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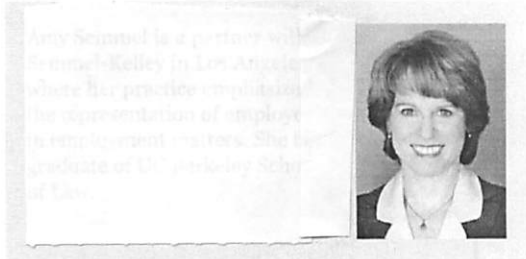
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Worker Privacy in Peril



A client e-mails you that she is being harassed and needs employment law advice. You exchange a few e-mails, giving some advice while the client vents her fears and frustrations. Some months later, to your shock and horror, defense counsel presents those very e-mails to your client at her deposition. You object that the

documents are attorney-client privileged and must be returned. A new case says you may be wrong.

In a case of first impression in California, *Holmes v. Petrovich Development Co. LLC*, 2011 DJDAR 671 (Jan. 13, 2011), held that an administrative assistant waived the attorney-client privilege by communicating with her attorney on her work e-mail account on her work computer.

Of grave concern for privacy advocates, the reasoning of the opinion suggests that any communication or screen shot on a company-owned electronic device may be fair game for the employer to view and exploit in litigation. Many employers have adopted policies explicitly stating that computer use is not private, and reserve the right to monitor such use. Employees who fail to heed this admonition and communicate with their attorneys on company issued electronic devices may well be inadvertently waiving the attorney-client privilege.

At the time she was hired, Gina M. Holmes, refrained from disclosing that she was pregnant to her prospective employer, and in particular, her boss. After approximately one month on the job, Holmes disclosed to her boss, Paul Petrovich, that she was pregnant and would need time off for maternity leave. Petrovich expressed surprise, disappointment and concern about his ability to handle his work in her absence. Holmes felt harassed and retaliated against, and ended up resigning shortly thereafter. Prior to her departure, however, she sent and received e-mails to and from her attorney on her company e-mail account and on her company computer.

Holmes apparently forgot - or did not believe - the company's electronic resources policy set forth in the employee handbook. Like most, the policy stated that employees had no right of privacy in information or messages on the company's electronic media. This policy made especially clear that e-mail communications were not private. The policy stated, "e-mail is not private communication, because others may be able to read or access message.... E-mail may be best regarded as a postcard rather than as a sealed letter." The policy further spelled out that the company could inspect all files or messages at any time and for any reason, and that it would monitor its technology resources for compliance with the company's policies.

When evaluating what constitutes a reasonable expectation of privacy, courts should recognize that there are - or should be - limits to what an

Government

Pension Increase Nixed for State Workers

A state appellate court nixed a deal Wednesday that would have sweetened the pensions of thousands of state employees and cost taxpayers up to \$39.6 million.

Labor/Employment

Employers Get Relief From Break Suits

A new state law gives some employers more leeway in when workers should take breaks. It could curb lawsuits arising from unionized construction, security, commercial driving industries.

Real Estate

Real Estate Movers & Dealmakers

Sovereign Capital Management Group, Inc., a private equity firm, helped revitalize a flagging San Diego shopping center and recapitalize its defaulting loan to get it sold for \$12.3 million.

Data Provider Accuses Competitor of Theft

Real estate software giant Yardi Systems is suing competitor RealPage in California federal court for allegedly infiltrating Yardi's internal web site, altering confidential data and illegally downloading copyrighted and trade secret programs.

Corporate

Online Company's Shares Surge in IPO

California lawyers guide Demand Media, the first of several Internet-based companies expected to go public by 2012, to a successful market launch.

Government

DOJ Announces Hiring Freeze

Looming budget cuts mean U.S. Attorneys throughout California will face a squeeze on resources in their first months on the job. The DOJ has said it hopes to avoid furloughs and pay cuts.

Law Practice

Allen Matkins Awarded \$851,000 in Fees

An Orange County judge strongly chastised the city of Laguna Woods for the manner in which it handled an eminent domain action, and ordered it to pay Allen Matkins Leck Gamble Mallory & Natsis \$851,000 in attorney's fees and other costs for the firm's work in fighting the case.

employer may view even if transmitted from its own device.

After Holmes filed suit, the company retrieved the e-mails to and from her attorney. During discovery, Holmes unsuccessfully sought an order returning all the e-mails between herself and her attorney. She then sought to exclude the e-mails from evidence at trial. She relied primarily on Evidence Code Section 917, which provides that 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 transmission or storage thereof might have access. The Court of Appeal resoundingly rejected these arguments, finding clear waiver of the attorney-client privilege: "Holmes used defendants' computer, after being expressly advised that this was a means that was not private and was accessible by Petrovich, the very person about whom Holmes contacted her lawyer and whom Holmes sued. This is akin to consulting her attorney in one of the defendants' conference rooms, in a loud voice, with the door open, and yet unreasonably expecting that the conversation overheard...[by the employer] would be privileged."

The finding of an utter lack of privacy in *Holmes v. Petrovich* might be attributed to the plaintiff's use of her work e-mail address to transmit and receive the attorney-client communications combined with her apparent obliviousness to a comprehensive and explicit company electronics policy. Courts might find a reasonable expectation of privacy and/or lack of waiver where: The communications are received and/or transmitted from a personal e-mail address with a password protected and Web-based e-mail service, such as Yahoo or Gmail; the electronics policy does not clearly alert employees that communications sent from their personal e-mail accounts may be accessed; or the communications are received and transmitted from a portable electronic device, such as a company issued smart phone or laptop.

Indeed, the *Holmes* court distinguished a New Jersey Supreme Court case finding a reasonable expectation of privacy in e-mail sent to and from a personal e-mail account - even though transmitted from a company computer. In *Stengart v. Loving Care Agency*, 990 A. 2d 650 (N.J. 2010), the employee-plaintiff sent e-mails to her attorney via Yahoo from her company issued laptop. She did not save her user name or password on the laptop. Unbeknownst to her, browser software made a copy of each webpage she viewed, which was then saved on the computer's hard drive in a "cache" folder of temporary Internet files. While the electronic resource policy broadly provided that the company could review and access all the companies media systems, including e-mail, at any time, the company also expressly permitted use of the company's computers for occasional personal use.

After the plaintiff filed suit, the employer retrieved the e-mails between her and her attorney from the "cache" on her laptop. Reviewing an order to show cause for return of the e-mails, the New Jersey Supreme Court found that despite using the company issued laptop to communicate with her attorney, the plaintiff had a reasonable expectation of privacy in the e-mails, which had not been waived. The court reasoned that the electronic policy did not clearly alert the plaintiff that e-mails sent from her personal account would not be private; that the e-mails were sent from a password protected personal Web-based Yahoo account; and that the e-mails from the attorney contained a legend noting their privileged and confidential character.

Finally, the court remanded the matter for consideration of whether the employer's attorneys had violated a New Jersey professional rule of conduct requiring an attorney who receives apparently inadvertently sent privileged documents to cease reading them and contact the opposing attorney. California common law is to similar effect. *State Compensation Ins. Fund v. WPS Inc.*, 70 Cal.App.4th 644(1999)(finding no waiver under Evidence Code Section 912).

The breadth of the reasoning in *Holmes* has troubling implications for online activities employees regularly engage in on company issued electronic devices. Many employees send and receive personal e-mail, shop, check Facebook pages, check medical records and bank on these devices. If an employee accesses her medical records via her work computer, does she waive all privacy interests in her financial affairs? Most people would probably be surprised to learn that this is true. Moreover, when evaluating what constitutes a reasonable expectation of privacy, courts should

Solo and Small Firms

Big Firm Lawyers Start Boutique

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Judges and Judiciary

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The 10-year pilot program would funnel patent cases to a small number of judges with the desire to hear them.

Criminal

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Family

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Law Practice

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Litigation

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Labor/Employment

Worker Privacy in Peril

A recent employment law case sets a dangerous standard for privacy in the workplace. By **Amy Semmel** of Semmel Kelley.

Judicial Profile

Robert L. Stevenson

Superior Court Referee
Los Angeles County (Monterey Park)

Health Care & Hospital Law

New Partnership Could Open China to U.S. Biotech

recognize that there are - or should be - limits to what an employer may view even if transmitted from its own device. The ordinary person is likely unaware, for example, that the employer can view communications on password protected personal e-mail accounts, even deleted e-mails and momentarily viewed Internet pages may be retrieved. The clash between the ordinary person's expectations and the *Holmes'* court's assumption that ownership of the computer trumps all cries out for further review.

Policies set forth in employee handbooks are unilaterally imposed by the employer. It is time to question whether a policy purporting to transmute even private communications into company property merely because the company owns the computer is justified. Certainly policies designed to ensure that employees are actually working and not spending the day updating their Facebook status should be enforceable. But confiscating an employee's personal online activity in its entirety is like dynamiting a pond to catch a fish.

For now, given the uncertainty surrounding the scope of possible waiver of the attorney client communications, prudent attorneys representing employees and consumers should warn their clients not to communicate with them via any company owned electronic device. The attorney should spell out that this includes smart phones, laptops and all other computers. The clients should be warned against opening or viewing a communication from the attorney, even from personal Web-based e-mail accounts.

U.S. pharmaceutical and medical device companies could gain greater access to the world's most populous nation through a new collaboration between the United States and China, but it's too early to say how the joint initiative will address the biotechnology industry's ongoing regulatory and intellectual property concerns.

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