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ATTORNEY-CLIENT PRIVILEGE

May you view an employee's attorney-client communications if exchanged via work e-mail?

by Lauren E. Moak

The relative secrecy of workplace communications has been in the news quite a bit recently. A new opinion from the California Court of Appeals raises the issue again, reminding Delaware employers that e-mail is not private, especially when your employees are using an e-mail address supplied by the company.

California law

In a recent decision, the California Court of Appeals decided that an employee's e-mails — sent to her attorney from her work e-mail address — are not subject to the attorney-client privilege. The issue arose after an employee sued her employer for wrongful termination. Before filing her lawsuit, she had exchanged e-mails with her attorney using her office e-mail account. The employer used the e-mails in its defense, and the employee objected, claiming that they were protected by the attorney-client privilege.

As it turned out, the employee handbook ended up being an important document in the case. Like many employers, the company included a notice to its employees stating that it reserved the right to monitor e-mails. Such a warning, the court concluded, made the employee's e-mails akin to "a conversation held in the company's conference room, with the door open, speaking in a loud voice." Because the e-mail conversation

wasn't considered private, the court found that the attorney-client privilege did not attach. *Holmes v. Petrovich Development Company, LLC* .

The California court's decision is in keeping with the U.S. Supreme Court's 2010 decision in *City of Ontario v. Quon* , in which the Court held that employees do not have an expectation of privacy in text messages sent using an employer-provided pager. This case, however, takes the *Quon* decision to its logical conclusion, holding that in the absence of a reasonable expectation of privacy, the attorney-client privilege cannot attach.

Delaware law

The *Holmes* decision isn't binding on Delaware courts, nor has any Delaware court previously ruled on the issue. However, the California Court of Appeals based its decision on basic principles of law, meaning other states (including Delaware) may rule the same way.

In Delaware, you are required by statute to inform employees before monitoring or intercepting their telephone, e-mail, or Internet activity. Thus, it is possible that Delaware employees who have received notice of e-mail monitoring under Delaware law have waived the attorney-client privilege regarding any e-mails exchanged with their attorney using their work e-mail account.

Bottom line

This case serves as a reminder to Delaware employers of the importance of proper notice to employees regarding Internet and e-mail monitoring. Proper notice of monitoring may result in an added bonus: the employee's inability to communicate with his attorney privately, at least from his work e-mail account.