E-mail Confidences and Privileges

John Travis
Partner | Gallagher Sharp

John Travis is a partner with Gallagher Sharp and manager of the firm's insurance practice group. He can be reached at (216) 522-1590 or jtravis@gallaghersharp.com.

A lawyer must preserve the confidences and secrets of a client and should avoid conduct that may waive the attorney-client privilege. DR 4-101. Confidence, secret and privilege issues may arise when the lawyer and client communicate by e-mail. These issues may be particularly acute where the client communicates with the lawyer using an e-mail system owned by another, such as the client's employer.

This article reviews two recent cases addressing the confidentiality of e-mail and summarizes relevant advisory opinions of The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. It concludes that lawyers ethically may use e-mail to communicate with clients, but suggests that practitioners not only use appropriate privacy disclaimers, but also recognize that communications using a system not owned by the lawyer or client may allow a third party to argue that the communications are not privileged.

Case Law

In re Asia Global Crossing, Ltd. (S.D.N.Y. 2006), 322 B.R. 247 addressed whether an employee's use of the employer's e-mail system to communicate with his personal counsel destroyed the attorney-client privilege. The court stated:

> *Although e-mail communication, like any other form of communication, carries the risk of unauthorized disclosure, the prevailing view is that lawyers and clients may communicate confidential information through unencrypted e-mail with a reasonable expectation of confidentiality and privacy. E.g. ABCNY Formal Op. 2000-1, 2000 WL 704689 (January, 2000); ABA Formal Ethics Op. 99-413 (March 10, 1999); NYSBA Eth. Op. 709, 1998 WL 957924 (September 16, 1998); see* City of Reno v. Reno Police Protective Ass'n, *118 Nev. 889, 59 P.3d 1212, 1218 (Nev. 2002); see, generally Audrey Jordan, Note, Does Unencrypted E-Mail Protect Client Confidentiality?, 27 Am. J. Trial Advoc. 623, 626 n.25 (Spring 2004)(referencing ethical opinions from 23 state bar associations).*

Id. at 256.

The court had not located any decisions analyzing the attorney-client privilege where an employee used an employer's e-mail system, so the court considered "the analogous question of the employee's expectation of privacy in his office computer and the company e-mail system." Id. at 256.

A right of privacy, the court observed, is recognized under the common law and the Fourth Amendment to the U.S. Constitution. To establish such a right, though, the aggrieved party must show a reasonable expectation of privacy. After examining the corporate e-mail policies, the expectations of privacy, and the actual practices of the employer, the court concluded that the employee's use of the e-mail system to communicate with personal counsel did not waive any attorney-client privilege.

In *Curto v. Med. World Communs., Inc.* (E.D. N.Y. 2006) , No. 03CV6377, 2006 U.S. Dist. LEXIS 29387 the plaintiff-employee sued her former employer for gender discrimination and retaliation after she was discharged. The focus of the case was whether e-mails between the plaintiff and her attorney using an employer-owned laptop were privileged. The computer had been provided to the plaintiff for use in her home office. Before the plaintiff returned the computer to her employer, she deleted all personal files and written communications to counsel. The employer, however, hired a forensic consultant who restored portions of deleted files and e-mails. The employer contended that the plaintiff had waived her right to assert the attorney-client privilege and work product immunity, in part because she had signed an acknowledgment of the employer's computer usage policy barring personal use of computers. Although the employee admitted that she used the computer for personal use, she argued that the employer did not routinely enforce its policy against personal use.

In resolving the issue, the court examined whether the employer actually enforced its computer usage policy. In fact, there were only a few instances where the employer actually monitored employees' personal e-mails. The employees, therefore, were lulled into a "false sense of security" regarding their personal use of company-owned computers.

The court also believed that it was "prudent to heed the Supreme Court's instruction" in *O'Connor v. Ortega* (1987), 480 U.S. 709, 107 S.Ct. 1492, where the high court stated: "Given the great variety of work environments, . . . the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Ortega*, at 718. On the facts of *Curto*, the court held that the communications at issue were privileged, and that the privilege had not been waived.

Advisory Opinions

The case law on the use of e-mails in Ohio is undeveloped. The Board of Commissioners on Grievances and Discipline, however, has considered whether it is ethical for a lawyer to communicate with clients through non-encrypted e-mail.

Seven years ago the Board was presented with the following question: Does a lawyer violate the duty to preserve confidences and secrets under DR 4-101 of the Ohio Code of Professional Responsibility by communicating with clients through electronic mail without encryption? In answering the question in Opinion 99-2, the Board identified four considerations:

1. E-mail has become a popular and efficient method of communication.
2. Although there are security risks that e-mail will be intercepted, every communication carries with it a risk of interception.
3. Interception of electronic communication is a crime under both federal and state law. 18 U.S.C.A. Section 2511; R.C. 2933.52(A).
4. The Supreme Court of Ohio held that another form of communication—cellular phone conversations—may implicate a reasonable expectation of privacy despite the potential for interception. Specifically, in *State v. Bidnost* (1994), 71 Ohio St.3d 449, the court said: "Fundamental rights should not be sacrificed on the altar of advancing technology." Id. at 462.

In summary, the Board stated that Ohio law has not traditionally required scrambling devices or encoding methods for forms of communication other than e-mail, even though the communication may be susceptible of interception. The Board concluded that an expectation of privacy is not per se unreasonable, particularly with communication methods that are illegal to intercept. The syllabus of the opinion provides: "A lawyer does not violate the duty to preserve confidences and secrets under DR 4-101 of the Ohio Code of Professional Responsibility by communicating with clients through electronic mail without encryption. An attorney must use his or her professional judgment in choosing the appropriate method of each attorney-client communication."

The Board has cited the foregoing opinion in two subsequent matters. In Opinion 99-9, the Board offered Opinion 99-2 as "guidance" in deciding that an attorney may properly provide on-line representation and answer e-mail questions. In Opinion 2004-1, the Board concluded that e-mail advertising is discouraged but not barred. In reviewing prior authority, the Board cited Opinion 99-2 for the proposition that "A lawyer may communicate with established clients through e-mail." Indeed, there is no reported case in which a lawyer has been disciplined for communicating with a client by e-mail.

Lawyers ethically may use e-mail to communicate with clients, but courts, at least in some contexts, may examine whether there is an expectation of privacy attendant to the communication. The privacy disclaimers lawyers typically append to their e-mails (and faxes), therefore, are prudent and reinforce an expectation of privacy.

Lawyers, however, should recognize that client communications using a system not owned by the lawyer or client may allow a third-party to raise a colorable claim that the communications are not privileged.