

Ethics: Teaching Your Team How Attorney Client Privilege and Document Discovery Work (And Do Not) *Before* The Lawsuits or Investigations Start



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- Class Action Defense
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DOCUMENT THE RIGHT WAY

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Areas We'll Cover Today

- Subject-verb agreement
- Proper use of the apostrophe and the semi-colon
- Refresher on the parts of speech
- Sentence diagramming (small groups)

Just Kidding!

- There is not one "right way to write."
- But being mindful of how your writing could be perceived by others advances the Company's business interests -- and your career.
- It also helps you avoid common problems that could get you and the Company into trouble.

Why Are We (Really) Here Today?

- Discuss the role your writing may play in litigation.
- Challenge you to look at your writing like a lawyer, judge, or regulator.
- Explain your obligation to preserve documents in certain circumstances.

Why Should This Matter To You?

- Written communication is essential to the your business.
- You may have to produce documents during some phase of your career.
- You could become the face of the Company in a lawsuit.
- Your writing could become "Exhibit A" in litigation.
- Your writing could help win a big case, or alternatively, it could cost the Company money.

What's Wrong With This E-mail?

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.

Samsung had to pay Apply \$ 1 Billion for patent infringement.

Easy Test for Written Communications

- 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

- ✓ Memos
- ✓ Letters
- ✓ E-mails
- ✓ Texts
- ✓ Instant messaging
- ✓ Facebook posts
- ✓ Snapchat
- ✓ Etc.

Why Documents Matter

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

Litigation in a Nutshell

- Complaint is filed and answer is served / regulatory proceeding is commenced
- Answer
- Discovery process
- Dispositive Motions
- Trial
- Appeal(s)
- Mediation or settlement at any stage

Discovery in a Nutshell

- Voluminous discovery requests exchanged
- Courts and agencies require production if a document is "relevant" or "reasonably calculated"
- Documents reviewed for privilege before production
- Interrogatories
- Depositions

It Does Not Matter Whether It's Still In Your Possession Or Where You Keep It

- Discovery can reach many places, including:
 - ✓ "Personal" file in office
 - ✓ Cell phone (company or personal)
 - ✓ Home files, home computer, CDs, and thumb drives
 - ✓ Car
 - ✓ The cloud

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.

Bottom Line

- Any recording of information may have to be produced (writings, CDs, photos, voicemails, texts, computer drives, cloud storage, etc.).
- The documents you create may be seen (and used) by people other than your intended audience.
- You may be called to answer questions under oath about your documents.

The Following E-mail Was Sent From A Gmail Account

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 now way for us to make money — ever.

The Result

- After this e-mail was sent, the Bear Stearns managers decided they could assure investors that they were comfortable with the fund.
- The e-mail turned up in a government investigation.
- Based on its content, the government asked a Court to allow discovery into Tannin and Cioffi's "personal" e-mail.
- Although they were eventually acquitted, both men were indicted for fraud, and this e-mail was Exhibit A.

The Right Way To Write In Practice

The goal is to make all of your writing more:

- Accurate
- Thorough
- Factual
- Specific
- Boring

But Should You Even Be Writing?

Sometimes talking is better:

- Permits greater informality
- Allows brainstorming without creating a permanent record
- Confines circulation

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.

Ten Guidelines For Good Documents

1. Good documents are honest and don't gloss over bad details.
2. They are thorough.
3. They are contemporaneous.
4. They don't include hyperbole.
5. They don't leap to conclusions.
6. They are not cute.
7. They don't use phrases that can be misconstrued or misunderstood.
8. They are shared only on a need-to-know basis.
9. Good document rules apply to "personal" notes.
10. All relevant documents must be preserved.

Rule 1: Good 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
 - ✓ Don't change them
 - ✓ "Doctoring" notes after the fact is never a good idea – for you or the Company
- Attach supporting documents (photos, lab tests, etc.) to your documents

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, counterparty's) – it may change and you want to capture the first version.

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.

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...."

What's Wrong With This Notes Report?

Notes For: Jane Customer

Generated on: 7/1/2012, 2:30 p.m.

Created On

Created By

Description

5/9/2012

Customer Service Rep

5/9/2012 phone call

Received phone call from Jane, screaming at me because she received another overdue notice. She is a complete idiot and this is not the first time she ranted and raved at me. Former customer service rep promised her that she wouldn't have to pay for these types of repairs. She is threatening a lawsuit. It appears like fraud and bad faith by us. Will call Corporate to discuss.

6/18/2012

Customer Service

5/9/2012 phone call

Called John Q Lawyer at Corporate and talked to him about Jane Customer. Said it looks like a messy situation and we should think about settling. I wish Corporate had never assigned this orphan to me. The situation is a mess and I am sick of listening to that idiot Jane whine.

Rule 5: Good Documents Don't Leap To Conclusions

- Where conclusions are appropriate, they should be supported by the 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.

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.

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.

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.

A Word About Your Attorneys

- Conversations with the Company's counsel may be – ***but are not necessarily*** – protected.
- Talking with an attorney can be an outlet to ask questions and get advice without exposing those discussions to the eyes or ears of third persons.

The Attorney-Client Privilege Is Not As Broad As People Think

- Not all statements to a lawyer are privileged; must be from a "client" seeking "legal advice."
- The privilege does not cover business advice.
- Former employees are tricky.
- Judges are skeptical, especially of in-house counsel.
- Privilege may be challenged, and the judge may review documents "in camera" to resolve challenge.

And There Are Many Ways To Lose It

- Privilege can be inadvertently waived by forwarding or summarizing. ("Quarles & Brady says...")
- Privilege can be waived if documents are shared too broadly at the time or in litigation.
- Inadvertent disclosure.

Rule 9: Good Document Rules Apply To "Personal" Documents

- There is no such thing as a personal document:

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!

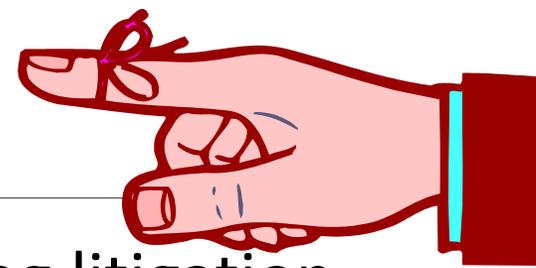
Result

- Inside information helped Samberg net his fund \$2.1 million.
- In turn, Samberg was caught and settled with the Securities Exchange Commission for \$28 million.

Rule 10: All Relevant Documents Must Be Preserved

- Whether good or bad.
- General rule: don't destroy documents during or in anticipation of litigation.
- Don't destroy evidence, no matter how bad.
- Repeat – don't destroy evidence.
- Documents must be preserved in original form, with any attachments.

Litigation Holds



- The Company must preserve documents relevant to pending litigation.
- The Company must preserve documents even when there is no pending litigation, but litigation is "reasonably foreseeable."
- Remedies for failure to preserve documents (spoliation) include monetary sanctions and/or entry of judgment.
- Stop, think, and talk to your leader about next steps when a lawsuit is received or is likely.

What Is A "Document"?

- Traditional documents include:
 - ✓ Letters
 - ✓ Memos
 - ✓ Reports
 - ✓ Contracts

But Litigation "Documents" Also Include:

- ✓ Drafts
- ✓ Notes on Napkins
- ✓ Post-It Notes
- ✓ "To Do" Lists
- ✓ PowerPoints
- ✓ Calendars
- ✓ Diaries
- ✓ Photos/Videos
- ✓ E-mails
- ✓ CDs
- ✓ Thumb Drives
- ✓ Facebook messages
- ✓ Tweets
- ✓ Blog Entries
- ✓ Recorded Voice Messages
- ✓ Text Messages

Why Electronic Communications Can Be So Dangerous

- E-mail, texts, instant messages, social media posts, etc. combine the immediacy of speech with the permanency of writing.
- Reality Check: people are not as careful with electronic communications as they are with more formal memos, letters and other documents.
- Before sending any instant communication, do the "letterhead" test.

Additional Issues With E-mail And Other Electronic Communications

- No control over forwarding
- Inadvertent reply to "all"
- Wrong e-mail address (autofill e-mail)
- Mixing business with personal matters
- "Deleted" e-mails or blog entries may still exist (court can order examination of hard drive and backup tapes)

Labeling Is Useful....

- "Not for File"
- "Personal"
- "For Your Eyes Only"
- "Destroy after Reading"

Useful? Yes, For The Other Side.

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.

Actual email messages. Fines and liability followed.

Email Phrases to Avoid

- "I shouldn't put this in writing, but . . ."
- "We're going to handle this differently than we usually do."
- "Delete this email as soon as you have read it."
- "Do not forward."

Whether Notes Or Otherwise, 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 that work is still a draft
- But remember: drafts are discoverable

But Never Use A "Draft" As The Final Document

The following will, though signed, was thrown out in a \$3 million dollar 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.

"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 [Signature] (print)

. . . 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.

What's Wrong With This E-mail?

From: [Summer Intern at prestigious N.Y. 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 shit. Went to a nice 2 hr sushi lunch today at Sushi Zen. Nice place. Spent the rest of the day typing emails and bullshitting 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 fuckup ...

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

Top 10 Reasons Not To Send An E-mail

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.

Top 10 Reasons Not To Send An E-mail (Cont.)

6. Feeling lazy.
7. Feeling rushed – it's 5:03 p.m.
8. Frustrated or irritated with a regulator, a customer, co-worker, a lawyer, or the world.
9. Unsure you completely understand the facts, the contract, or the issue.
10. Don't know your audience.

Take-Home Message About Electronic Communications

E-mail, texts, etc. are an important business tool...

... but always think about how it will look and sound before you press "send."

Conclusion

- Think before you write.
- Use (un)common sense.

Questions?



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