

## PROFESSIONAL LIABILITY UPDATE

### ATTORNEY-CLIENT PRIVILEGE

By Jennifer A. Becker

#### ***Holmes v. Petrovich Development Co. (2011) 191 Cal.App.4<sup>th</sup> 1047***

*The Third District holds that attorney-client communications transmitted from an employer's computer are not privileged.*

Shortly after Gina Holmes began working for Paul Petrovich as his executive assistant, she announced her pregnancy. After an e-mail exchange about the issues with her employer, she used her company e-mail account to communicate with her counsel about what she perceived to be workplace pregnancy discrimination.

In the ensuing litigation, Petrovich's counsel introduced the e-mails between Holmes and her counsel that had been retrieved from the company computer. Petrovich's counsel asserted Holmes made a knowing waiver of the privilege when she used the company's e-mail system after being advised in the employee handbook that her e-mails were not private. In the context of summary judgment and trial, the trial court ruled that the e-mails were not privileged. The Court of Appeal agreed.

Evidence Code § 954 renders confidential attorney-client communications privileged. Pursuant to E.C. § 952, a confidential communication is one that, so far as the client is aware, is not disclosed to third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the

lawyer is consulted. Pursuant to E.C. § 917(b), transmission of a communication electronically does not eliminate the privilege merely because third parties involved in the transmission may be able to access the communication. However, E.C. § 912 provides that waiver occurs if the holder of the privilege discloses or consents to disclosure of a significant part of a communication. Consent to disclosure can be manifested by conduct.

An e-mail does not lose its privileged character because it is transmitted electronically. However, a communication is not confidential when the electronic means used belongs to the defendant; the defendant has advised the plaintiff that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and the plaintiff is aware of and agrees to these conditions. Such a communication is not transmitted by means which the client has reason to believe does not disclose the information to third persons.

If Holmes had used an e-mail account inaccessible to third parties, the communications would have been privileged. Using her employer's computer, which Holmes knew

could be accessed by Petrovich, is analogous to consulting her attorney within earshot of Petrovich.

The Court was not persuaded that Holmes' use of a password and her deletion of the e-mails rendered them private. Her belief was unreasonable because she was warned that the company would monitor e-mail, not to use company computers for personal matters, and that she had no expectation of privacy in any messages she sent via the company computer.

A reasonable expectation of privacy was not created by the fact that the Company did not access or audit employees' computers. The court disagreed with Holmes's characterization of the limited ability of the company to do so, and cited Holmes's lack of evidence as to how the Company actually implemented its right to monitor. Holmes's employer had never contradicted its stated policy, and Holmes had no reasonable expectation of privacy despite her beliefs about whether the employer actually audited employee e-mail.

The U.S. Supreme Court held that a government employee's fourth amendment right to be free of government searches and seizures was not violated by his employer accessing his text messages on a government issued device despite statements by a supervisor that contradicted stated employer policy. The Court noted that reasonable expectations of privacy in new technology will be fashioned by the degree to which society will be prepared to recognize those expectations as reasonable. Expectations will be shaped in part by employer policies, especially to the extent that policies are clearly communicated.

*Comment:* The Court of Appeal rejected the argument that the actual practice of the employer in not monitoring employee e-mail created an expectation of privacy. Yet, the practice of employees using employer controlled e-mail to conduct private business is

widespread, as is the assumption by employees that as a practical matter their e-mail is not monitored despite stated employer policies. It remains to be seen if a different District will come to the same conclusion concerning attorney-client communications transmitted on a workplace computer.