Attorney-Client Privilege May Not Attach to Communications Between an Individual and His Attorney When Made Through an Employer-Provided E-Mail System

9.18.2020

Recently, in a case of first impression in Michigan, the Michigan Court of Appeals held that, depending on the circumstances (as further explained below), an individual may be prevented from asserting attorney-client privilege with respect to communications with his attorney that were made via an employer's e-mail system. The case was *Stavale v. Stavale*, a divorce proceeding. The issue raised on appeal arose when the plaintiff in the case issued a subpoena to the defendant's employer requesting e-mails that defendant had sent to his personal attorney through defendant's employer-provided e-mail address. Defendant, Mr. Stavale, sought to quash the subpoena, on the basis of attorney-client privilege. The court held that if the employer has a clear and unambiguous policy that the company's electronic communication and information systems are company property provided to employees and intended for business use, and that users have no legitimate expectation of privacy regarding system usage, and if the employee was made aware of the same, then defendant had no reasonable expectation of privacy when he used the employer-provided e-mail address to communicate with his attorney, such that attorney-client privilege never attached to the e-mails and they could be obtained by plaintiff.

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Thus, a key hallmark is whether or not the communications are truly confidential. In Michigan, the attorney-client privilege attaches to communications made by a client to an attorney acting as a legal advisor and made for the purpose of seeking and obtaining legal advice. The scope of the privilege is narrow – with limited exceptions, it attaches only to confidential communications by the client to his counsel for the purpose of receiving legal advice. The attorney-client privilege is designed

Related People

Donald B. Miller
Shareholder

Related Services

Litigation and Dispute Resolution

to enable a client to confide in his attorney, knowing that his communications are safe from disclosure to third parties. As stated in *Stavale*, citing to a related case from California in which the employer was a party, "The e-mails sent via company computer under the circumstances of this case were akin to the plaintiff consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." Therefore, the crucial issue in the *Stavale* case was whether the defendant had a reasonable expectation of privacy in e-mail communications with his attorney that were made through his employer's e-mail system.

Significance of the Case

From the standpoint of Butzel Long's employer clients, an opinion about attorney-client privilege in the context of a divorce case may not seem terribly significant. However, suppose that the employee in question was sending e-mails to his attorney plotting strategy and forwarding documents related to a lawsuit to be filed against the employer, utilizing the employer's own e-mail system. It would certainly be advantageous to ensure that such e-mails would not be protected by a claim of attorney-client privilege, so that the employer could review them and make use of them in possible future litigation brought by that employee. Viewed from the opposite perspective, that is, with respect to Butzel Long's individual clients, the *Stavale* case is also instructive, because it cautions that e-mail communications with Butzel Long lawyers should always be via the individual's own personal e-mail accounts, and not though an employer's e-mail system, lest the e-mails be subject to discovery as not protected by attorney-client privilege, as in the *Stavale* case.

The Court of Appeals in *Stavale* did not reach a final decision, however, and remanded the case to the trial court in Kent County for further consideration. It was clear that the defendant's employer maintained an unambiguous policy concerning defendant's use of his employer-provided e-mail. Indeed, the employee handbook specifically and thoroughly provided:

> The Company's electronic communication and information systems including, but not limited to, computers, related hardware, software and networks as well as internet systems, telephone, voice mail and e-mail systems are Company property provided to employees and are intended for business use. Any personal use must not interfere with performance or operations and must not violate any Company policy or applicable law. **Users have no legitimate and/or reasonable expectation of privacy regarding system usage.** As a result, you should not use the Company's electronic communication systems to discuss or correspond about anything personal, particularly sensitive, confidential, or privileged personal communications to outside parties, as the Company reserves the right to monitor all system usage, including such communications.
>
> The Company may access its electronic communications and information systems and obtain the communications with the systems, including past voice mail and e-mail messages, without notice to users of the system, in the ordinary course of business when the Company deems it appropriate to do so. The Company also has the right to and may inspect or monitor without notice any device employees use to access electronic communications and information systems, including but not limited to computers, laptops, notebooks, tablet computers, or mobile

> devices. Further, the Company may review Internet usage. The reasons for which the Company may obtain access include, but are not limited to: maintaining the system, preventing or investigating allegations of system abuse or misuse, assuring compliance with software copyright laws, complying with legal and regulatory requests for information, protecting proprietary information, and ensuring that operations continue appropriately during an employee's absence.

As the Court stated in *Stavale*, the employer's policy could not be clearer, and to the extent that defendant was made aware of the same, it is sufficient to extinguish any reasonable expectation of privacy that defendant might have had.

Despite this clear and unambiguous policy, the reason for the remand to the trial court was that the Court of Appeals was not able to discern from the record before it whether defendant in the case was notified or otherwise made aware of the policy. There was apparently no inquiry made in the trial court, before the appeal, on that issue. Defendant's brief on appeal suggested that he may never have been asked to read or sign the employee manual that sets forth the relevant policy. Thus, the question was defendant's understanding of the policy at the time that he made the communications with his attorney. Accordingly, on remand, the trial court was directed to focus on whether and to what extent defendant was notified or otherwise made aware of the policy, since the issue was whether defendant has a reasonable expectation of privacy in his e-mails with his attorney.

The Court of Appeals' opinion in *Stavale* emphasized that in determining whether an employee has a reasonable expectation of privacy in an employer-provided e-mail or computer system, it is most important to consider (1) whether the employer maintains a policy with respect to the use of those systems and what the policy entails, and (2) whether the employee was ever notified or made aware of the employer's policy and practices with respect to computer privacy and monitoring. Whether a company actually monitors employee computers, and the employee's knowledge of the same, may be relevant in some cases, but that factor should not ordinarily overpower considerations of the employer's stated policy and the employee's knowledge of that policy.

Lesson for Employers: Employers should have a thorough and unambiguous policy concerning employees' use of company electronic communications and information systems, for a variety of reasons, one of which is the attorney-client privilege issue discussed in the *Stavale* case. And, the policy should be effectively disseminated to employees and perhaps even acknowledged in writing.

Donald Miller
313.225.7020
miller@butzel.com