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Protecting the Attorney-Client Privilege in the Workplace

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We are a nation hooked on e-mail. AOL Mail's fourth annual E-mail Addiction Survey recently reported all time highs; a 24-7 society in which it is common to be online and checking e-mail at all hours of the day. Now that users can send e-mails from mobile devices like BlackBerrys or iPhones, people check and send e-mails while driving, on vacation, in church, and, yes, even in the bathroom. While it appears that no place is sacred anymore, there is one place where business and personal simply cannot mix: the office computer. According to a growing body of law, when using an employer's computer, employees should take heed before hitting the send button.

Employees who engage in e-mail communications with their attorneys via office accounts and computers may be waiving their attorney-client privilege with every message sent or received. Though the law in this area is neither mature nor settled, employees would be wise to review company policies prohibiting personal use of company computers, which most corporations have adopted. Additionally, workplaces warn that e-mail traffic may be monitored and read by company officials.

Because communications between an attorney and client/employee are not deemed privileged if exchanged in a setting with no reasonable expectation of confidentiality for the client/employee, these warnings should signal that the privilege does not attach in this setting. Yet even after receiving this information, many employees use corporate computers for personal use as a matter of convenience. This includes communicating with their lawyers, even in situations where the employee and company are adverse.

Despite the perceived lack of fairness of inadvertently waiving one's attorney-client privilege, employees should recognize that when they are at work, it is not their computer, but company property. If employers reserve the right to monitor what employees do, then nothing is confidential when it comes to electronic communications in the workplace.

Recently, a New York trial court held in *Scott v. Beth Israel Medical Center*[1] that e-mails sent by a physician to his personal attorney via the employer/hospital's computer system were not

[1] 847 N.Y.S.2d 436 (N.Y. Sup. 2007).

protected by the attorney-client privilege because the hospital had an e-mail policy mandating that computer and e-mail use were to be solely for business purposes and warning against the expectation of privacy with regard to any communication created, saved or sent using the hospital's computers. In its analysis, the court relied on four factors that had been set out in the case of *In re Asia Global Crossing, Ltd.*,[2] namely whether:

1. the employer's policies ban personal or other objectionable use of its computers;

2. the employer monitors its employees' computer activities and e-mails;

3. third parties have a right of access to company computers and employee e-mails; and

4. the employer notified employees about the other factors or whether the employees were generally aware.

Therefore, a company may defeat an employee's claim of privilege where the employee either knows or should know that sending personal e-mail communications over the company computer system is contrary to company policy and is also subject to monitoring. If a company has such a policy in place, even password-protected e-mail accounts may not be enough to meet the "reasonable expectation of confidentiality" standard. More substantial efforts, however, such as protecting documents from disclosure by password protection and segregating them in a clearly marked and designed folder (i.e. "attorney"), are of significance to the court.

Another relevant issue is the scope of the employer's e-mail policy. In *People v. Jiang*,[3] the court examined what the employer's e-mail policy was designed to protect. In that case, because the policy was designed to protect the employer's intellectual property, it was held to be irrelevant in terms of barring personal use.

Employees should proceed at their own risk, taking care to make sure that their personal business does not end up being a company matter.

If you have questions regarding the protection of the attorney-client privilege in the workplace, please contact Dave Hathaway at *dhathaway@deanmead.com*.

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[2] 322 B.R. 247 (S.D.N.Y. 2005).
[3] 131 Cal. App. 4th 1027, 33 Cal. Rptr. 3d 184, 204 (2005).

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