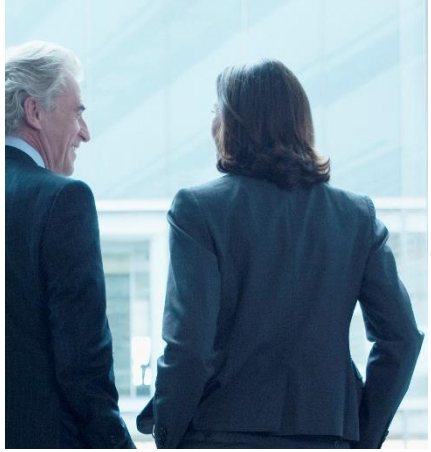

2017 Annual Ethics Presentation Waukesha County Bar

November 16, 2017

Quarles & Brady LLP

Teaching Corporate Employees How Attorney-Client Privilege Works (and Doesn't Work), and Why They Should Care

Alexandra W. Shortridge and Joshua D. Maggard

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Introductions and Roadmap

- Overview of attorney-client privilege
  - Protections
  - Limitations
  - Waivers
- Teaching your team (or clients) about attorney-client privilege and why they should care
  - Role written materials play in litigation
  - Ways to avoid common mistakes
  - Takeaway: look at written material like a lawyer, judge, regulator, or jury eventually will

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Overview: What Every Lawyer Should Know About Attorney-Client Privilege

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Overview of Attorney-Client Privilege

- Generally applies when
  1) A client communicates with a lawyer regarding legal advice;
  2) The lawyer is acting in a professional capacity (rather than, for example, as a friend); and
  3) The client intended the communications to be private and acted accordingly

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Overview of Attorney-Client Privilege

- Even preliminary conversations between a prospective client and attorney are typically protected
- The privilege stays in effect after the attorney-client relationship ends, and even after the client dies
- The lawyer can never divulge the client's secrets without the client's permission, unless an exception or waiver applies

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Overview of Attorney-Client Privilege

- Privilege vs. Confidentiality
  - Attorney-client **privilege** is a rule of evidence, frequently set out by statute and explored through case law
  - Duty of **confidentiality** is a rule of legal ethics set out in each jurisdiction and in ABA Model Rule 1.6

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Privilege: Wis. Stat. 905.03

- (2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . .
- (4) EXCEPTIONS. There is no privilege under this rule:
  - (a) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
  - (b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or
  - (c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or
  - (d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
  - (e) *Joint clients.* As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients

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Privilege: Wis. Stat. 905.03

- (5) Forfeiture of Privilege
  - (a) *Effect of inadvertent disclosure.* A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if all of the following apply:
    - 1. The disclosure is inadvertent.
    - 2. The holder of the privilege or protection took reasonable steps to prevent disclosure.
    - 3. The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01 (7).
  - (b) *Scope of forfeiture.* A disclosure that constitutes a forfeiture under par. (a) extends to an undisclosed communication only if all of the following apply:
    - 1. The disclosure is not inadvertent.
    - 2. The disclosed and undisclosed communications concern the same subject matter.
    - 3. The disclosed and undisclosed communications ought in fairness to be considered together.

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Confidentiality: Model Rule 1.6

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Confidentiality: Wisconsin SCR 20:1.6

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).
- (b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.
- (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably likely death or substantial bodily harm;
  - (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (3) to secure legal advice about the lawyer's conduct under these rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law or a court order; or
  - (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Overview of Attorney-Client Privilege

- Other potential areas for protection
  - ***Work product:*** Even if they are not privileged, attorney-to-client communications often will be independently protected as attorney work product
  - ***Consultant/expert disclosures:*** Communications with consultant engaged by counsel in anticipation of litigation may not be discoverable—confirm with your attorneys before contacting consultant
  - ***Joint Defense/Common Interest doctrine:*** Expansion of attorney-client privilege to third parties subject to joint defense agreement

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Attorney-Client Privilege: The Bad News

- The scope and applicability of the attorney-client privilege are uncertain and very jurisdiction-specific
- The privilege has never been as broad as people think
  - Doesn't cover business advice
  - Must be "confidential," which means not intended to be disclosed to third parties
- Different jurisdictions have different rules
  - In-house communications are particularly scrutinized
  - If the jurisdiction is foreign, there may be no privilege at all

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Attorney-Client Privilege: The Bad News

- There are many other trap doors where you can lose protection:
  - Crime/fraud
  - Sharing information with insurer
  - Other selective disclosures
  - Mistake/inadvertent disclosure
  - Unauthorized use of employer email system
  - Internal investigation
- ***Individual judicial discretion/judge's more narrow definition***

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Attorney-Client Privilege: The Bad News

- The practical realities of litigation
  - Opponents' litigation strategy when losing on merits
  - Courts often review in camera and see it anyway; the bell cannot be unrung
  - Privilege—let alone claims of confidentiality—does not survive real explosions
  - Disclosure is often not surprising to other attorneys but can be to juries, judges, and newspapers
  - Document retention/production is being put on trial; privilege/ethics are next

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Attorney-Client Privilege: Best Practices

- Everything doesn't have to be in writing (but some things do)
- Run your business, but observe formalities: If it is a secret, treat it as such
- Edit communications as if a judge might see them someday or as if someone with great incentive to take things out of context will distort them
- The transaction costs of the fight to compel production may not be worth the likely result
- Consultants' work may be protected, but only if proper procedures are in place
- Recent cases (see Appendix)

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Teaching Your Employees/Clients About How the Privilege Works (and Doesn't Work) and Why They Should Care

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Documentation: Areas We'll Cover

- In-subject verb agreement
- Proper use of the apostrophe and the semicolon
- Gerunds: Friend or foe?
- Sentence diagramming (small groups)

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Just Kidding!

- There is not one "right way to write"
- But teaching your team to be mindful regarding how their writing can (and will) be perceived by others both advances the Company's business and protects the Company
- We will discuss how to avoid common problems that can get your team and the Company into trouble

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Educating Your Team: Why it is Important

- It is important they understand the rules before and after the game starts
- Many of the rules are consistent with good business practice as well as risk management
- Not knowing the rules in advance can lead to unfortunate consequences later
- Many executives and other employees have wild misconceptions about the rules
- It is our obligation as attorneys to teach them

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Big Picture Messages

- You could become the face of the Company in a lawsuit
- Your documents could become "Exhibit A" in litigation
- Your documents could help win a big case, or alternatively, they could cost the Company money

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Big Picture: Should You Even Be Writing?

- Sometimes talking is better
  - Permits greater informality
  - Allows brainstorming
  - Confines circulation
- You should write:
  - When it is dictated by business needs
  - When it is necessary to create an essential record of what occurred
  - After you have necessary facts/information—or after you acknowledge you still need additional information
  - Document the bad news as well as the good news

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The Basics: Why Documents Matter

- Circumstantial evidence is often the only evidence
- Conversations exist only in memory
- By contrast, documents are real, permanent, and can be seen and touched
- Documents can be used to answer questions or contradict after-the-fact oral explanations
- In regulatory proceedings and litigation, the outcome often depends on the quality of the parties' documents

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The Basics: Discovery

- Voluminous discovery requests exchanged
- Courts and agencies require production if a document is "relevant" or "reasonably calculated"
- Documents reviewed for privilege before production
- It does not matter where documents are stored
  - "Personal" or Shadow file in office
  - Cell phone (company or personal)
  - Home files/computer, CDs, thumb drives; car
  - The cloud

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The Basics: Can't We Pick and Choose What to Produce?

- Ask Arthur Andersen's former employees
- In the absence of any lawsuits or claims, follow your normal record retention requirements
- If a lawsuit, notice of claim, or government investigation is filed, started, or reasonably likely, **do not destroy anything!**
- Consult with counsel assigned to the case
- With the discovery tort (spoliation), a party may win a case based on discovery, even if they couldn't win on the merits

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The Basics: Easy Test for All Documents

- If your communication were reprinted on the first page of the newspaper, what would your reaction be?
- Note: This easy "test" applies to *all* written communications
  - Traditional: Memos, letters, emails, calendar, diaries, billing records
  - Nontraditional: Notes on napkins, post-its, receipts
  - *Anything* electronic: Texts, instant messaging, Facebook, Snapchat, Instagram, Twitter, message boards, etc.

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The Basics: Electronic Communications are Dangerous

- Combine the immediacy of speech with the permanency of writing
  - People are not as careful with electronic communications as they are with more formal documents
  - Before hitting send, do the "letterhead" test
- No control over forwarding
- Inadvertent "reply to all"
- Wrong email address (autofill email)
- Mixing business with personal matters

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How Your Employees Can Create Good Documents

- The goal is to make all writing more:
  - Accurate
  - Thorough
  - Factual
  - Specific
  - Boring
- Ten Rules for Good Documents
  - These rules apply to "personal" documents
  - (Because there are no personal documents)

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Rule 1: Documents are Honest and Don't Gloss Over Ugly Details

- Be accurate and truthful—enhances credibility
- Stick to the facts
- The facts are what they are: Never change or "doctor" documents after the fact
- Attach supporting documents (photos, lab tests, etc.) to your documents

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Rule 2: Good Documents Are Thorough

- Think like a news reporter, and dig into the details
- Search for corroborating evidence (photos, lab tests, etc.) and attach it to your documents
- Use full names of people involved
- Include dates of events
- Include your name and the date
- Include the other side of the story (the customer's, counter-party's)—it may change and you want to capture the first version

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Rule 3: Good Documents Are Contemporaneous

- Write it down ASAP, not ASAConvenient
- Write it when facts and impressions are fresh and when details can easily be verified

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Rule 4: Good Documents Don't Include Hyperbole

- Avoid conclusory statements
  - "The Company never/always does this..."
- Avoid unnecessary personal opinions and judgments
  - "Customer called our customer service representative, whining about..."
  - "Customer is crazy..."

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Rule 5: Good Documents Don't Leap to Conclusions

- Where conclusions are appropriate, they should be supported by facts
- Where conclusions are appropriate, they should logically flow from the facts
- Describe both the facts supportive of your conclusion and the facts competing for a different conclusion
- Important to show that we are not "cherry picking" the facts

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Rule 6: Good Documents Are Not Cute

- Don't "talk" in writing
- Don't include personal asides or emote
- Don't use sarcasm. It's too easy to misconstrue later.
- Don't mix business and personal
- Don't use humor inappropriately
- Don't use profanity

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Rule 7: Good Documents Don't Use Phrases That Can Be Misconstrued or Misunderstood

- Writing simply and clearly is always a good idea
- If possible, avoid Company acronyms and jargon when communicating with the outside world
- Looks do matter
  - Proper grammar and spelling connote the proper impression regarding the careful and professional way in which we perform our job duties
- Labeling ("not for file," "destroy after reading," "do not forward," "delete as soon as you read) is useful...
  - ...for the other side

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Rule 8: Good Documents Should Be Shared Only on a Need-to-Know Basis

- Documents concerning trade secrets and related matters should always be treated with confidentiality
- Don't use written communications for sensitive information unless protected by the privilege
- Be careful even with documents you think are attorney-client privileged
  - They may not be privileged
  - The privilege can be easy to lose

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Rule 9: All Relevant Documents Must Be Preserved

- Whether good or bad
- Don't destroy documents during or in anticipation of litigation
- Never destroy evidence, no matter how bad
- Documents must be preserved in original form, with any attachments
- Documents must be preserved even when there is no pending litigation, but litigation is "reasonably foreseeable"
- Penalties include monetary sanctions and/or entry of judgment

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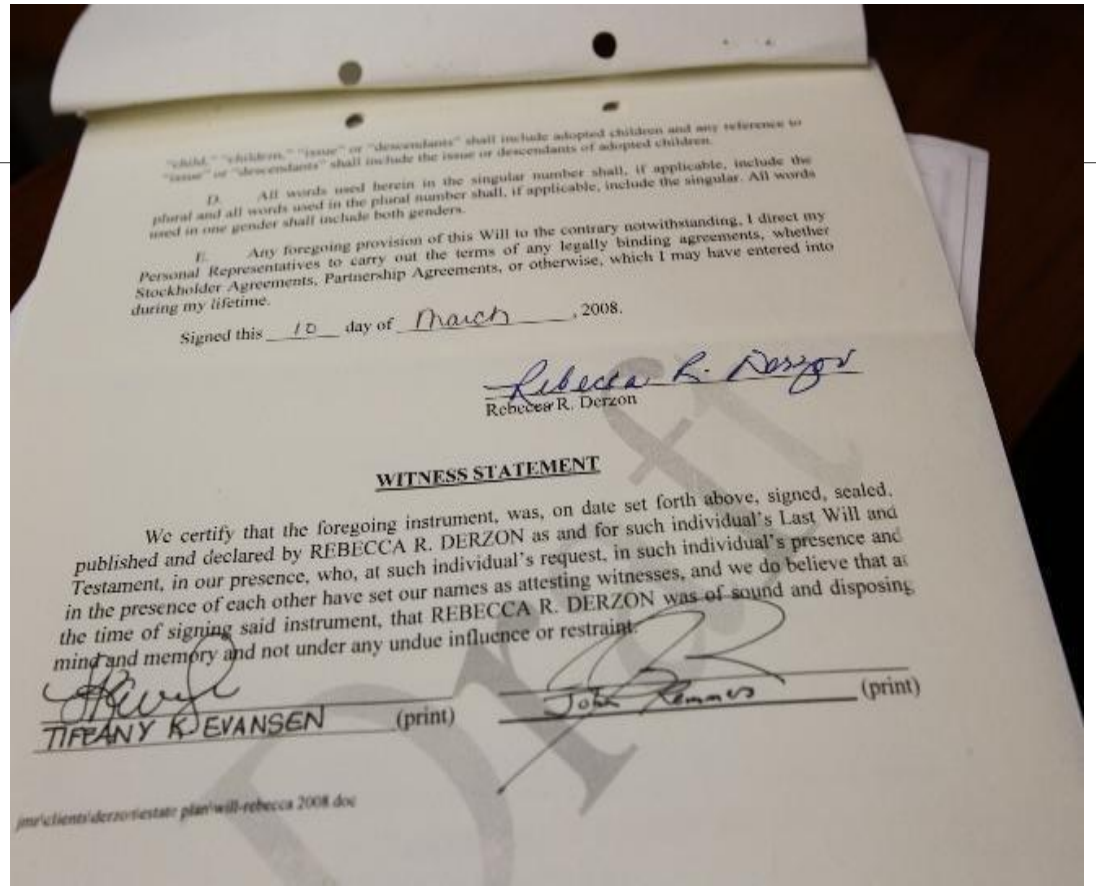
Rule 10: Label a Draft "Draft"

- Creating work product is a dynamic process
- Lawsuits occur years later when it is difficult to create a timeline of events and expectations
- Legal duties and jury expectations will be lower when everyone recognizes the work is still a draft
  - Remember: Drafts are discoverable
- Remember: Never use a "draft" as the final document



"child," "children," "issue" or "descendants" shall include adopted children and any reference to "issue" or "descendants" shall include the issue or descendants of adopted children.

D. All words used herein in the singular number shall, if applicable, include the plural and all words used in the plural number shall, if applicable, include the singular. All words used in one gender shall include both genders.

E. Any foregoing provision of this Will to the contrary notwithstanding, I direct my Personal Representatives to carry out the terms of any legally binding agreements, whether Stockholder Agreements, Partnership Agreements, or otherwise, which I may have entered into during my lifetime.

Signed this 10 day of March, 2008.

Rebecca R. Derzon

Rebecca R. Derzon

WITNESS STATEMENT

We certify that the foregoing instrument, was, on date set forth above, signed, sealed, published and declared by REBECCA R. DERZON as and for such individual's Last Will and Testament, in our presence, who, at such individual's request, in such individual's presence and in the presence of each other have set our names as attesting witnesses, and we do believe that at the time of signing said instrument, that REBECCA R. DERZON was of sound and disposing mind and memory and not under any undue influence or restraint.

TIFFANY K EVANSEN (print)

John Timms (print)

jmr\clients\derzon\estate plan\will-rebecca 2008.doc

This will, although signed, was thrown out in a $3 million estate dispute, in part because it was stamped "draft" and the court was suspicious of whether it was forged or signed as the result of undue influence by the new heirs

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And One More Word to the Wise...

- Careless email practices can result in "accidental contracts"
- Offer, acceptance, and consideration
- Many contracts need not be signed to be enforceable

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Top Ten Reasons Not to Send an Email

1) Venting
2) Criticizing or avoiding tough conversations
3) Covering yourself: *"I told you so."*
4) Shifting responsibility
5) Looking for an easy or quick way out
6) Feeling lazy
7) Feeling rushed (it's 5:03 p.m.)
8) Irritated with a customer, co-worker, or the world
9) Unsure you fully understand the facts (or contract/issue)
10) Don't know your audience

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Examples of Bad Documents

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Examples of Bad Documents

E-mail 1: From: J. K. Shin (Samsung's Mobile Leader)
RE: Samsung's Omnia phone and Apple's iPhone

Influential figures outside the Company come across the iPhone, and they point out that 'Samsung is dozing off.' All this time we've been paying all our attention to Nokia, and concentrated our efforts on things like Folder, Bar, Slide . . .
Yet when our UX is compared to the unexpected competitor Apple's iPhone, the difference is truly that of Heaven and Earth. It's a crisis of design.

E-mail 2: From: J. K. Shin (Samsung's Mobile Leader)
RE: Samsung's phones and Apple's iPhone

When everybody (both consumers and the industry) talk about UX, they weigh it against the iPhone. The iPhone has become the standard. That's how things are already.

E-mail 3: From: J. K. Shin (Samsung's Mobile Leader)
RE: Samsung's phones and Apple's iPhone

Do you know how difficult the Omnia is to use? When you compare the 2007 version of the iPhone with our current Omnia, can you honestly say the Omnia is better? If you compare the UX with the iPhone, it's a difference between Heaven and Earth.

Result: Samsung had to pay Apple $1 billion for patent infringement

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Examples of Bad Documents

From: Matthew Tannin (Bear Stearns hedge fund manager)
To: Ralph Cioffi (Bear Stearns hedge fund manager)
Date: 22 April 2007

...the subprime market looks pretty damn ugly...If we believe [our internal modelling] is ANYWHERE CLOSE to accurate I think we should close the funds now. The reason for this is that if [our internal modelling] is correct then the entire subprime market is toast...If AAA bonds are systematically downgraded then there is simply no way for us to make money—ever.

Result: Both men were indicted for fraud, and this email was Exhibit A

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Examples of Bad Documents

E-mail 1: From: Arthur Samberg (Hedge fund executive)
RE: David Zilkha (prospective new hire currently working at Microsoft--"msft")
Date: 28 February 2001

im not as impressed with our research on msft. do you have any current views that could be helpful? Might as well pick your brain before you go on the payroll!!

E-mail 2: Date: 06 April 2001

I own some msft based on the win2000 cycle, despite recurring indications from knowledgeable people that the Company will either preannounce or take guidance down. Any tidbits you might care to lob in would be appreciated

---

E-mail 3: Date: 20 April 2001

I shouldn't say this, but you have probably paid for yourself already!

Result: Inside information helped Samberg net his fund $1.2 million. Until he was caught, settling with the SEC for $28 million.

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Examples of Bad Documents

E-mail 1: From: [Chairman of Big Publicly Traded National Bank]
To: [A Director of that Bank]
Date: 16 January 2009
Re: [Write downs on value of financial institution just purchased by the Bank]

Unfortunately, it's screw the shareholders.

E-mail 2: From: [The Director]
To: [The Chairman]
Date: 16 January 2009
Re: [Write downs on value of financial institution just purchased by the Bank]

No trail.

Result: Actual email messages. Fines and liability followed.

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Examples of Bad Documents

From: Tim Muir (attorney)
To: Scott Tucker (client)
Date: July 31, 2010

"This should be the 'Sexual Chocolate' of my legal career...I should just drop the mic and walk off the stage."

[*See Coming to America* (1998), in which Eddie Murphy drops the mic after performing a *terrible* cover of that song.]

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The Result

- September 26, 2017 *Law360* headline:
  - "Lawyers Email Boasts Shown at $2B Payday Loan Fraud Trial"
  - Tucker and Muir each face 14 criminal counts, including fraud, racketeering, and money laundering charges
  - In 2010, when a potentially costly legal snafu related to a (sham) sale cropped up, Muir is accused of engineering a sham lawsuit, in which Tucker sued his own interests, to correct the problem
  - Muir then sent his Sexual Chocolate Mic Drop email after winning the sham lawsuit

One Last Example

From: [Summer intern at prestigious NY law firm]
To: [Outside friend **(and mistakenly 40 partners in the firm)**]
Date: June 2003

Congrats on the Certified Financial Analyst exam. I'm sure you're about to make VP any day now.

I'm busy doing jack s***. Went to a nice 2 hr sushi lunch today at Sushi Zen. Nice place. Spent the rest of the day typing emails and bullsh***ing with people. Unfortunately, I actually have work to do—I'm on some corp finance deal, under the global head of corp finance, which means I should really peruse these materials and not be a f*** up...

Oh yeah, Corporate Love hasn't worn off yet...But just give me time.

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Questions?

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