

Emails Between Attorneys and Clients Not Always Protected By Privilege

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Preventing the production of attorney-client privileged documents in discovery is essential – how else are we to convince our clients that they must provide a detailed description of the underlying facts? A fact not lost on recent law school graduates is the existence of entire minions whose sole duties involve reading and reviewing documents, flagging some as “ACP” to be withheld, and bates-stamping others, ready for production. While that in and of itself sounds like an awful job description, at least there are certain truths that tend to make the responsibilities more defined. If you find yourself wondering how any repeated, patterned indicators could make such a task more ideal, consider that many of the fresh attorneys who perform document review projects are either compensated or rewarded with additional assignments based almost solely on the speed with which privilege determination is made. A matter of seconds per page can mean the difference between being re-upped for additional contract work or finding oneself yet again without a steady income.

In this context, the repetitive indicators are a godsend: look to the document’s author and the recipients. An internal memorandum from associate to partner – not being produced. A letter addressed to the client from the attorney with no other recipient – culled from the stack. An email from the client to the attorney under the same circumstances – not so fast. The trouble with electronic communication is it necessarily requires additional consideration as it can be reviewed by third parties unbeknownst to the author, whether contemporaneously or at any point in its perpetual existence. An email may exist in a hundred different forwarded iterations, may have blind carbon copy recipients, or may be reviewed by human resources as it is written key stroke by key stroke.

A recent decision confirms that what appears to be “confidential communications between client and lawyer,” requires more than just a simple facial analysis of the recipients. In *Holmes v. Petrovich Development Co., LLC* 2011 WL 117230, the court looked beyond the four corners of email communications between a client and her attorney and applied the context of privacy expectations during an employment relationship to strip away privilege.

Holmes itself does not present a unique litigation situation. Soon after the parties’ employment relationship began, the plaintiff found herself pregnant and eligible for maternity leave of up to four months. Tensions arose between the employee and the employer, about statutory obligations and the rules of pregnancy etiquette, which led to the employee emailing an attorney friend for advice. The email exchange was addressed solely to the attorney, but was sent to and from the employee’s work email address. In the emails, the plaintiff stated she was upset and hurt by the dialogue she was having with her supervisor, but that she did not want to quit her job, and only hoped to make the situation better. Later that same day, the attorney emailed the plaintiff and advised her to

delete their communications, fearful the employer might claim a right to access it at a later date. The situation progressed, with the plaintiff eventually quitting and filing litigation with the operative claims of harassment and wrongful termination.

When plaintiff's deposition occurred, to her surprise, defendant produced copies of the emails she exchanged with her attorney. Over objection, a line of questioning regarding the communications was pursued. Thereafter, the plaintiff unsuccessfully sought a protective order and the emails were presented in summary adjudication hearings and at trial to show that the plaintiff did not suffer severe and pervasive harassment or emotional distress, but instead mere frustration and annoyance. The emails further reflected that the lawsuit might in fact have been filed at the attorney's urgence, when the plaintiff just wanted to make the situation "better." The plaintiff appealed the admission of the emails into evidence.

In finding no error, the Court of Appeal recognized that such communications exist at the boundary line of privilege and privacy expectation:

Although a communication between persons in an attorney-client relationship 'does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication' this does not mean that an electronic communication is privileged (1) when the electronic means used belongs to the defendant; (2) the defendant has advised the plaintiff that communications using electronic means are not private and may be monitored, and may be used only for business purposes; and (3) the plaintiff is aware of and agrees to these conditions.

Id. at 4 (internal citations omitted).

No privilege could attach because the plaintiff used her employer's company e-mail account, after being warned it was to be used for company-only business, and that emails were subject to monitoring and periodic review. The warnings contained in the employee handbook issued at the beginning of employment were sufficient to put the employee on notice. Plaintiff's belief that she was entitled to privacy because of a unique personal access password and the immediate deletion of the emails were found to be unreasonable. Perhaps going a bit overboard, the Court used the following analogy: "This is akin to consulting her attorney in one of defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by [defendant] would be privileged." *Id.* Of course, in reality, the conversation had not been contemporaneously overheard and no "door" was left open. Instead, defendant performed a post-employment, litigation inspired, reconnaissance mission to retrieve all emails, whether deleted or not.

Holmes makes it clear that the expectation of privacy does not exist when employees use employer's electronic systems to communicate with attorneys, after forewarning that communications *may* be reviewed. Applying a similar analysis may shed the attorney-

client privilege in situations where public computers are used or third party email accounts are employed despite the fact that the third party never actually reviews the communication. A finding of attorney-client privilege is grounded in expectation, losing the privilege may be grounded in expectation as well. It is important to remember, however, that Evidence Code section 917(b) explicitly provides that email will not lose its privileged character *solely* because a third party may have access to the correspondence at some point in the transmission. In general to lose privilege, there must be something more; in *Holmes*, the something more was the corporate policy that removed the plaintiff's reasonable expectation of privacy.

Unlike a letter, each email requires individual scrutiny beyond the identity of the author and recipients. The location of the author must be considered, along with the objective expectations of privacy that the particular location carries with it. In the age of laptops and iPhones, location clearly is not limited to physical presence but can also mean the basis for the internet connection or email provider. Yet, using a personal email account on a work device may not be enough to ensure privilege either. It is necessary to consider the provider's policy, whether that is the employer or the public library. Basic policies detailing permissible uses of property, which identify the possibility that some third party entity may scour email transmissions and monitor interest use, will likely operate to remove any expectation of privacy. When that loss of expectation occurs, the attorney-client privilege is lost.

Naturally, the expectations of who will review correspondence prepared on a typewriter are significantly different than that of an email. To the dislike of techies, efficiency enthusiasts, and document reviewers everywhere, sometimes it is simply less risky to communicate face-to-face or by hard copy. However, I speak on behalf of my generation in proclaiming the hope that *Holmes* and its progeny does not inspire a return to facsimile correspondence.