UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

43rd Annual Page Keeton
Civil Litigation Conference

November 22, 2019

Confidentiality

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Confidentiality

I. The Risk of Communicating with Clients by Email

We all know that the attorney-client privilege ordinarily protects communications between an attorney and a client from compelled disclosure.[1] We all also know that the rules of professional responsibility require lawyers to maintain the confidentiality of information relating to the representation of a client.[2] Furthermore, we all know lawyers have a duty to provide competent representation.[3] As discussed later, that includes acting competently to protect the confidentiality of attorney-client communications.[4] Finally, almost all lawyers communicate with their clients at least sometimes by email.[5] What many lawyers don't know is how easy it may be to lose privilege protection by communicating with clients via email.

In the last fifteen years, a substantial number of cases have addressed the privileged status of lawyer-client email communications where the client is either using an employer's equipment (e.g., a company laptop) or an employer's email system.[6] Many of the cases hold that the communications are not privileged.

The leading case is *In re Asia Global Crossing, Ltd.*[7] The court there focused on whether the communications were confidential. The Texas Rules of Evidence define the confidentiality of a communication for purposes of the attorney-client privilege in terms of intent to disclose to third persons.[8] The federal rules, however, lack a codified attorney-client privilege. In *Asia Global*, the

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1 See, e.g., Tex. R. Evid. 503.

2 See Tex. Disc. R. Prof. Cond. 1.05; Model R. Prof. Conduct 1.6.

3 Tex. Disc. R. Prof. Cond. 1.01; Model R. Prof. Conduct 1.1.

4 See ABA Formal Opinion 11-459 (Aug. 4, 2011); Texas Prof. Ethics Opinion 648 (2015).

5 ABA Formal Opinion 99-413 (Mar. 10, 1999) (approving use of unencrypted email by lawyers to communicate with clients). Similarly, see Tex, Prof. Ethics Op. 648 (2015); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011); State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010); Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. No. 195 (2008); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 820 (2008); Alaska Bar Ass'n Ethics Comm., Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Op. 281 (1998); Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1997); State Bar Ass'n of N.D. Ethics Comm., Op. No. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Vt. Bar Ass'n, Advisory Ethics Op. No 97-05 (1997).

6 See generally Fischer, Big Boss is Watching: Circumstances Under Which Employees Waive the Attorney-Client Privilege By Using E-Mail at Work, 12 Colo. Tech. L.J. 365 (2014); Levy, Employee E-Mails and the Concept of Earning the Privilege, 9 I/S: J. L. & Policy for Info. Soc'y 245 (2013); DeLisi, Employer Monitoring of Employee Email: Attorney-Client Privilege Should Attach to Communications That the Client Believed Were Confidential, 81 Fordham L. Rev. 3521 (2013).

7 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

8 Tex. R. Evid. 503(a)(3) defines a confidential communication in terms of the intent to disclose to third persons "other than those to whom disclosure is made (1) to further the rendition of professional legal services . . . or (2) reasonably necessary to transmit the communication."

court stated that "[c]onfidentiality has both a subjective and objective component; the communication must be given in confidence, and the client must reasonably understand it to be so given."[9] The court then held that the privileged status of the emailed attorney-client communications depended on whether there existed a reasonable expectation of privacy. To determine this, the court set forth a four-factor test:

> In general, a court should consider four factors: (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails7, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Numerous courts have applied this test.[10] As should be expected with multi-factor tests, courts do not always apply the *Asia Global* test in a manner that is easy to predict. A reading of the cases indicates that the single most important factors are the clarity of the company policy regarding the use of email and its right to inspect the employee's computer or email. *In re Royce Homes, LP,*[11] a Texas bankruptcy case, illustrates this. The company's Employee Handbook stated, "Employees are NOT to disseminate any confidential information over the company's system."[12] The court had no problem finding that the attorney-client privilege was inapplicable. In *Bingham v. Baycare Health System*, a Florida federal court recently concluded that "it appears that the majority of courts have found that an employee has no reasonable expectation of privacy in workplace e-mails when the employer's policy limits personal use or otherwise restricts employees' use of its system and notifies employees of its policy."[13]

Ambiguous policies (or the absence of a policy) are likely to lead to the opposite conclusion. In *Stengart v. Loving Care Agency, Inc.,*[14] another widely-cited case, the client used a company laptop to communicate with his attorney through a personal, password-protected Yahoo email account. The company's policy stated that the company may access "all matters on the company's media systems" and that emails are "considered part of the company's business . . .

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[9] 322 B.R. at 255.

[10] As of September 2019, Westlaw lists 68 cases that cite *Asia Global*.

[11] 449 B.R. 709 (Bankr. S.D. Tex. 2011).

[12] Id. at 738. See, e.g., Goldstein v. Colborne Acquisition Co., LLC, 873 F. Supp. 2d 932 (N.D. Ill. 2012) (policy stated "all messages . . . are Colbourne records"); United States v. Finazzo, 2013 WL 619572 (E.D.N.Y. Feb. 19, 2013) ("[y]ou should have no expectation of privacy" and "[a]ll information . . . may be monitored, accessed, deleted, or disclosed at any time without your permission"); In re Info. Mgmt. Servs., Inc. Derivative Litig., 81 A.3d 278, 282 (Del. Ch. 2013) (employees "should assume files and Internet messages are open to access by IMS staff"); Farris v. Int'l Paper Inc., 2014 WL 6473273, at *1 (C.D. Cal. Nov. 17, 2014) ("employees' activities on company computers are not private."); Scott v. Beth Israel Med. Ctr. Inc., 847 N.Y.S.2d 436, 442 (N.Y. Sup. Ct. 2007). Cf. Kreuze v. VAC Animal Hosp., Inc., 2018 WL 1898248 (D. Md. 4/20/2018) (because policy indicated that private use should be kept to a minimum but did not prohibit it, this factor favored retaining privileged status of emails sent on company email account).

[13] 2016 WL 3917513 *4 (M.D. Fla. 2016). The court cites numerous cases. Anyone looking for a quick entry to the case law on this issue should consult this opinion.

[14] 990 A.3d 650 (N.J. 2010).

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First appeared as part of the conference materials for the
43rd Annual Page Keeton Civil Litigation Conference session
"Confidentiality"