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ETHICS: EFFECT OF CORPORATE I.T. POLICIES ON OTHERWISE PRIVILEGED COMMUNICATIONS

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THE EFFECT OF CORPORATE IT POLICIES ON OTHERWISE PRIVILEGED COMMUNICATIONS

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In this technology-driven era, employees depend heavily upon computers, iPhones, Blackberries, and other PDAs for their daily communications. Although many view communicating by way of electronic means as generally easier and more effective than communicating using more traditional methods (*e.g.*, facsimile or regular mail), electronic communications are more easily accessible by third parties. In the litigation context, this reduced security can affect whether communications ordinarily deemed confidential—such as communications between a husband and wife or an attorney and client—are, in fact, confidential and, therefore, privileged.

It is widely accepted that communications between a husband and wife or an attorney and client do not lose their confidential status simply because they are made by way of electronic means.[1] When an employee's personal communication involves his employer's information technology ("IT") resources, however, the privilege issues become more complex. In recent years, several courts have addressed whether an employee has a reasonable expectation of

privacy in communications made using an employer's IT resources *if* the employer has an IT policy restricting personal use and/or reserving the employer's right to monitor employees' communications. If it is determined that an employee does not have a reasonable expectation of privacy in such communications, no privilege attaches and those communications become discoverable in both civil and criminal litigation.

As more and more courts address this issue, discovery of employees' electronic communications can become a powerful litigation tool. Thus, it is critical for employers and their counsel to understand the factors courts consider in determining whether employees' electronic communications can be discoverable, how courts have applied these factors, and the steps employers and employees can take to protect their respective interests.

A. The *Asia Global* Factors

Evidentiary privileges, which protect a variety of communications from litigation discovery, are strictly construed and apply only to communications made in confidence.[2] It is well established that a communication made in the presence of or shared with a third party is not made in confidence and, therefore, is not privileged. The question few courts have considered, however, is whether an otherwise privileged communication made using an employer's IT resources is technically "shared" with the employer, thereby defeating any claim of privilege.

The seminal case on this issue is *In re Asia Global Crossing, Ltd.*, in which a Chapter 11 bankruptcy trustee moved to compel disclosure of communications between the debtor-company's former executives and their attorneys transmitted over the company's e-mail system, arguing that the executives' use of the employer's e-mail system had waived any privilege that would have otherwise attached to the communications.[3] In its analysis, the bankruptcy court started with the proposition that, for a communication to be privileged, it "must be given in

confidence, and the client must *reasonably* understand it to be so given."[4] To determine whether the employees reasonably understood their e-mail communications to be privileged, the court considered four factors:

> (1) does the corporation maintain a policy banning personal or other objectionable use,
> (2) does the company monitor the use of the employee's computer or e-mail,
> (3) do third parties have a right of access to the computer or e-mails, and
> (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Although the *Asia Global* court found that the debtor-company "clearly" had access to its employees' e-mails, the court found that the employees nevertheless had a reasonable expectation of privacy in the e-mails because the evidence regarding the existence of a company IT policy was "equivocal."[5]

B. Application of the *Asia Global* Factors to Employee Communications

Since *Asia Global*, several courts have applied its factors to determine whether employees had a reasonable expectation of privacy in the following types of communications made using an employer's IT resources.

1. Communications Made Via the Company E-mail Account

Courts have repeatedly held that an employee's communications sent by way of the company e-mail account are *not* protected by the attorney-client privilege. In *Scott v. Beth Israel Medical Center, Inc.*, for example, the New York Supreme Court denied a plaintiff physician's motion for a protective order regarding e-mails he sent to his attorneys via his employer's e-mail account.[6] In this wrongful termination action, the court applied the *Asia Global* factors, and determined that the physician did not have a reasonable expectation of privacy in the e-mails because the hospital's IT policy prohibited personal use and provided for monitoring. The court also found that the physician had actual and constructive notice of the policy—despite his

arguments to the contrary—because the hospital had distributed the policy to each employee in 2002 and provided Internet notice, and because, as an administrator, the physician had instructed doctors under his supervision to acknowledge the policy. In *Leor Exploration & Production LLC v. Aguiar*, the Southern District of Florida similarly found that the defendant CEO in a corporate governance dispute did not have a reasonable expectation of privacy in e-mails sent to his personal attorney and in-house counsel because the company handbook stated that the company may access and monitor the use of its systems.[7]

It appears that employees may have greater protection over communications sent via the company's e-mail account, however, in criminal proceedings. In *United States v. Long*, for example, the court found that a search of an employee's e-mail communications violated the employee's Fourth Amendment rights because the search was conducted without probable cause of unlawful activity.[8]

2. Communications Made Via a Password-Protected, Web-Based E-mail

Unlike communications made via a company e-mail account, courts have found that communications made via a personal, web-based account, such as Yahoo! or Gmail, *are* confidential even if made using a company-issued computer. In *Stengart v. Loving Care Agency, Inc.*, for example, the court held that such e-mails were privileged for two primary reasons.[9] First, the applicable IT policy was unclear on whether it covered the use of personal, password-protected, web-based e-mail accounts via company equipment." Second, the employee "plainly took steps to protect the privacy of [the] e-mails and shield them from her employer" since she had used her personal, web-based account instead of her work e-mail and did not save the password to the account on her computer.[10]

3. Documents Saved Locally on a Company-Issued Computer

Whether documents saved locally on a company-issued computer are privileged depends on the applicable IT policy. In *People v. Jiang*, for example, the court found that an employee had a reasonable expectation of privacy on files he had password-protected and stored in a folder named "Attorney" on his company computer. The court found it significant that the applicable IT policy was written in English, whereas the employee had only a limited understanding of English, and did not address the employer's right to copy or disclose any contents of the computer.[11] In *Banks v. Mario Industries of Virginia, Inc.*, however, the court found that the employee had waived the attorney-client privilege by temporarily saving a document on his work computer because the "employee handbook provided that there was no expectation of privacy regarding [employees' work] computers."[12]

C. What Employers and Employees Should Do

Employers should review their IT policies, to the extent they exist, and determine whether any changes should be made to protect (or preclude) employees' reasonable expectation of privacy in communications made using the company's IT resources. If a company's IT policy likely prevents employees from having a reasonable expectation of privacy in their communications, employers may wish to notify employees (or key employees) to ensure that their employees can adequately protect their interests.

Along the same lines, employees should review their employers' IT policies, if they exist, and determine whether the policies provide for monitoring and/or limit personal use. Regardless of the terms of such policies, employees would be wise not to transmit *any* communications they wish to keep confidential via their employers' IT systems.

Employers and employees who are currently engaged in litigation may also wish to consider the impact the *Asia Global* factors may have on any pending or future discovery requests.

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[1] *See*, *e.g.*, ABA Formal Opinion 99-413 dated March 10, 1999, *available at* http://www.abanet.org/cpr/pubs/fo99-413.html (last visited Oct. 21, 2010).
[2] *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[3] 322 B.R. 247 (S.D.N.Y. Bankr. 2005).
[4] *Id.* at 255.
[5] *Id.* at 257-60.
[6] 17 Misc. 3d 934 (N.Y. Sup. 2007).
[7] Case Nos. 09-60136-CIV, 09-60683-CIV, 2009 WL 3097207 (S.D. Fla. Sept. 23, 2009). *See also Bonds v. Leavitt*, 647 F. Supp. 2d 541, 556 (D. Md. 2009) (holding that "any assertion of privilege in the email communications is undermined and the privilege rendered inapplicable by the existence of a warning in the pop-up screen").
[8] 64 M.J. 57 (C.M.A. 2006).
[9] 990 A.2d 650 (N.J. 2010).
[10] *Id.* at 659-63.
[11] 33 Cal. Rptr. 3d 184 (Cal. App. 2005).
[12] 650 S.E.2d 687, 695 (Va. 2007).

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Jonathan Barton is a shareholder of Sandberg Phoenix & von Gontard. He is a member of the firm's products liability practice group and is active in the firm's general litigation and business litigation practice. Jon is engaged in all aspects of litigation from the initial claim investigation stage through trial before the bench and jury in both state and federal courts. He has extensive experience in defending products liability cases involving a wide array of industrial machinery, motorized vehicles, electrical components (including medium and high voltage equipment) and consumer goods. Jon is also experienced in cases involving fire science, premises liability, transportation law, intellectual property litigation and insurance defense.

Jon is a regular speaker to members of the Missouri Bar and Illinois Bar as well as attorneys on a national basis. He presents seminars on issues involving integration of technology during the discovery process and at trial as well as advanced trial and deposition skills and techniques. Jon also hosts a yearly web seminar on ethics from the litigator's perspective.

Jon received the honor of being named by Missouri Lawyers Weekly as one of the Up & Coming Lawyers in Missouri for 2008. He was also named a *Rising Star* by *Missouri & Kansas Super Lawyers* in 2010 in the area of "Personal Injury Defense: Products." Recently, Jon received an AV Peer Review Rating on Martindale Hubbell which was given by his peers for his high level of professional excellence.

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Professional Activities
Jon is licensed to practice before the Supreme Court of Missouri, the Supreme Court of Illinois and the United States District Court for the Eastern and Western Districts of Missouri as well as for the Southern and Central Districts of Illinois and the Eighth Circuit Court of Appeals. Jon has also been admitted *pro-hac vice* to handle matters for various clients in state and federal court in Indiana, Kentucky, Maryland, Massachusetts Oklahoma, Oregon, Tennessee, New York, Michigan, Connecticut and Colorado.

Jon is a member of the Order of Barristers and is the recipient of two consecutive Lewis F. Powell, Jr. Awards for Excellence in Advocacy, issued by American College of Trial Lawyers.

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