

Don't Let Your Manual Be a Liability

By Stacy D. Fulco

The Danger of Security

If your company is involved in the retail, hospitality or restaurant industries and you have a security manual, beware! Your

security manual could be more of a liability than an asset. What you think is a useful tool to use in an emergency or a manual to help guide employees to ensure better security at your facility could be used against you.

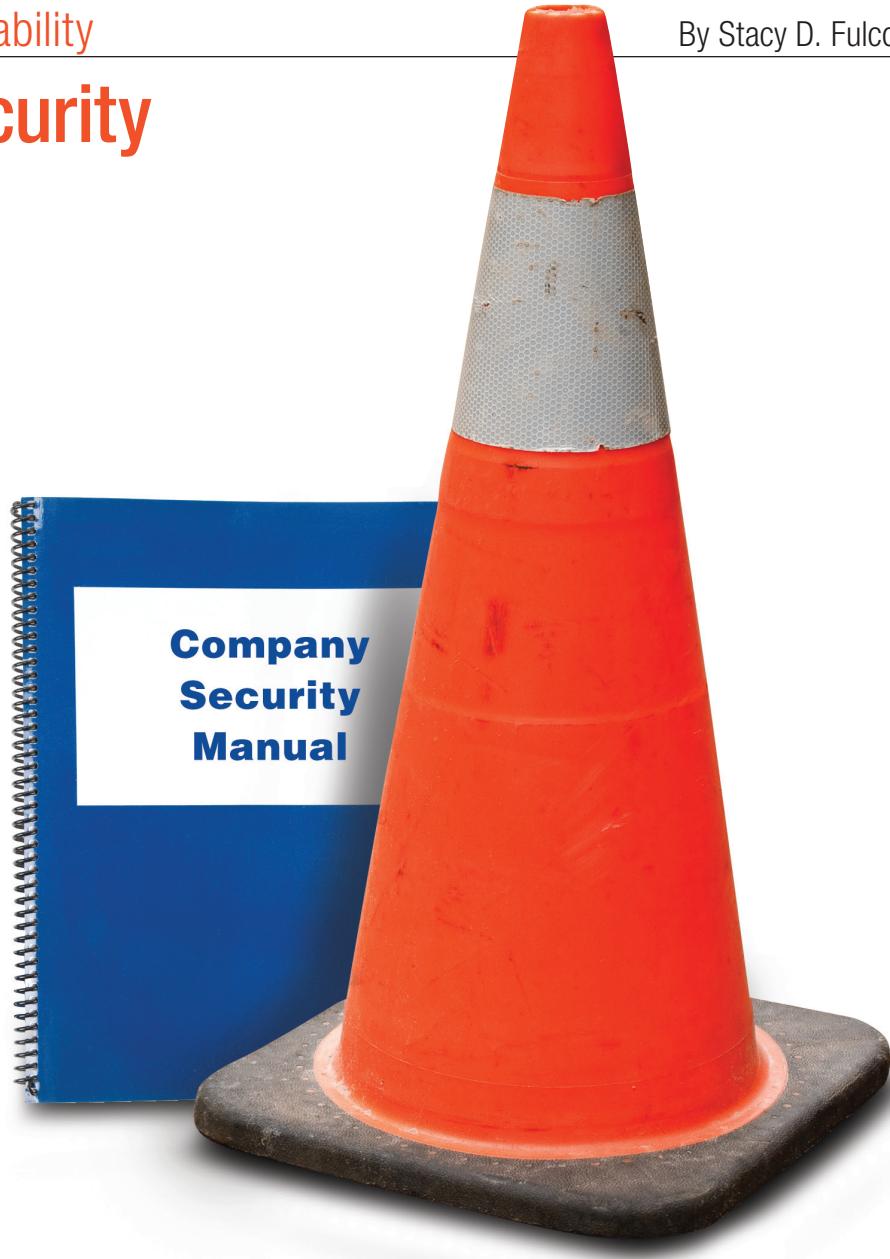
It is well-known that a written policy or procedure is open to broad interpretation by a plaintiff's attorney during civil litigation. With a security manual, the potential threat becomes much stronger when counsel uses it to create a new duty of care against a company defendant. If every word of a security manual is not followed, a plaintiff's attorney will likely argue that a defendant's employees breached a duty. In other words, a poorly worded manual can impose a duty of care on a company that heightens what is otherwise required by law. Even in jurisdictions where internal manuals and policies cannot be used to establish a duty of care, compliance with such manuals and policies is often admissible to assist a trier of fact in determining whether a legal duty has been breached.

This article provides some examples of how security manuals can be used against

a company rather than as a tool to keep a company safe. It also provides practical tips on how to draft security manuals to provide optimal protection for employees, customers, and a company. Finally, the article discusses several legal issues depicting how security manuals can be used in civil litigation.



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Scenarios: Liability Created by Security Manuals

The two scenarios below explain some ways that a security manual can be used against a company.

Scenario #1

A restaurant chain develops what it calls a "crisis handbook" and provides one to each restaurant location for use in case of emergencies such as fire, burglary, or rioting, among other crises. Each such handbook is to be stored in the same location at each restaurant so that everyone always knows where it is located. Company policy requires that every person who could be in charge of the restaurant is to be trained on

the procedures in the handbook and know how and when to use them. The training is to be provided by the corporate security department. Company policy also dictates that everyone trained is to sign a form showing that they receive training and the form is to be kept in each employee's personnel file.

A few years after the handbook goes into effect, a gang shooting takes place in the parking lot of one of the restaurants. The person in charge of the restaurant never refers to the crisis handbook because there was no emergency inside the restaurant. By the time the people inside the restaurant learn about the shooting, the entire incident is over. However, just minutes before the shooting, the person who was shot and the shooter were both inside the restaurant.

Fast forward a few months. The shooting victim files a civil lawsuit against the restaurant alleging that it had insufficient security and the criminal attack was reasonably foreseeable based on previous crime in the area. During written discovery, the plaintiff requests the production of all security manuals. Now the crisis handbook must be produced, under a court protective order, of course.

Once the handbook is produced, the plaintiff's attorney studies every word of it. In addition to the sections about what to do in case of certain emergencies, the plaintiff's counsel finds that the handbook includes sections about what to watch out for as signs or indications of violence. It also lists other types of preventive measures that the restaurant should take if there are any signs of gang activity. These sections require the restaurant managers to be aware of loitering and other activity in the area and it specifies that restaurant managers need to notify the corporate security department if any signs of gangs or violence are noticed so that the company could act properly.

During her deposition, the person in charge of the restaurant at the time of the shooting testifies that while she was aware of the handbook, she had no knowledge of the sections that addressed preventive measures and potential signs of gangs or violence. She also testifies that she was not trained on the specifics of the handbook. She thought that the handbook was

only meant for emergency situations and would never look at it unless there was an emergency in progress. The company cannot produce the form proving that the employee was properly trained, when she was trained, and by whom.

In this scenario, the restaurant's crisis handbook created its own crisis. The

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plaintiff's attorney amends the complaint and sets forth specific duties and breaches of duty that are drawn directly from the handbook. At trial, the plaintiff's attorney blows up sections of the handbook that discuss preventive measures and signs of violence. He reviews them with the person in charge of the store while she is on the stand. She is forced to admit to the jury that she did not follow any of the preventive measures, had never read them, and had never been trained on those sections of the handbook. With this evidence before the jury, the handbook easily creates a heightened duty of care for the restaurant and its employees. This, in turn, increases the potential that the restaurant will have liability imposed on it.

Scenario #2

A corporation with hundreds of franchised gas station locations around the country develops a corporate security department and manual aimed at protecting employees. The manual sets standards for outside lighting and other required security procedures. The corporation's security department monitors and enforces compliance with the standards contained in the manual by performing inspections at each location several times a year. If a franchised location is found not to be complying with

the safety measures in the manual, warnings and fines are imposed.

A few years after the franchisor corporation develops the manual and the compliance program, a gas station employee arrives to work late one night and parks in the back. Before she can get inside, she is grabbed by an unknown assailant, robbed, and killed. The employee's estate files a lawsuit against the franchisor corporation, alleging negligence. The corporation argues that it did not own, operate, or control the gas station. It also argues that it did not hire, fire, or train the employees.

The plaintiff's attorney obtains a copy of the security manual and procedures during discovery and speaks to other employees to learn about the franchisor corporation's involvement in security at the gas station. The plaintiff contends that a corporate representative visits the gas station several times a year and speaks with management about the manual and safety compliance. Therefore, counsel representing the plaintiff's estate argues that the franchisor corporation voluntarily assumes a duty of protection over the employees as a result of the security department and the manual.

The court agrees with the plaintiff's position and determines that because the franchisor corporation provides such detailed and thorough security procedures for the employees, the duty is assumed by the corporation. The court also determines that the corporation had the duty to ensure that the manual was followed and complied with by the employees. Therefore, the franchisor corporation could also be held liable for the employees' failure to comply with the strict security policies in the manual.

In this scenario, the franchisor corporation set out to protect its franchisees and their employees, but because of the way the policies were drafted and because of how much control the corporation retained over the process, it failed to protect itself from liability.

Practical Tips for Security Manual Content

These examples show how security manuals can create problems and liability. It is up to a retailer, restaurant, hotel, or business open to the public to ensure that this does not happen and that its security manual is

used for good, rather than used against it. The following are some practical tips that can help ensure that your security manual does not become a liability.

First, before writing a manual, or rewriting it, think about the intent and purpose of the manual. Keep the focus narrow and do not try and fill a manual with superfluous information that is not directly relevant to the specific intent and purpose. For example, if you have a crisis manual, such as in the first scenario above, be sure that the entire focus of your manual is what to do in times of a specific crisis. The *only* information that the manual should contain is a step-by-step process explaining what should be done in response to a certain crisis that has already occurred or is in the process of occurring. This way, the entire manual can be viewed only as a handbook on how to manage an ongoing crisis, rather than how to prevent one from occurring.

Second, keep it simple. An executive in a corporate office may be able to create a nicely worded manual, but what really matters is that it can be easily followed and executed on site. If there are too many procedures, too many requirements, or too many details, these characteristics will greatly reduce the chances that individuals on site will follow the policies. This, in turn, will increase the chances of a manual becoming a liability. The important thing is for a manual to be complete and for it to be followed properly: you cannot have one without the other, and if you do, this is bound to create liability. So if a manual is too difficult, lengthy, or overwhelming to follow, it is useless and harmful.

Third, pay attention to who contributes to drafting a security manual. Too many manuals are written by suits with corner offices who rarely visit their own store or restaurant. These people will never need to follow one of these manuals, so they should not be the only one involved in drafting it. Instead, many different people *should* be involved in drafting a security manual. This includes the people in the corporate office who decide policy, the managers who will train others on the manual and its procedures, and those working on site and in the field who will be forced to follow the policy requirements. People from all of these departments within a company can

provide invaluable information to make a manual more useful and user friendly.

Fourth, once you have a good draft of a manual, be sure that your in-house counsel is next to review it. It is extremely important to ensure that not only your wording is correct, but also that your procedures are not stricter than required by

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law. Many times drafters get carried away with guidelines in an attempt to create a safer environment. While that is a good thought in theory, it can create real problems. If a manual requires more than what the law requires and the manual is shown to a jury, the jury very well may, whether properly or not, hold that store or retailer to the heightened standard that the manual created, rather than to the *legal* standard. This can be absolutely disastrous for your defense.

Even though in-house counsel has reviewed your manual, the legal review of your manual should not stop with that one attorney. Do not forget one important person from outside the company who is an imperative contributor to any security manual: your friendly litigation defense attorney. No security manual should be finalized until a defense litigation attorney has reviewed it because he or she is the one who will be called upon to defend the manual in times of trouble. For that reason, defense counsel will often be the best person to point out sections of it that could potentially be problematic. It is always better to have those conversations before a manual is finalized than later, when your company faces a wrongful death lawsuit. Also, be sure that defense counsel analyzes your manual taking the law in each jurisdiction where it will be used into consideration. Just because a manual may be suitable for use in Indiana does not mean it will withstand scrutiny in California.

Once your manual is drafted and ready to go, the next important step is training. This cannot be emphasized enough. Not only must training be done, but it must be documented. As with the proverbial falling tree in the forest, if you cannot prove that the training happened, did it really happen? On the flip side, if no one is properly trained on a new manual, what is the point in drafting it?

Decide which level of employees should to be trained and get them trained before the manual is put into use. Have each trained employee sign a form to prove that the training occurred and to prove that the employee understood your manual. As soon as an employee signs this form, put it in the employee's personnel file. If an employee goes from location to location within your company, keeping the document located in the personnel file in the corporate office ensures that it can always be found.

Ensuring that training takes place and is documented becomes very useful when a disgruntled former employee is the star witness. During the deposition, when he or she claims never to have heard of the manual and never to have seen it before, a document with his or her signature, a date, the type of training received, and the name of the trainer becomes crucial.

Once everyone is trained and a manual is released, the process is not over. As a manual continues to be used, it is important that training continue for all future hires and promotions. As long as a manual is in existence there will always be new employees; so training will need to be ongoing. In addition, depending on the type of manual and the information provided, you may find it necessary to provide ongoing training as reminders. This could involve a yearly class or something as simple as an e-mail or mailer. However, these too should be documented so that you can prove that each required employee received the necessary follow-up training.

Legal Implications: Security Manuals as Evidence

If a plaintiff's attorney believes that a security manual could be used against a defendant at trial, counsel will do anything to put it in front of a jury. The most power-

ful way that a plaintiff's attorney can use a security manual is to argue that it created a duty of care, an employee did not comply with the manual, and therefore, the defendant breached its duty and was negligent. This argument is the primary reason that companies must ensure that their manuals are properly written.

The way that courts handle security manuals as evidence differs from state to state. In some states, a defendant can argue that a manual is not admissible to create a duty of care because a company's internal policies do not create the rule of law. See *Jones v. Montgomery Ward & Co. Inc.*, 49 Or. App. 231, 237 (Or. 1980); *Jones v. Sears, Roebuck and Company*, 459 F.2d 584, 587 (6th Cir. 1972) (applying Michigan law). In other states, the courts hold that a violation of a party's internal policies can be evidence of its negligence. See *50 State Security Service, Inc. v. Giangrandi*, 132 So. 3d 1128, 1134 (Fla. Dist. Ct. App. 2013); *Garrison v. D.C. Transit System, Inc.*, 196 A.2d 924 (DC 1964).

In *Shell Oil Company v. Khan*, 138 S.W.3d 288, 293 (Tex. 2003), a gas station attendant was shot during a robbery. The plaintiff attempted to admit the parent company's manual to prove that the company provided training measures that were not followed by the plaintiff's employer. The court would not allow the admission of manual excerpts into the record because they were clearly labeled as suggestions and recommendations. The court noted that it had repeatedly held, following the Restatement, that merely making recommendations is not evidence of a right to control. *Id.*

Knowing ahead of time that a state where your manual will be used applies the type of analysis that this Texas court applied is invaluable, especially to a franchisor. Any manual can be written either as a directive or merely as a suggestion. Knowing which way you should write your manual so that it cannot be used against you is critical.

In *State v. Post*, 1993 WL 71539 (Minn. 1993), the trial court admitted portions of the defendant's training manual into evidence. The defendant objected, arguing that the manual was not relevant and that its prejudicial effect on the jury outweighed its probative value. On appeal, the court ruled that the manual was neither

irrelevant nor confusing to the jury. The trial court gave a cautionary instruction, explaining that the manual was not the law upon which the jury was to decide the case. In addition, the trial court properly instructed the jury concerning the applicable law. Therefore, the appellate court upheld the admission of the manual.

Therefore, if a security manual is going to exist and be an asset to a company, it must be well written and well executed.

As this Minnesota case shows, when a plaintiff is barred from using a manual against a defendant to prove negligence directly, the plaintiff's counsel will look for other ways to put the manual in front of a jury. *Jett v. Ford Motor Company*, 183 Or. App. 260 (Or. 2002); *Globe Security Systems Co. v. Sterling*, 79 Md. App. 303, 309 (Md. 1988).

In *Jett v. Ford Motor Company*, 183 Or. App. 260 (Or. 2002), the defendant attempted to admit the plaintiff's employee safety manual into evidence. The trial court excluded the manual, but on appeal, the appellate court ruled that the safety manual was relevant to the reasonableness of the plaintiff's conduct. The plaintiff argued that the safety manual should be excluded because it expressed a higher standard of law. In response, the defendant stated that the plaintiff's argument was irrelevant because the manual was not being offered as evidence of negligence per se, but instead only as relevant evidence of the reasonableness of the plaintiff's conduct. The appellate court agreed the manual was admissible on the basis asserted by the defense.

In *Minch v. California Highway Patrol*, 140 Cal. App. 4th 895, 907 (Cal. 2006), the plaintiff argued that the provisions of the CHP Officer Safety Manual established that the officers owed the plaintiff a duty in tort. The appellate court ruled that the manual would be admissible evidence on

the question of the breach of duty but the manual did not have the force of law so its provisions did not establish a duty of care. The court noted that under "Evidence Code section 669.1, the manual cannot be read to establish a standard of care within the meaning of Evidence Code section 669; however, it may be admitted into evidence for the trier of fact's consideration in determining the issue of negligence if there otherwise is a duty."

As these cases show, there are many ways that a plaintiff's attorney can put all or part of a company's security manual in front of a jury. This is important because in some lawsuits, a manual is potentially so detrimental to a defendant that the mere viewing of it by a jury is enough to cause concern, and a quick settlement. Even if a jury receives an instruction and a court advises that a manual does not have the force of the rule of law, the jury seeing that manual and determining that an employee did not comply with it can significantly harm a defense.

Conclusion

Security is a very important issue that every retailer, restaurant, hotel, and business open to the public must address. For most companies, having a manual that solely addresses security issues is a must. For that reason, every company needs to ensure that its manual is an asset to the company and not a liability.

No matter how well a manual is written, if a company cannot prove that the appropriate employees received the manual and corresponding training and if the company cannot prove that it was ensuring that the appropriate follow-up training was provided, the manual can still become a liability. Along the same lines, if employees do not follow a manual and everyone completely ignores it at store level, it does not matter how well it is written, it can still be a liability. Therefore, if a security manual is going to exist and be an asset to a company, it must be well written and well executed. The ability to defend one wrongful death lawsuit with a well-written and well-executed security manual makes the hard work that goes into drafting the manual and training the employees worth the time and the expense.

