ETHICS COLUMN

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Attorney/Client Privilege Honored Despite E-mail Communication Sent from Employer's Account

In the recent decision of *Convertino v. U.S. Dept. of Justice*, No. Civ. A. 04-0236 (RCL) 2009 U.S. Dist. LEXIS 115050, the U.S. District Court for the District of Columbia addressed whether or not the attorney/client privilege applies to e-mails exchanged between a federal prosecutor using his government e-mail account and personal counsel hired by the prosecutor. Several years after the prosecutor retained personal counsel using his government e-mail address, the prosecutor learned that his employer, the Department of Justice (DOJ), had three dozen e-mails that were being sought through discovery by a third-party in an action against the DOJ. The federal prosecutor was not involved in that suit but filed a Motion to Intervene to assert his privilege claim over the e-mails. The Court determined that he was permitted to intervene and that he did not waive the attorney/client privilege by communicating with his personal counsel while using the e-mail address provided to him by his employer.

In determining whether or not the privilege was waived due to the e-mails being disclosed to a third-party, the employer, the Court relied on Federal Rule of Evidence 502(b) which provides that no waiver exists if: "(1) The disclosure is inadvertent;" and "(2) The holder of the privilege or protection took reasonable steps to prevent disclosure." The Court reasoned that the disclosure was inadvertent because the prosecutor had no intention of allowing the DOJ, to read the e-mails he sent to his personal attorney using his work e-mail account. The prosecutor, as an employee of the DOJ, failed to realize that the DOJ kept the e-mails even after they were deleted. Once, however, he discovered that the DOJ still had access to the e-mails, he took reasonable steps to prevent disclosure to additional parties by filing a Motion to Intervene.

The employee reasonably expected that his e-mails to his personal attorney would remain confidential. The Court relied on the decision in the case of *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y 2005). In that case, the Court determined that the question of privilege "comes down to whether the intent to communicate in confidence was objectively reasonable." *Id.* In order for documents sent by e-mail to be protected by the attorney/client privilege, there "must be a subjective expectation of confidentiality that is found to be objectively reasonable." *Id.* at 257. The Court outlined four factors to determine reasonableness: "(1) Does the corporation maintain a policy banning personal or other objectionable use, (2) Does the company monitor the use of their employees' computer or e-mail, (3) Do third-parties have a right of access to the computer or e-mails, and (4) Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *Id.* In this case, the Court reasoned that the expectation of privacy was reasonable. The DOJ maintains a policy that does not ban personal use of company e-mail and although the DOJ does have access to personal e-mails sent through their account, the prosecutor/employee in this case was unaware that the DOJ would be regularly accessing and saving e-mails from his account even after they were deleted. Because the Court reasoned that his expectations were reasonable, the Court concluded that his private e-mails would remain protected by the attorney/client privilege.

There are contrary holdings by other courts that have addressed the same issue but ruled differently than the court in *Convertino*. *See, e.g., Scott v. Beth Israel Medical Center, Inc.*, 17 Misc. 3d 934, 847 N.Y.S. 2d 436 (Sup. 2007). *See generally* Andrew Serwin, *Information Security and Privacy: Practice Guide to Federal, State and International Law* § 9:5 (July 2009); Adam Losey, *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 Fla. L. Rev. 1179 (Dec. 2008); Kara Williams, *Protecting What You Thought was Yours: Expanding Employee Privacy to Protect the Attorney/Client Privilege from Employer Computer Monitoring*, 69 Ohio St. L. J. 347 (2008).

The cases on this issue vary from state to state, without a general rule that can be safely applied nationwide. One writer has summarized a leading case as formulating the following test: "Does the employee know that his/her e-mails are monitored by the company? If so, then there is a strong argument that the attorney/client privilege does not apply because there is no objective or subjective expectation of privacy." *See* Michael Fielding, *Practical Pointers for Your Practice: Bankruptcy, ESI and the Attorney/Client Privilege*, 26-10 Amer. Bank. Inst. J. 52 (Dec. 2007/Jan. 2008) (citing *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (S.D.N.Y. 2006)). *See also Sims v. Lakeside School*, 2007 WL 2745367 (W.D.Wash. 2007).

In sum, this is an issue that requires familiarity with state specific statutes and case law. Proceed with caution. ◆

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