Employee Communications And Loss of Privilege

By Marjorie J. Peerce and Elizabeth S. Weinstein

When employees use their employers' electronic systems for personal communications and storage of personal documents, there are potential implications for the attorney-client and marital privileges. Some recent cases, as well as some ABA Formal Ethics Opinions released in August 2011, can provide guidance to attorneys who must counsel corporate clients that are conducting internal investigations or responding to subpoenas.

An Employee's Reasonable Expectation of Privacy

Determining whether an employee's personal electronic communications are privileged turns on whether the employee had a reasonable expectation of privacy in the communications. There is both a subjective and objective component — the employee must have a subjective expectation of privacy that is found to be objectively reasonable. *See In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005).

In determining whether an expectation of privacy is reasonable, courts use a four-factored test originally set forth in *Asia Global Crossing*. It asks: "(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 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*.

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When a Company Lacks an E-Mail or Computer Policy

The absence of an electronic use policy increases the likelihood that a court will find that an employee communication is privileged. For example, in *Asia Global Crossing*, the Southern District of New York Bankruptcy Court found that employees' e-mails to and from their attorneys through company e-mail accounts were privileged because the employer did not have an e-mail policy in place and did not otherwise put the employees on notice that e-mails sent or received through the employer's system should not be considered private. 322 B.R. at 259-261.

When a Company's Electronic Use Policy Is Vague or Inapplicable

In cases where companies do have an electronic use policy, courts have scrutinized that policy to determine whether it applies to the communications at issue and whether it is sufficiently specific to put employees on notice.

The New Jersey Supreme Court recently found that, based on the language of an employer's e-mail policy, an employee had a reasonable expectation of privacy in communications with her attorney through her webmail account, which she accessed through her employer's computer. *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010). The relevant language from the employer's e-mail policy was: "The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time, with or without notice … [e-Mail] communications are not to be considered private or personal to any individual employee. The principal purpose of electronic mail (e-mail) is for company business communications. Occasional personal use is permitted … " *Id*. at 311. Finding that the policy did not clearly apply to "personal, password-protected web-based e-mail accounts [accessed] via company equipment," and permitted "occasional personal use" of the e-mail system, the court found that the policy "create[d] ambiguity about whether personal e-mail use is company or private property." *Id*. at 315.

Similarly, in *Convertino v. Dept. of Justice*, 674 F. Supp. 2d 97 (D.D.C. 2009), Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia found that a Department of Justice (DOJ) employee had a reasonable expectation of privacy in his correspondence with his attorney through his DOJ e-mail account. The court came to this conclusion because the DOJ policy did not ban personal use of its e-mail system, and did not make employees aware that the DOJ regularly accessed and saved e-mails in his account. *Id*. at 110.

At least two federal district courts have also recently found that employees retained attorney-client privilege over documents related to personal litigation matters that they saved on the hard drives of their work computers because their employers' electronic use policies did not specifically ban that conduct. *See United States v. Nagle*, No. 1:09-CR-384, 2010 U.S. Dist. LEXIS 104711, (M.D. Pa. Sep. 30, 2010); *United States v. Hatfield*, No. 06-CR-0550, 2009 U.S. Dist. LEXIS 106269 (E.D.N.Y. Nov. 13, 2009).

When an Electronic Use Policy Does Apply to the Communications at Issue

As companies become more careful in crafting their electronic use policies, courts are finding that employee communications are not privileged and thus are subject to review and production. No doubt in recognition of this trend, the ABA released a Formal Ethics Opinion in August 2011 stating that, depending on the particular circumstance, attorneys may have an ethical obligation to advise clients about the risks of using a workplace device or system for attorney-client communications. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).

It is crucial to recognize that personal use of corporate computers or systems can have serious consequences for businesses, as well as for the individuals who work for them. For example, in *SEC v. Reserve Management Co. Inc.*, __ F.R.D. __,

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No. 09-Civ-4346, U.S. Dist. LEXIS 55769 (S.D.N.Y. May 23, 2011), Judge Paul G. Gardephe of the U.S. District Court for the Southern District of New York found that, based on the employer's e-mail policy, e-mails sent between an employee and his wife were not protected by the marital privilege. The company's e-mail policy stated: "Employees may only use the e-mail system provided by [the employer] to communicate with clients and the public. Use of outside Internet service providers or Websites providing e-mail accounts while on [the employer's] premises is prohibited … [The employer] reserves the right to access an employee's e-mail for a legitimate business reason … " *Id*. at *3-*4. That court reasoned that the employer not only banned the use of its e-mail system for personal matters, but also put employees on notice that the employer had the right to access the e-mails, and that an expectation of privacy was unreasonable. The court therefore required the employer to produce the e-mails at issue to the SEC as part of the SEC's enforcement action against the employer and the employee. *Id*. at *8.

Similarly, in *In re Royce Homes, LP*, 449 B.R. 709 (Bankr. S.D. Tx. 2011), the bankruptcy court found that an employee waived his attorney-client privilege over e-mails sent to his attorney from his work e-mail account and through his work computer. The court's conclusion that the employee's expectation of privacy was unreasonable was based on the specific language of the employer's electronic use policy, which provided that "personal communications may be accessed, viewed, read, or retrieved by a company Manager or employee." *Id*. at 732-41. Accordingly, the employer was required to produce the e-mails at issue to the bankruptcy trustee. *Id*. at 744.

In *Leor Exploration & Prod. LLC v. Aguiar*, No. 09-60136-CIV, 2009 U.S. Dist. LEXIS 87323 (S.D. Fl. Sep. 23, 2009), Magistrate Judge John J. O'Sullivan of the U.S. District Court for the Southern District of Florida found that an employee had no expectation of privacy with respect to e-mails sent by his attorney to his work e-mail account. This conclusion was based on the following employee handbook language: "Employees should have *no expectation of privacy* with regard to communications made over [the employer's] systems … Employees should not use [the employer's] electronic … communications systems to communicate, receive, or store information that they wish to keep personal or private." *Id*. at *4 (emphasis in original).

Likewise, in *Long v. Marubeni America Corp.*, No. 05-Civ.-639, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. Oct. 19, 2006), Magistrate Judge Kevin Nathaniel Fox of the Southern District of New York found that e-mails employees sent to and received from their attorneys through their personal password-protected webmail accounts and accessed from their work computers were not privileged because the employer's employee handbook advised employees that "use of the [employer's computer] systems for personal purposes are (sic) prohibited." *Id*. at *1.

CONCLUSION

The lesson for attorneys advising companies on their review and production of potentially privileged employee e-mails and documents is to consult the company's electronic use policy carefully in light of the *Asia Global Crossing* factors before commencing the review. Moreover, attorneys must be familiar with the relevant laws and procedural and ethical rules in the jurisdictions where they practice.

For instance, although a recent ABA Ethics Opinion concluded that the Model Rules do not impose an independent ethical obligation on attorneys to notify opposing counsel of potentially privileged employee e-mails or documents that an employer obtained from a computer or other device owned by the employer, the ABA warned that courts or procedural rules may require such disclosure. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).

In addition, although a client's discovery of employee e-mails is "information relating to the representation of [the] client" that must be kept confidential per Model Rule 1.6(a) absent an applicable exception, the ABA advised that Model Rule 1.6(b)(6) permits an attorney to disclose his or her client's discovery of employee e-mails to opposing counsel if he or she reasonably believes the disclosure is required by the prevailing law. *Id*. The ABA also counseled that even absent a clear legal mandate for providing notice, it will often be in the employer's best interest to alert opposing counsel to the potentially privileged communications in order to obtain a judicial ruling allowing review before relying on the communications. *Id*.

Accordingly, in order to best advise corporate clients on these matters, practitioners must monitor the relevant decisions on privilege law, both to determine the company's general legal obligations regarding the review of potentially privileged communications and to determine the privilege law implications of the company's specific electronic use policy.

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Wiretaps

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revelations about the Rajaratnam wiretaps, hedge-fund managers wondered whether even legitimate exchanges caught on tape would draw scrutiny. Katherine Burton and David Glovin, Galleon Wiretaps Rattle Hedge Funds, Bloomberg (Oct. 26, 2009), www.bloomberg.com/apps/news?pid=newsarchive&sid=as8seXJpbDUY.

One hedge fund executive has reportedly "instructed his colleagues to be extra careful about what they say on the phone, not because they are breaking the law, but because they are fearful that any conversation about stocks could be misconstrued." *Id*.

Others may choose to meet in person instead of picking up the phone. *Id*. But whether the success of the

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