



LEGAL DEFENSE TRUST TRAINING BULLETIN

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USE OF EMPLOYER COMPUTERS AND PRIVACY RIGHTS

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This article examines a case of first impression in California, *Holmes v. Petrovich*, which holds that e-mails sent from a work e-mail account on a company computer do not constitute confidential communications for purposes of the attorney-client privilege.

The Attorney-Client Privilege

Evidence Code § 954 states in relevant part: “[s]ubject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...”

Evidence Code § 952 provides that a “confidential communication between client and lawyer” is “information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, as far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client...”

Recent Decision

In *Holmes v. Petrovich Development Co. LLC*, (Cal. Ct. App. - Jan. 13, 2011) a female employee sued her employer for sexual harassment and violation of the right to privacy, among other things. The plaintiff felt she was harassed and retaliated against after disclosing one month after her hire date that she was pregnant and would need time off for maternity leave. Shortly thereafter plaintiff resigned, but prior to her departure plaintiff exchanged e-mails with her attorney on her company e-mail account using her company computer regarding possible legal action against the defendants.

The defendants’ employee handbook, which the plaintiff admitted reading and signing, contained provisions clearly spelling out the policy concerning use of the company’s technology resources. The handbook warned that “employees who use the company’s technology resources to create or maintain personal information or messages have no right of privacy with respect to that information or message.”

After the plaintiff filed her complaint, the defendants retrieved and used the e-mails in their motion for summary judgment. Plaintiff objected to use of the e-mails on the grounds of attorney-client privilege. The court rejected the plaintiff's arguments and determined the plaintiff waived her attorney-client privilege.

The court held that by using the company's computer to communicate with her lawyer, knowing the communications violated the company's computer policy and could be discovered by her employer due to the company's policy of monitoring e-mail usage, plaintiff's communications were not made in a manner designed to prevent disclosure of the information to other than those who are present to further the client's interest.

The court explained that an attorney-client communication "does not lose its privilege character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." However, the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaint about her employer would be overheard.

Privacy Rights Issue: Any communication on an employer-owned electronic device may be fair game for the employer to view and exploit in litigation.

The court's holding in *Holmes* is justified in part by the fact that Holmes used her work e-mail account to exchange communications with her attorney in direct violation of her company's computer policy. But would the court have found a reasonable expectation of privacy and/or lack of waiver if Holmes had used a personal e-mail account and/or the company's computer policy had not clearly warned employees that such communications maybe accessed? No, according to the *Holmes'* court.

Holmes suggests that any communication or online activity on a company-owned electronic device may be fair game for the employer to view and exploit in litigation. The court's decision could have severe implications for employees who regularly engage in online activities on company-issued electronic devices. It appears that the next judicial step will be to address the conflict between the employee's expectation of privacy and the *Holmes'* case decision that ownership of the computer trumps all. Until then, given the uncertainty surrounding the expanse of *Holmes* application, employees should think twice before communicating with their attorneys via any company-owned electronic device, even from personal password protected e-mail accounts.

Stay Safe!
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