RISKS IN COMMUNICATING BY EMAIL AND TEXT MESSAGES

It is common for attorneys to communicate with their clients by email and text messages. The use of such electronic communications, however, may increase the risk of claims under a variety of circumstances.

Are Communications Privileged/Confidential?

One of the risks in communicating electronically by text and email is illustrated in *Holmes v. Petrovich Development Company, LLC*, 191 Cal.App.4th 1047, 119 Cal.Rptr.3d 878 (Cal.App. 3 Dist., 2011), which involved an employee who communicated with her attorney by email while at work about litigation with her employer. The employer had a policy that e-mail would not be considered private, prohibited employees from sending or receiving personal e-mails, and permitted the company to inspect messages at any time for any reason. The court held that, although a communication between attorney and client did not lose its privileged character solely because it is communicated by electronic means, these email communications were not protected as privileged.

Similarly, in *Scott v. Beth Israel Medical Center Inc*., 17 Misc.3d 934, 847 N.Y.S.2d 436 (N.Y.Sup.,2007), involved a physician who sued a hospital for wrongful termination. When the physician moved for a protective order requiring the hospital to return all e-mail correspondence between physician and his attorney sent and received on the hospital's e-mail system, the court denied the motion, holding that a "no personal use" policy combined with a policy allowing for employer monitoring and the employee's knowledge of these two policies diminishes any expectation of confidentiality, so that no attorney-client privilege attached to those communications.

When communications between the client and her or his attorney are discoverable because they involved email messages sent under circumstances like those in *Holmes* and *Scott*, and the client believes that she or he has been prejudiced by the disclosure of those communications to the party opponent, there is a potential risk of a later malpractice claim (or Bar grievance) against the lawyer. American Bar Association Formal Opinion 11-459 (2011) recognized this risk and warned that the attorney-client privilege may be jeopardized where clients use employer provided computers, smart phones, or other devices, or an employer-provided email account, to communicate with their personal attorney when the employer has a policy asserting employer ownership of all email and hardware and permitting the employer to access email communications, and when third parties may obtain access to an employee's electronic communications by issuing a subpoena to the employer.

The opinion stated that, because clients may be unaware of the possibility of the loss of confidentiality or privilege by the use of employer-owned technology, the attorney should make the client aware of these risks.

This opinion urged lawyers to consult with their clients, and to follow client instructions, as to how highly sensitive information should be communicated, and when it would or would not be appropriate to communicate by email, particularly by email from the client's place of employment.

Importance of Determining at the Outset of Representation

The file intake process can be set up to identify any categories of information that state or federal law treat as highly sensitive in nature or that the firm believes should be treated as highly sensitive, such as personal identifying information, protected health information, non-public financial information, proprietary information, source code, patents, trademarks, trade dress, trade secrets, a merger and acquisition or other transaction. A firm can then take any steps it deems necessary and appropriate to protect that information, including limiting who is permitted to access that information and how it may be transmitted.

Preserving Information Received on Mobile Devices

Another risk may arise when a law firm is sued or threatened with a lawsuit, and a firm attorney sends and receives email or text messages from clients on their personal mobile devices. The firm is required to preserve electronically stored information ("ESI"). A law firm's failure to preserve ESI on its lawyer's mobile devices can potentially trigger a spoliation claim. The problem arises from the need to preserve text messages and emails sent by a personal, web-based email account, which do not reside on the firm's servers.

Keep Client Information Separate from Personal Devices

It should be anticipated that lawyers will want to protect their personal privacy and limit access to their home computers and personal devices. This can be accomplished by them not transferring work-related ESI to home computers or backing up their devices to home computers or personal storage devices. To limit this clash of interests and to limit the risk of spoliation, a law firm should consider addressing these issues in either its technology policies. In formulating a litigation hold, law firms should include their lawyers' mobile devices, home computers and personal storage devices where potentially relevant ESI may be located.

Policy on Distracted Driving

The risk of distracted driving is well known, and lawyers who attempt to review or send email or text messages while driving place themselves and their law firm at risk of liability if they harm anyone while engaged in that activity. A firm should consider prohibiting the use of a mobile device to review or send email or text messages while driving.

Additionally, law firms should be aware of a recent appellate decision from New Jersey, *Kubert v. Best*, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013), which suggested that a person who sends an email or text message to someone he or she knows is driving a vehicle could be held liable if the driver is involved in an accident while reviewing the message. Consequently, law firms may want to consider prohibiting the sending of email or text messages to anyone its lawyers or staff know or have reason to know is operating a motor vehicle.

Risk Management Tips

- Inform the client of the risks of communicating by text and email. It is important to follow client instructions as to how highly sensitive information should be communicated and when it would or would not be appropriate to communicate by email, particularly by email from the client's place of employment. It is important to also discuss the client's use of other media and the risks of waiving the privilege of internet postings.

- Determine at the outset of representation, what is highly sensitive information and ensure proper steps are taken to protect this information when it is being transmitted via electronic means.
- Ensure that information is retained when transmitted via mobile device.
- Consider a law firm policy on not using personal devices (personal computer, handheld devices) for client related matters.
- Consider a law firm policy on refraining from distracted driving (reading email and texts while driving).
- Be aware of any specific state rules, regulations or ethics opinions on texting and emailing with clients and concerning client information.
- Should you have questions concerning these issues, consider consulting with an attorney or risk management professional.

We invite Allied World policyholders to access additional information on this and other Risk Management topics. The lawyers' risk management website, http://awac.lawyeringlaw.com, contains resources as well as related topics.

Also, the **Risk Management Hotline** is included for up to 2 free hours per year, per firm of confidential advice regarding risk management questions that your law firm may have. If you are an Allied World policyholder, the hotline can be accessed through the risk management website, http://awac.lawyeringlaw.com. Once you log on to the website, the link to contact the hotline is on the upper left side, under the Allied World logo.

If you are not a current Allied World policyholder and would like information on our program and our risk management services, please contact your agent or broker.

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