LAWYERS' PROFESSIONAL LIABILITY
update
SUMMER/FALL 2012 • VOLUME 12 • NUMBER 2
LawyerCare®
ProAssurance Treated Fairly
Professional Liability Coverage for Lawyers and Law Firms
Georgia Lawyers Insurance Program

Attorney-Client Privilege in the Tech Age:

How to Ensure Your Multimedia Communications are Protected

Authors: Jamie Price, Esq., and Monica Sansalone, Esq.

With the increasing use of multimedia communications, it is important to be aware of the potential risks of using such media to communicate with clients—and to ensure communications are and remain privileged.

The Attorney-Client Privilege

While the specifics of the attorney-client privilege vary from state to state, the intent is to protect oral and written communications between an attorney and a client during the attorney-client relationship. Assuming an exception does not apply, attorney-client communications are privileged unless there is a waiver.

A client can waive the privilege as enumerated in a state statute or as recognized by common law. Waivers differ by jurisdiction. For example, Ohio has a statutory testimonial attorney-client privilege set forth in R.C. 2317.02 and a broader common law privilege that covers communications not subject to statute. Based upon Ohio statutory law, a client can waive the attorney-client privilege by giving express consent or by testifying as to the subject covered by the privilege. Based upon Ohio common law, a client can waive the privilege by either providing express consent or by disclosing the communication to a third party by express or implied conduct.[1] Implied waiver becomes important in addressing concerns with multimedia communications.

Implied waiver becomes important in addressing concerns with multimedia communications.

[1] R.C. 2317.02; *Grace v. Mastruserio*, 182 Ohio App.3d 243, 2007-Ohio-3942 (1st Dist.).

(continued on page 2)

(continued from page 1)

Attorney-Client Privilege in the Tech Age:

How to Ensure Your Multimedia Communications are Protected

How to Keep Multimedia Communications Protected

The key to determining whether multimedia communications are and remain privileged is whether a client has a reasonable expectation of privacy using the given media. If so, the communication is privileged, and the privilege can only be waived as enumerated in the applicable statute or recognized common law.

Email

Clients have a reasonable expectation of privacy in email communications with their attorney[2]; therefore, attorney-client email is generally privileged. Clients may not, however, have a reasonable expectation of privacy in personal email with their attorney when using their employer's email system and/or work computer to send or receive email.[3] Some courts have held clients do not have a reasonable expectation of privacy in personal attorney-client email communications sent and received on an employer's computer or email system.[4]

However, at least one court held there is a reasonable expectation of privacy when a client used a web-based, password-protected, personal email system on a work computer for personal attorney-client communications and the employer monitored the computer usage.[5]

The American Bar Association (ABA) has recommended that when an attorney believes there is significant risk of third party access to attorney-client email communication (i.e., the attorney believes the client may be using an employer's email system or computer for such communication), the attorney has a duty to warn the client of the risk.[6] If the client does not heed the warning and the attorney still believes the client may be using an employer's email system or computer, the attorney should refrain from further client communication via email.[7]

Cell Phone Communications

When cell phones first emerged, some courts held cell phone users did not have a reasonable expectation of privacy in their conversations.[8] This was due, at least in part, to the absence of federal law protecting cell phone communications.[9] In 1994, the Wiretap Statute was amended to extend the same legal protections afforded to regular phone communications to cordless phone communications. As a result, courts now appear to be inclined to hold, and bar associations are beginning to opine, there is a reasonable expectation of privacy in cell phone communications between clients and attorneys.[10]

[2] See generally *U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

[3] *Holmes v. Petrovich Development Company*, LLC, 191 Cal. App. 4th 1947 (Jan. 13, 2011); *Fazio v. Temporary Excellence, Inc.*, 2012 N.J. Super. Unpub. LEXIS 216 (Feb. 2, 2012).

[4] *Id.*

[5] *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54, 973 A.2d 390 (N.J. Super A.D. 2009).

[6] American Bar Association Formal Opinion 11-459: Duty to Protect the Confidentiality of E-mail Communications with One's Client (August 4, 2011).

[7] *Id.*

[8] See American Bar Association Formal Opinion 99-413: Protecting the Confidentiality of Unencrypted E-mail (Mar. 10, 1999).

[9] *Id.*

[10] *Id.*

Assuming a reasonable expectation of privacy in cell phone communications, one concern is how to ensure the conversations are not overheard by a third party, thereby waiving the common law privilege. Although it does not appear courts have addressed this issue, it may be problematic for attorneys and clients to have cell phone communications while in public. Attorneys should be careful when talking to clients on their cell phones in public and should caution clients to be mindful of this practice, as well.

Text Messages

Courts have held clients have a reasonable expectation of privacy in attorney-client text messages sent or received on a personal device if the messages are not disclosed to a third party.[11] Therefore, as long as the text message sent or received on a personal device is not disclosed to a third party or the privilege is not otherwise waived, the text message is protected by the attorney-client privilege. As with email, however, there is no reasonable expectation of privacy, and therefore no privilege, in personal text messages sent or received on a device owned and/or issued by an employer.[12] It is important clients are aware they should be careful when sending and receiving confidential text messages on a device they do not own personally.

Social Media

Social media encompasses an array of websites that connect people to one another to share information, such as Facebook, LinkedIn, Twitter, blogs, and instant messaging sites. Given that the general purpose of these sites is to share information, courts have determined there is no reasonable expectation of privacy in information posted or shared through social media sites. Any attorney-client communication through these sites is not privileged.[13] In addition, many sites' privacy policies explicitly state the site cannot guarantee information contained in the site will not be disclosed to a third party.[14]

If there was a reasonable expectation of privacy in these communications, the privilege is generally waived once the client posts about or otherwise discloses the communication on a social media site. For example, in *Lentz v. Universal Music Corp.,* N.D. Cal. Case No. 5:07-cv-03783 JF, the plaintiff posted on a blog, sent emails to friends and family, and instant messaged a friend about communications she had with her attorney regarding possible defenses to claims, the impetus for filing the lawsuit, and case strategy.[15] When the issue of waiver came before the court, the court determined the plaintiff voluntarily waived the privilege as to the subject matter of these communications.[16]

In light of this authority, clients should be advised that, as a general rule, they should not post or share any information on a social media site that relates to any attorney-client communication or any ongoing litigation or legal dispute.

Additional Considerations

Ethical Rules

As the information in previous sections has indicated, attorneys should seek guidance from applicable ethical rules in determining how best to keep attorney-client communications protected and how to properly advise clients to ensure the attorney-client privilege is not waived. The two primary rules are ABA Model Rules 1.6 and 1.1. Rule 1.6 provides an attorney "shall not reveal information relating to the representation of a client" unless the client gives informed consent, the disclosure is "impliedly authorized" to carry out the representation of the client, or the disclosure is otherwise permitted by the Rule. Model Rule 1.1 provides an attorney "shall provide competent representation to a client." When taken together, these Rules indicate that, when dealing with multimedia attorney-client communications, attorneys should always act in ways that protect communications, such as refraining from speaking on a cell phone to a client in public where a third party could overhear. Attorneys should properly advise a client as to potential waiver situations. Most states have adopted some form of these Model Rules, so attorneys should look to the version applied in their jurisdiction.

Inadvertent Disclosure

Inadvertent disclosure of privileged communications is not a new problem for attorneys. A typical scenario involves an attorney accidently producing a privileged letter to opposing counsel in a large stack of documents during discovery. Once the inadvertent disclosure is discovered, the issue becomes whether or not the privilege is waived by virtue of the disclosure. The same holds true for multimedia communications. As with traditional inadvertent disclosures, whether the privilege has been deemed waived for multimedia disclosures will depend on the jurisdiction in which the case is being litigated. Some jurisdictions hold an inadvertent disclosure automatically waives the attorney-client privilege.[17] Other jurisdictions hold an inadvertent disclosure does not waive the privilege.[18] Still others take a mid-line approach and apply a balancing test

[11] See *Clampitt*, 2011 Mo. App. LEXIS 1741.

[12] *Ontario v. Quon*, 130 S.Ct. 2619 (2010).

[13] *Tompkins v. Detroit Metropolitan Airport*, E.D. Mich. No.10-10413, 2012 U.S. Dist. LEXIS 5749 (Jan. 18, 2012); *Romano v. Steelcase Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650 (N.Y. 2010); *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa.Dist. & Cnty. Dec. LEXIS 270 (Pa. Com. Pl. Sept. 9, 2010); *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App.4th 1125 (1st Dist. 2009).

[14] *Id.*

[15] *Lentz v. Universal Music Corp*., N.D. Cal. Case No. 5:07-cv-03783 JF, Order Overruling Objections to Discovery Order (Nov. 17, 2010).

[16] *Id.*

[17] *See Draus v. Healthtrust, Inc.*, 172 F.R.D. 384 (S.D.Ind.1997); *Miles-McClellan Constr. Co. v. Westerville Bd. of Edn.*, 10th Dist. Nos. 05AP-1112, 05AP-1113, 05AP-1114, 05AP-1115, 2006-Ohio-3439; *Victor Stanley, Inc. v. CreativePipe, Inc.*, 250 F.R.D. 251 (D.Md. 2008).

[18] *Miles-McClellan*, 2006-Ohio-3439.

(continued on page 4)

ProAssurance
Treated Fairly

PRSRT STD
US POSTAGE
PAID
PROASSURANCE
48924

ProAssurance Casualty Company
ProAssurance Indemnity Company, Inc.

2600 Professionals Drive
P.O. Box 150
Okemos, Michigan 48805-0150

Georgia Lawyers Insurance Program
125 Flat Creek Trail, Suite 200
Fayetteville, Georgia 30214

Telephone: 800.292.1036
Fax: 517.349.8978

The Lawyers' Professional Liability *Update* newsletter is published three times per year for the benefit of ProAssurance insureds. Suggested topics for future issues and address updates should be directed to Connie DeMarco at the number listed above.

Find risk management articles and information archived on our website at ***www.proassurance.com/lawyer/newsletter.aspx***

(continued from page 3)

Attorney-Client Privilege in the Tech Age:
How to Ensure Your Multimedia Communications are Protected

in order to determine whether the disclosure has waived the privilege.[19] Courts using the balancing test consider the following factors: 1) the reasonableness of the precautions taken to prevent the inadvertent disclosure; 2) the amount of time taken to rectify the inadvertent disclosure; 3) the scope of the discovery; 4) the extent of the inadvertent disclosure; and 5) overriding issues of fairness.[20] Despite the lack of a uniform standard, these varying approaches help illustrate the importance of ensuring attorney-client communications and other protected information are not disclosed to a third party.

Conclusion

Multimedia communications pose unique challenges and risks for attorneys and clients alike. Attorneys should review the applicable law, ethical rules, and ethics opinions in their jurisdictions to properly and effectively counsel their clients.

[19] *Air-Ride, Inc. v. DHL Express (USA), Inc.*, 12th Dist. No. CA2008-01-001, 2008-Ohio-5669; *Atronic International GMBH v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160 (E.D.N.Y. 2005); *Gray v. Bicknell*, 86 F.3d 1472 (C.A.8, 1996).

[20] *Id.*

Jamie Price is an Associate at Gallagher Sharp in Cleveland, Ohio. Her practice involves the defense of lawyers against malpractice claims. She also represents employers in discrimination, harassment, whistle-blowing, as well as violations or enforcement of non-compete agreements. Her experience includes commercial litigation, breach of contract, post-trial motions and appeals at the state and federal levels. She is a graduate of Northwestern University and Case Western Reserve University School of Law. She is a member of the American, Ohio and Cleveland Metropolitan Bar Associations.

Monica Sansalone is a Partner and the Professional Liability Practice Group Manager at Gallagher Sharp in Cleveland, Ohio. She represents lawyers in grievance proceedings and defends them against malpractice claims. She provides representation in trial courts and on appeal, including matters before the Supreme Court of Ohio. Ms. Sansalone lectures on ethics, malpractice issues, and professionalism. She provides counsel for risk management matters, pre-suit evaluation, and claim repair. She is a graduate of Loyola University of Chicago and Cleveland-Marshall College of Law. From 2004 to 2012, she served on the Commission on Professionalism of the Supreme Court of Ohio, Chairing the Commission from 2007 to 2008. An Ohio SuperLawyer, she is a member of the Lawyers Professional Liability Committee of the American Bar Association and the Professional Liability; Appellate; and Advocacy and Lawyers' Professionalism & Ethics Committees of the Defense Research Institute.