

WHO SHOULD DESIGN YOUR WARNINGS?

by

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Manufacturers have a duty to warn about hazards associated with the use of their products, and often this duty to warn is fulfilled in part by the creation of warning labels applied to the product and safety warnings included in the operator's manual. The decision to develop a warning for a particular hazard is usually a team effort, involving engineers, technical writers, and attorneys. But who should actually design the warning? This article suggests a step-by-step approach to ensure that your warnings are state-of-the-art, but first, here are few pitfalls to avoid:

- Don't rely solely on in-house counsel
- Don't give the marketing department veto power
- Don't assume your local print shop can supply warning labels

Each of these mistakes can result in your product's warnings being legally inadequate. Here's why.

Don't Rely Solely on In-House Counsel

Attorneys, like other professionals, tend to specialize. They become very skilled in the areas of law that they practice regularly, but usually are not top-notch in other areas. You wouldn't ask your cardiologist to do a hip replacement would you? Well, don't expect your corporate counsel to be on the cutting edge of products liability law. Products liability law is a complex and rapidly evolving area of the law—it's hard to keep up even if you work in that area full time. Moreover, company lawyers spend most of their time drafting language for sales contracts, licensing agreements, warranties, and so on—and that may actually make it *harder* for them to write good warnings.

Think about it—what does a good sales contract or licensing agreement or warranty do? It spells out in detail how every single imaginable situation will be handled. Even if it is not written in "legalese" (the party of the first part, etc.), it still is likely to have phrases like "including but not limited to," "no part of this agreement shall be construed..." and "the company accepts no liability for..." While phrases like these may represent effective wording for some kinds of legal documents, they make for terrible warnings. Warnings should be concise, straightforward, and easy to understand.

Corporate lawyers also tend to want to be extremely comprehensive and warn against every possible hazard, even those that are obvious and generally known. To quote a manufacturer's in-house counsel working on a set of safety instructions, "I don't see any downside to over-warning." The fact is there is a big downside: including too many warnings—especially about hazards the user already recognizes—diminishes the attention given to more critical ones. As the *Restatement of the Torts* puts it,

Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks.¹

Your in-house counsel can help ensure that warnings and other product-related information are consistent, but he or she should not be solely in charge of warnings.

Don't Give Marketing Veto Power

In some companies, responsibility for producing all product documentation, including manuals, spec sheets, sales brochures, etc., is given to the marketing department. While it makes a lot of sense to put all those functions under a single authority, doing so has a few drawbacks. One of these is that marketing professionals are generally going to want to minimize the number and intensity of warnings—both on the product and in the manuals. That's only natural: marketing's primary mission is to sell products. Those in marketing want to avoid anything that might make the product less attractive to buyers.

Marketing personnel should certainly be involved in product decisions, but they shouldn't be given sole responsibility for writing the warnings—nor the power to tone down the language. For warnings to do their job, the language needs to convey the seriousness and immediacy of the hazard being warned against.

Nor should marketing have veto power over the appearance of on-product warnings. On-product warnings can take a variety of forms, from the familiar ANSI-style warning labels using color, signal word, and pictorial to help convey the message to words molded into the product housing. Some products use hang-tags, box inserts, or packaging to convey warning messages. The decision as to what form warnings should take must consider not only appearance, but also location with respect to the hazard, whether there are mandatory regulations regarding wording or appearance, and the need to conform to industry standards. Marketing should certainly have a voice—but it should not be the only one.

Don't Assume Your Local Print Shop Can Supply Warning Labels

You have had excellent service from your local print shop for all your other printing needs, from stationery to 4-color sales brochures. They've always been prompt and reasonably priced, and you want to support the local economy. Why not give them the contract for warning labels? To continue the medical analogy used earlier, for the same reason that you wouldn't want your family doctor to perform open-heart surgery.

Local printers are generalists, just like your family doctor. They are skilled and competent at a wide range of printing needs. But they aren't specialists, and warning labels represent a printing specialty. Warning labels are different from ordinary printing products in two important ways:

¹ *Restatement of the Law Third (Torts—Products Liability)* § 2 j, The American Law Institute, St. Paul: 1998, p. 31.

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- They need to meet standards
 - They need to be durable under expected use conditions

In many cases, warning labels must meet mandatory or voluntary standards to ensure that they are legally adequate. These standards may include detailed technical specifications for colors, print size, and so on. Your local printer might well be able to *meet* these standards—but they probably won't be aware of them. Instead the printer will rely on you to specify the job. You could assign in-house personnel to become technical experts on warning label standards—or you could simply contract with a label company that already *has* the expertise.

You may have designed the best warning in the world, but if the label it's printed on falls off the product, or is faded by exposure to sunlight, or abraded beyond legibility, that warning does no good. A durable safety label may need to incorporate a specialized base material and be covered with a clear layer to protect against abrasion. The adhesives, the inks, and the layers all have to be compatible with each other and the surface to which the label is applied—and be designed to withstand expected environmental exposures. Your local printer is probably not equipped to handle these requirements.

Now you know what not to do—but what *should* you do? The best plan is to develop a comprehensive approach to warnings, involving partners both within your company and outside it. Here's a step-by-step guide.

1. Form a product safety team.

Start by creating a group of people within your company whose job is to monitor product safety. Incorporate stakeholders from all areas—engineering, manufacturing, marketing, legal, and so on. The goal is to have a group that has a big-picture perspective on product safety. That way, when decisions involve tradeoffs—and they always do—you can ensure that all points of view are represented and all voices heard. You'll end up with better decisions and better buy-in from all parts of the company.

2. Consider using an outside consultant.

You may find it beneficial to contract with an outside warnings consultant to help you develop product warnings. A good consultant will bring a broad perspective to the table. A consultant will know what other companies and industries are doing in this area and can conduct a literature search on safety issues connected with your product. He or she will be aware of current trends in product liability law. And most important, a consultant will bring an outside eye. One of the primary obstacles for in-house personnel in addressing product safety is over-familiarity with the product. Sometime called “shop-blindness,” knowing your product inside and out can make it difficult or impossible to look at the product as a first-time user might—which is critical to developing good warnings.

3. Partner with a label supplier.

Find a label manufacturer who is experienced in making warning labels. A good label manufacturer should be knowledgeable about applicable standards, technically expert in label manufacture, and flexible enough to respond to your particular needs. If you have

an application that is unique or unusual enough that stock label designs won't work, your label supplier should be willing to work with you to help design custom labels to fit your needs. Beware—lots of companies without specialized expertise are jumping on the safety label bandwagon. Before you contract with a label supplier, make sure it's a company that specializes in safety labels and has the necessary expertise to do the job.

4. Put in place a system to review your warnings on a regular basis.

Even if you design a state-of-the-art warning label, it's important to conduct a periodic review. Product liability law is evolving, and standards are evolving, particularly in the area of "harmonizing" standards for U.S. and overseas labeling. Keeping your warnings up to date shows your company's commitment to product safety. Even when the law and standards don't change, periodic reviews allow you to incorporate your product's use history into your hazard analysis and decision-making. Your customers are your best source of information about the use environment and risk potential. Periodic reviews ensure that your safety response remains appropriate.

This article started by asking, "Who should design your warnings?" The answer is no one person. Putting together the right group of partners is your best approach to ensuring state-of-the-art warnings for your products.

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