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January 19, 2011 *By*: *Jessica Davison*

California Appeals Court Rules: Some E-mails Not Protected by Attorney Client Privilege

A California appeals court ruled last week that if a client sends an e-mail to an attorney from a work e-mail account, that e-mail is not protected by attorney-client privilege. What are the implications of this decision? In short, if you are suing your employer, you should not correspond with your attorney using company e-mail because the company may have a right to access and use it against you in court.

In the opinion, the court explained that the e-mails at issue in that case, which were sent on a company computer, were like "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 complaints about her employer would be overheard."

This case appears to expand on a recent Supreme Court decision from last year, which held that a police officer's text messages on two-way department pagers were not private because the Ontario Police Department's policy said that text messages on work pagers were not private.

Electronic privacy case law is still evolving and the law varies from state to state, and from situation to situation. For example, the New Jersey Supreme Court ruled that the use of a personal web-based e-mail account accessed from an employer's computer were private.

Yet, in another case addressing the privacy issue, a California Circuit Court ruled that an employee has a reasonable expectation of privacy within the space of his private office. Therefore, "any search of that space and the items located therein must comply with the Fourth Amendment." However, "had the company computer assigned to Ziegler [the employee] for his business-use only been physically located outside a private office, we might have had to consider whether Ziegler had reasonable expectation of privacy in the device itself, in the face of a corporate policy of monitoring the corporate computers."

Significantly, while recognizing the greater expectation of privacy within a specific office, the courts have also been clear that employees "reasonable expectation of privacy" is overcome if a company has clearly stated a policy that it has the right to inspect all equipment (including laptops, filing cabinets, etc) that it has provided to its employees.

Thus, "a public employee's reasonable expectation of privacy may be reduced or eliminated by 'legitimate regulations' or by 'office practices and procedures,' such as how frequently coworkers and other individuals are permitted to enter the area that was searched."

Along these same lines, the courts have found that an employee's own conduct may limit his expectation of privacy and thus his privacy rights. For example, if an employee "knowingly exposes [materials] to the public, even in his own home or office, [those materials are] not a subject of Fourth Amendment protection."

The lesson is that the legitimate interests of employers and employees are best met by the development and implementation of clear policies and practices regarding the use and monitoring of communications originating from a workplace. These policies must recognize both that employees do have a "reasonable expectation of privacy" but that employers also have a legitimate interest in ensuring that company email is utilized for its intended purpose.

At the end of the day, given the fragility of private information and the difficulty of repairing the damage that can be done by public disclosure, employees are well advised to keep personal e-mails, documents, or the like out of the office and off of company computers or technological devices.

What do you think? Should a company have unlimited access to an employee's work e-mail? Should employees have a reasonable expectation of privacy even on work e-mail? We welcome your thoughts! Please feel free to comment at our interactive blog at blog.tlgdc.com.

If you have questions about this issue, or if we may be of assistance to you, please feel free to contact us.

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