



**ÆGIS** e-journal

***Addressing threats that affect your bottom line***

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We are proud to announce the addition of *Bernard M. Plaia, Jr.* as vice president of The LUBRINCO Group. Mr. Plaia was a Sergeant with the Jefferson Parish (Louisiana) Sheriff's Office, serving with a multi-jurisdictional narcotics task force and commanding a multi-jurisdictional organized crime task force. He subsequently served over 31 years of active and reserve duty in the military: 14 years in the Special Forces ("A" Team Commander) and the remainder in Military Intelligence Officer, first as commander of a counterintelligence company and later as a senior staff officer and special projects officer, retiring as a Lieutenant Colonel. In 1999 and 2000, he served as a military intelligence officer in the Balkans and Western Europe, directing a project targeting organized crime, terrorism, and paramilitary/political groups in the Balkans, and as the commander of the U.S. Joint Operations Intelligence Center assigned to and supporting the Northern Headquarters of NATO.

Mr. Plaia received a Bachelor of Science degree from Louisiana State University and a Juris Doctor from Loyola University School of Law. He has been a practicing attorney for over 22 years. He is a member of the OPSEC Professionals Society (OPS) and the American Society for Industrial Security (ASIS).

## **1. Due Diligence — Why our feet get muddy exercising financial due diligence**

Some time ago I got a call from a friend who is an Emmy award-winning documentary film editor and producer asking if I had believed the rumors that footage of Palestinians dancing in the streets after September 11<sup>th</sup> was actually from some earlier occasion. I said that I neither believed nor disbelieved them, and was then chastised for not understanding that there were rules about such things that would prevent such incidents from happening except by accident.

I am certainly delighted that the entertainment industry has rules, but assume that, in fact, they need to be taken with the same grain of salt associated with financial reporting, and transactions. Most financial reporting and transactions are verified via paperwork. And it is not uncommon for the paperwork to be believed. Indeed, financial auditing revolves around paperwork, and most financial due diligence revolves around paperwork, and much verification is in fact checking one piece of paper against another.

While we don't wish to give the appearance of being suspicious or paranoid (We are, in fact, both suspicious *and* paranoid: We merely don't wish to give that impression), we don't trust paperwork all that much, and, as a rule of

thumb, want to see the goods and services being described. If someone says they are building a house, we want to see the house. If someone says their money is coming from construction, we want to see the buildings. If someone says they are selling herring, we want to open a few casks. Or, even better, all the casks.

This jaundiced view is one of the separators between an audit, which verifies that the accounting procedures are correct, and due diligence, in which we verify (among other things) that the audited figures are real. As chance would have it, a surprising amount of stuff we look at turns out to be a trifle less real than we would like, and a surprising number of the people we look at are a bit less real than we would like. As an example, roughly one out of seven doctors we look at are not people we'd like treating us.

We also find a depressing number of cases in which what is listed on web sites doesn't match what we find: It is not uncommon to have an address and a picture of a facility, with the implication being that the facility shown is at the address shown. Sometimes we discover that the building at the address is not the one shown in the picture. Sometimes we discover that the goods listed in inventory are, how can we put it? Not there.

While this occurs in the U.S., it is even more prevalent in Central and Eastern Europe, China, and Latin America, where we do much of our work. Different customs, different economies, different laws, and if you ignore this, you do so at your own peril.

The bottom line here is that when financial due diligence is exercised, the paperwork is a starting point, not an end in and of itself. When we look at the paperwork on a cattle operation, if we don't come back with mud – and cow dung – on our boots, the job was not done. The good news is that when due diligence is exercised appropriately, you minimize your chance of a loss and looking like a fool.

## **2. OPSEC, Economic Espionage, and Competitive Intelligence — First mail and newspapers, then voicemail, now e-mail as an indicator**

We have spoken in the past about how imprudent it is to tell strangers you are going to be leaving your house empty and unguarded for an extended period of time. And that when you call your newspaper delivery service and tell them to hold your paper for two weeks (you should be so lucky as to get two weeks off!) or call the post office and tell some disembodied voice to hold your mail, you are doing just that. It is much better and safer to have someone you know and trust pick up your mail and newspapers.

We have also written about how your voicemail messages can tell much too much. Nothing personal, but if I call your home and get a message saying you will be away from now 'til then, I don't have to be a rocket scientist to realize that you will be away from now 'til then. And, frankly, it is not all that much more difficult to figure it out if I get the message on your office voicemail: I can safely guess that if you are out of your office for two weeks you may not be home during that period. And it doesn't help if you tell me you are on vacation, or even that you will be working on the Mugwump Project in your Texas research facility for two weeks. It is better to have your secretary pick up your voicemail and deal with anything urgent.

It also doesn't help if we send you an email and get an auto-response saying you are on vacation, or away working. Now, crazy as it seems, if we send you an email on December 23<sup>rd</sup> and don't hear from you for a few days, we probably will not be overcome with either worry or surprise: We know that people like to have time at home on the big holidays, and telling us when and where you are going is not really necessary. But if you are going to be away for weeks at a time you may wish to have someone deal with your email, just as they deal with you home mail, your office mail, and your voice mail, for all the obvious reasons.

### **3. Executive Protection — Sexual harassment policy as a tool**

Protection against sexual harassment is a good thing, as is protection against a variety of other behaviors that can create a hostile work environment. That said, we have seen an increasing number of cases in which sexual harassment protections are being used as a tool.

In one case, a manager wished to get rid of a co-worker. The co-worker was a genuinely touchy-feely guy, and one who tended to call every woman "honey," and to compliment women on their dress or hair. He also tended to call all men "pal," and compliment them on their ties, and was equally touchy-feely with them. The manager tried to convince women in the department to file complaints against the co-worker, but, as it happened, the women knew that this was not harassment and nothing came of it.

Similarly, when a woman's job is in danger, a complaint filed against a manager can virtually assure her position in perpetuity. This can be particularly effective if a company is in any sort of financial trouble (which is virtually every company when the market goes south), and management fears suits that could lead to suits against the board.

A contributory factor can be internal politics: There is always someone who dislikes the accused, and can be expected to fall in behind a movement to take “appropriate action.”

As with criminal cases, the innocent often have the odd view that they don't need to take immediate, forceful, action to deal with a baseless accusation. Because of this, they tend not to race to get an attorney, and to be painfully free to discuss the issues within the formal structure of the situation, and without counsel. It has been said by prosecutors that cases are won on the basis of the “preponderance of perjury.” Putting aside the truth or falsity of this jaundiced view, there is no reason to believe the situation is any better outside the protection of due process.

This means that guidelines regarding harassment should be taken seriously, both for the protection of the innocent who may actually be harassed, and the innocent who might be falsely accused of harassment. Further, if a charge is filed, it should be taken very seriously, and dealt with appropriately. For the subject of the charge it is important to remember that there is no minor surgery when you are the patient....

#### **4. Technical Issues — Why you or your staff need to take action even though you believe your IT staff already deals with these problems**

When you read about viruses and worms running rampant through the internet, you probably sigh with relief, sure in the knowledge that your crack staff is on top of the problem.

Well, don't sigh so soon. According to a paper by Eric Rescorla of RTFM, Inc. (<http://www.rtfm.com/upgrade.pdf>), “Two weeks after the bug announcement, more than two thirds of servers were still vulnerable.” For the curious among you, after a week only 23% of shops have taken appropriate steps to eliminate the vulnerability.

Now, we know that running an IT organization is not easy, and it is not easy to find time to deal with vulnerabilities. Nonetheless, if after a week only a quarter of all shops are secure from a specific vulnerability, and only a third are safe after two weeks, the likelihood is that your shop is one of those who has not acted in a timely manner.

If the vulnerability is one that affects, say, servers not directly under your immediate control, the only thing you can do is to try to change policy if it within your purview. On the other hand, many vulnerabilities affect individual computers, and your computer is, in fact, under your control.

The bad news is that there is no reason for us to assume that you, as a senior manager, have the expertise to be maintaining your computer. We do assume, however, that you have the ability to have someone from IT set up a schedule to check for updates and patches and see that they are installed on your computer in a timely manner. This includes making sure that anti-virus software is current, that virus definitions are updated regularly, and that operating system and application patches are applied in a timely manner.

On our computer the anti-virus software updates itself as automatically, the operating system checks for updates periodically, BigFix notifies us of some patches and upgrades, and we run the windows update software at least weekly to check for anything not otherwise seen. Does this guarantee that we won't have problems? Of course not, but it certainly minimizes our risk.

## **5. Real Stories from the Field — The “Vail Letter”, FTC, FCRA, and Background Checks**

Attorney Judy Vail wrote to the Federal Trade Commission in April 1999 asking whether the recent amendments to the Fair Credit Reporting Act applied to sexual harassment investigations by outside organizations such as law firms. The surprising answer by FTC staff attorney Christopher Keller was “yes.” Suddenly, according to the FTC, employers retaining outside organizations to conduct workplace investigations must notify the employees involved that a report was being obtained, give the employees a copy of the report before taking any adverse employment action, and provide the employees with adequate time to challenge the report's accuracy. These requirements did not apply if the company used its own employees to conduct the investigation.

When personnel directors are asked, their leading candidate for the administrative policy that should be consigned to legal oblivion, their collective response will likely be the “Vail Letter.”

The FTC did not and has not retreated from this position. However, every court that has addressed the issues has strongly disagreed with the FTC. To date, five district courts have each held the FTC's rationale for the application of the FCRA to workplace investigations by third parties is “unpersuasive.” Employers anticipate that the courts of appeal will similarly join this legal mutiny and consign the Vail letter to the dead letter office.

The FTC position produces absurd results. This was dramatically shown by the *Rebecca Johnson v. Federal Express Corp.*, 147 F. Supp. 2d 1268 (M.D.Ala., May 18, 2001). Rebecca was a consumer service agent in Federal

Express' Montgomery, Alabama, office. After she returned from a two-day suspension, Rebecca's supervisors and managers began to receive frightening "apocalyptic messages." Pager messages were received with the telephone numbers of local funeral homes and the Satanist number 666. Then, a chilling letter complaining about two of Rebecca's supervisors arrived, only one month after the World Trade Center tragedies. It stated: "Someone is going to come in here one day and shoot up this place."

Federal Express hired a forensic examiner and gave him samples of Rebecca's handwriting. He reported there was a "high degree of probability" that Rebecca wrote the threatening letter. Federal Express then completed its investigation and fired Rebecca. She sued, arguing the company violated the FCRA by collecting her handwriting samples and commissioning the forensic examiner's report. Rebecca claimed the FCRA entitled her to notice that the forensic examiner was preparing his report, a copy of his report, and an opportunity for rebuttal before she could be fired.

District Judge Ira DeMent rejected Rebecca's reliance on the FCRA finding the Vail letter "not binding and not persuasive." He decried the "false analogy" drawn by the Commission between employment decisions based on a consumer's "general status" (such as credit histories and prior criminal convictions) and employment decisions based on a consumer's "particular workplace conduct," such as sexual harassment allegations or, in Rebecca's case, threats of violence. As with earlier decisions, Judge DeMent noted the FCRA definition of "consumer report" did not cover reports "containing information solely as to transactions or experiences between the consumer and the person making the report." This statutory exception has been held to exclude reports of drug tests and polygraph examinations from the FCRA. The forensic examiner's handwriting analysis report was based entirely on information (i.e., handwriting samples) supplied by the consumer herself, namely Rebecca.

Judge DeMent, also in agreement with earlier courts, held the forensic examiner was not a "consumer reporting agency" under FCRA since he did not "regularly engage" in assembling consumer credit information. The examiner submitted an affidavit stating he usually worked for prosecutors and police departments in criminal matters and "less than ten percent" of his work related to "employment matters."

*Hazel Hartman v. Lisle Park District*, 158 F. Supp. 2d 869 (N.D. Ill., August 16, 2001), returned to the typical fact pattern of an outside law firm retained to conduct an investigation of workplace allegations. Judge Kennelly

squarely stated “we reject [the Commission's] construction of the statute.” Judge Kennelly went even further. He saw no difference between an in-house investigator and an outside investigator. That last point strikes at the heart of the FTC position, since the Commission seeks to perpetuate this artificial distinction between allowable in-house investigations and disallowed outside investigations.

The unanimity of the district courts rejecting the FTC's position is encouraging. Should the appellate courts similarly debunk the FTC, the emperor-has-no-clothes chorus will become deafening. If the Vail letter finally ends up in the dead letter office, the only mourners will be plaintiffs’ lawyers.

Each year administrative agencies issue numerous guidelines and opinion letters. Employers must then decide, with the assistance of counsel, whether they must follow these pronouncements. Guidelines are simply the law as the agency would *like* it to be. They become accepted rules only if courts adopt them. If they remain un-adopted they disappear from the legal landscape.

For those interested here are three additional cases for your reference.

District Judge Robert Sweet held it had "doubtful application" to a report prepared by an outside law firm retained by Time Warner following an investigation of racial discrimination allegations, *J. Edward Robinson v. Time Warner Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999).

*Friend v. Ancillia Systems Incorporated*, 68 F. Supp. 2d 969 (N.D. Ill., September 22, 1999), similarly parted company with the FTC.

*Tiffany McIntyre and Deneane Hibbits v. Main Street*, 2000 U.S. Dist. LEXIS 19617 (N.D. Calif., September 29, 2000)

## **6. Book and Product Reviews**

*Philosophical Foundations of Leadership*

David Cawthon

ISBN 0-7658-0125-6 114 pages \$29.95

Transaction Books 1-732-445-1245 <http://www.transactionpub.com/>

We have read roughly 40 books on leadership, as well as many articles. This book is far and away the best book we have found on the philosophical underpinnings of leadership. The author examines beliefs about the nature of leadership from the time of the Greeks on, and pulls from these philosophical sources that which is relevant in today’s society. It daringly addresses the myth that we can all be leaders (we cannot), and that all people are equal (we are not) If you are a student of leadership and wish to have an

understanding of leadership and the western philosophical underpinnings of leadership this book is as clear and concise foundation as has you are likely to find.

*The Sourcebook to Public Record Information, 4<sup>th</sup> Edition*

ISBN#: 1-879792-68-0 1650 pages \$76.95

BRB Publications, Inc. 1-800-929-3811 <http://www.brbpub.com/>

BRB has just released its 4<sup>th</sup> edition of the “Big Book” as we like to call it. It is 1,650 pages of information on how to find public records in the US Federal Government, 50 States, the Territories, and all of the counties. It also has a narrative feature for each information source describing what is needed to access the information. BRB has also taken the time and effort to supplement all of the hard copy access information with web address and searchable databases for many of the sources. If you do record searches and don't buy this book you will waste 100 times the cost trying to recreate even the smallest portion. Buy the book, use it and look smarter in front of your clients! Typical buyers include investigators, public record experts, lawyers, legal assistants, law enforcement, and anyone doing research.

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