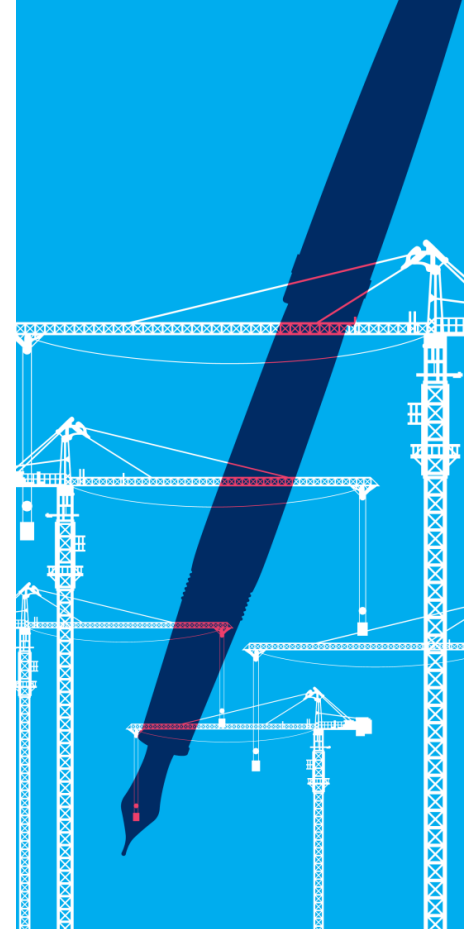
Know how to write right

Short, plain, professional language

- Militant or Violent: “Scorched earth” - “Will not negotiate with terrorists”
- Profanity never plays well
- Emotional: “Stupid” – “Unsophisticated morons!”

Eliminate suggestions of guilt

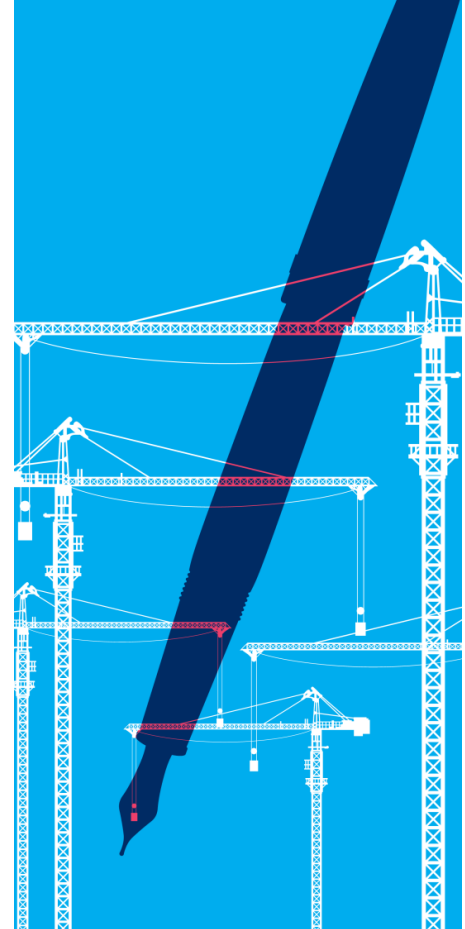
- “For your eyes only”
- “Destroy after reading”
- “Off the record . . .”



Know how to write right



- Avoid admissions of liability
- Public Responsibility Chapter in XL Catlin's Contract eGuide for Design Professionals



The rule of equal dignities

- If you receive a letter sent return receipt requested or FedEx from your long time friend / client of 30 years stating why you are a horrible design professional and sounding like it was written by a lawyer
 - It probably was written by a lawyer
 - You need to respond
- Phone calls are always best...
- Followed by a letter (that you keep and can readily find)



The rule of equal dignities



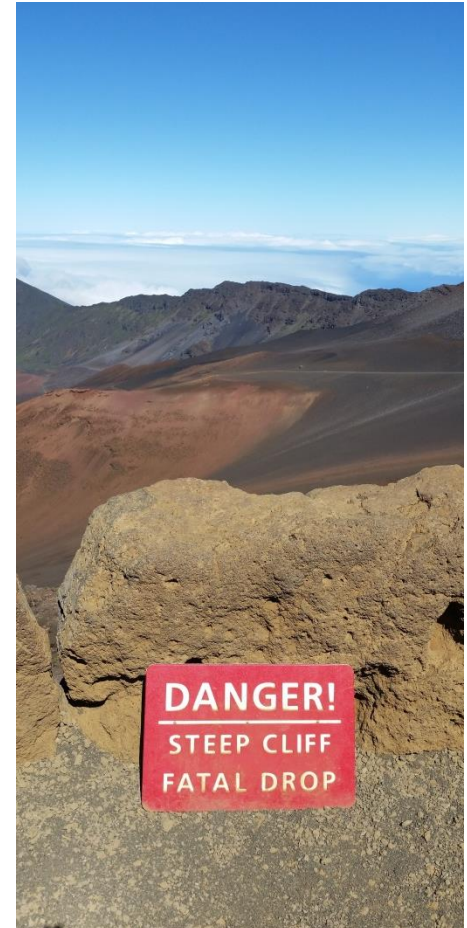
- Create a paper trail for others to find
- Avoid the perception that you didn't feel it necessary to respond
 - Silence as a tacit admission
 - The forgotten conversation
- Protect your brand!



Warn like you mean it



Your job is to help others make the most informed decision and to tell others when it is a bad idea to do something and what can happen as a result



Warn like you mean it

You must connect the dots

“We strongly recommend against this design change at this point during construction as it will impact the schedule by at least 6 months and result in an additional cost of at least \$3M.”

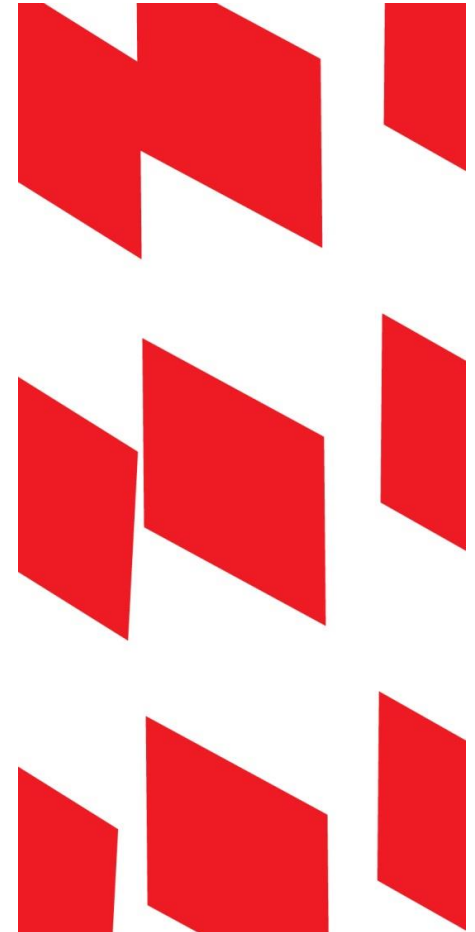


Warn like you mean it



Waiver

“If you decide to proceed with this course of action, you hereby waive any and all claims for damage that arise out of your decision to do so.”

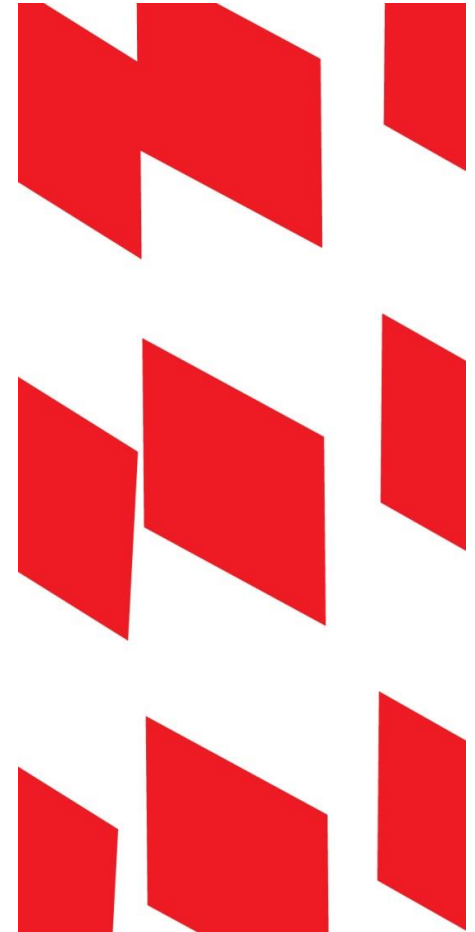


Warn like you mean it



Indemnity

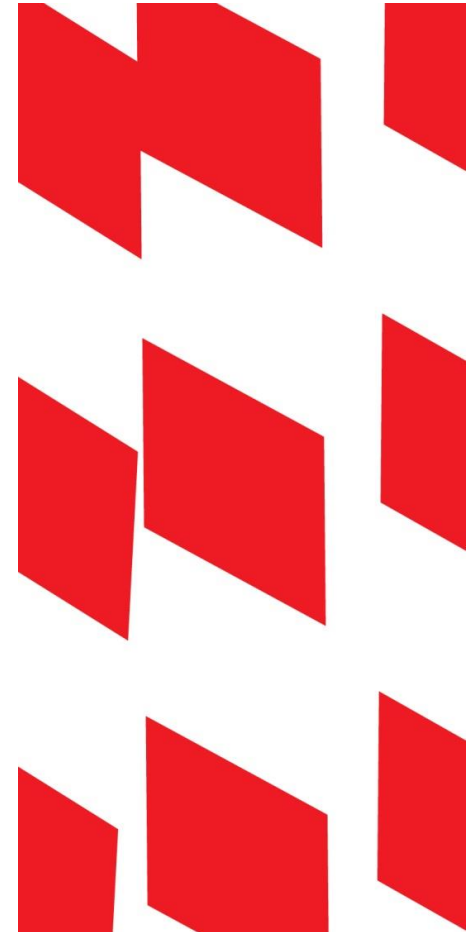
“You agree to defend and indemnify the design professional from any and all lawsuits, claims, costs, damages and expenses in any way related to or in connection with this change.”



Warn like you mean it



“A ten year old could knock over this cabinet and can kill himself. I have instructed my workers to lay the cabinet down flat and to walk away.”

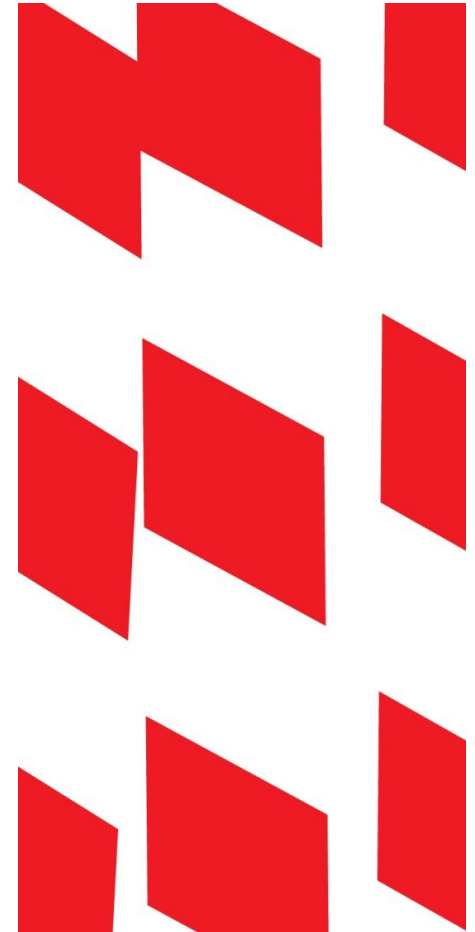


Warn like you mean it



“The construction site is in close proximity to a known archaeological hot spot. We strongly recommend that the City hire an archaeologist to have on site if any human remains are found. The cost is about \$8,000. Doing so could be a complete defense to a lawsuit by the Native American Tribes.”

Email from a civil engineer to its client

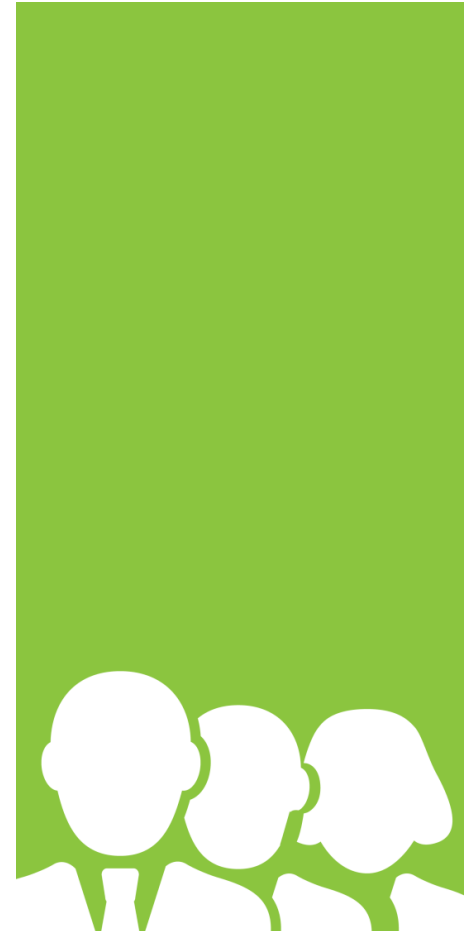


Company policy



Employee Handbook and Code of Conduct

- Focus on core values
- Clear rules on conduct that is allowed and prohibited
 - Workplace free of harassment and discrimination
 - Professional conduct
 - No disparaging remarks about the company and clients
 - Social media policy



Company policy



- Consult with counsel
- The bad acts of a single employee can tarnish your brand
 - Impact the ability to win work
 - Adversely impact litigation
 - Deal with an HR issue before it becomes a PR issue



What to do when trouble is lurking



- ✓ Call your broker
- ✓ Open a loss prevention file
- ✓ If necessary, assignment of counsel
 - Benefit of attorney-client privilege
- ✓ Have a crisis management team in place
 - Walnut Creek pipeline disaster
- ✓ Crisis Event and Reputation Management Coverage
 - There are two side to every story – make sure you tell yours



Closing Remarks



- Your brand is your most valuable asset
- Anything you do wrong can be spun into a reptile case
- There are two sides to every story
- Employ diligent internal efforts to manage your brand
- A tarnished brand can create an indefensible professional liability case



XL CATLIN

QUESTIONS?

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