# The Lawyers' Lawyer Newsletter

*Recent Developments in Risk Management*



**August 2011** | Volume 16 | Issue 3


## Attorney-Client Privilege—Electronic Communications

### *Holmes v. Petrovich Development Company, LLC,* 2011 WL 117230 (Cal. App. 3d Dist. Jan. 13, 2011)

**Risk Management Issue:** How should lawyers address the problem that communications sent from their clients' employer-provided e-mail addresses, or communications originating from employer-provided technology, may not be protected by the attorney-client privilege?

**Editors' Note**: This article supplements previous discussions in connection with the decisions in *Scott v. Beth Israel Medical Center Inc.,* in the *Lawyers' Lawyer* (Vol. 13, Issue 3, Apr. 1, 2008), and *Stengart v. Loving Care* (along with three other decisions) in the *Lawyers' Lawyer* (Vol. 15, Issue 1, 2010), all addressing the same or closely related issues.

**The Case**: Holmes sued her employer and supervisor for sexual harassment, retaliation, wrongful termination, violation of the right to privacy, and intentional infliction of emotional distress. At issue for present purposes was the fact that Holmes used her employer's company e-mail account to communicate with her attorney. During Holmes' deposition the employer's counsel questioned her about specific e-mail communications she had with her attorney using the employer's computer. Holmes' attorney objected on the basis of privilege and afterward, demanded the e-mails be returned and not used. Holmes' counsel and the employer's attorney then discussed a possible protective order to restrict usage of the e-mails, but before any agreement was consummated the employer switched counsel and the employer's new counsel used the e-mails against Holmes in a summary judgment motion.

Holmes sought an order that the e-mails be returned, that they not be used at trial, and that the employer's attorney be sanctioned for using them as exhibits in violation of the alleged agreement with the employer's former counsel. The trial court denied Holmes' motions, finding that the e-mails were not privileged communications, and allowed them to be used at trial.

Holmes appealed, contending the trial court misunderstood the proper application of Cal. Evid. Code § 917, which states that electronic communications do not lose their privileged character just because a third party is involved in their storage and transmission.

Holmes' employer countered that the attorney-client privilege did not apply to the communications because Holmes used her employer's computer and fax machine to communicate with her counsel. The employer had expressly warned its employees that the company's e-mail account should only be used for company business, that e-mail communications were not private, and that the company would periodically monitor its technology resources to ensure compliance with company policy.

Holmes argued on appeal that she believed her personal e-mail would nonetheless be private because she utilized a private password to use the company computer and deleted e-mails after they were sent. Holmes also argued that, because the company did not actually access or audit employees' computers, the "operational reality" was such that she could reasonably expect her e-mail communications were confidential. In this last argument, Holmes sought to rely on *Quon v. Arch Wireless Operating Co., Inc.* (9th Cir.2008) 529 F3d 892 [reversed by *City of Ontario v. Quon* (2010), __ U.S. ___, 177 L.Ed.2d 216], finding a governmental employee had a reasonable expectation of privacy despite the existence of a departmental policy declaring the opposite. Quon was a police sergeant who had sued his employer for violating his Fourth Amendment rights when they reviewed text messages he sent on the employer-issued pager. The Ninth Circuit found that he had a reasonable expectation of privacy, despite department policy that such communications were not private, because Quon had been given an "expressly conflicting message to the contrary by his supervisor." The California Court of Appeal held here that Holmes' belief that her communications were confidential was unreasonable because she had been adequately warned that the company would monitor e-mail to ensure employees were complying with office policy not to use company computers for personal matters, and she had been told that she had no expectation of privacy in any messages she sent via company computers. Unlike Quon, Holmes had not received any information from the company explicitly contradicting its warning that company computers would be periodically monitored and were not to be used for private communications. Holmes could not reasonably expect her communications would be confidential, regardless of whether her employer actually monitored employee e-mail.


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**Comment:** The California Court of Appeal emphasized the fact-intensive nature of these inquiries; it was not persuaded by Holmes' citation to *Quon,* which involved a governmental employee's Fourth Amendment rights, and it noted that the facts here were inapposite to *Stengart* and *Beth Israel* (see Editors' Note). Those cases also addressed whether e-mail communications were protected by privilege, where the clients used employer resources to transmit them. Quoting the Supreme Court in *Quon*, the Court of Appeal agreed that "The judiciary risks error by elaborating too fully [on the implications] of emerging technology before its role in society has become clear," and "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." Insofar as Holmes was aware, however, "the company computer was not a means by which to communicate in confidence any information to her attorney."

**Risk Management Solution**: Lawyers representing individual clients should consider giving explicit advice at the outset of every engagement regarding the use of technology owned or operated by employers, or employer-provided e-mail accounts, for communications that the client or the lawyer wish to have treated as confidential. This advice should make clear that any use of the employer's hardware—not just e-mail addresses provided by the employer—may result in the loss of the attorney-client privilege. At a minimum, clients should be advised to consult their employers' policies to determine whether any restrictions exist on the personal use employers' resources.

Counsel for organizations should consider advising their clients of the need for carefully formulated, broadly worded but explicit policies warning employees that they have no expectation of privacy when using company resources to communicate. Lawyers should advise their employer-clients to circulate those policies to their employees from time to time, and lawyers should encourage their employer-clients to refrain from publishing any information that would tend to contradict the explicit warning that employees have no right to privacy when using workplace resources.

Nevertheless, as discussed in our earlier notes on this subject, even where counsel for an organization is confident that the client's policy effectively removes its employees' expectation of privacy, an attorney who receives potentially privileged or confidential information of an individual that was intercepted by the organization pursuant to the policy should take great care before unilaterally deciding either to read or to use the intercepted material. In particular, counsel should consult the applicable rules of professional responsibility and case law in order to establish the scope of his or her ethical and legal duties under the circumstances presented, and should consider whether some form of notice to the employee is required that the communications were discovered. Failure to consider the relevant law and rules before using information obtained from employee e-mails may result in disqualification or sanctions, including an adverse outcome in the underlying dispute.

## Inadvertently or Improperly Received Communications—Use of Wrongfully Procured Documentary Evidence

### *White v. Withers LLP and Marcus Dearle,* [2009] EWCA Civ 1122 (27 Oct. 2009)

**Risk Management Issue**: What are the duties of lawyers who receive documents from their clients which the client has (or may have) obtained improperly?

**The Case**: In this family law matter in the United Kingdom, the English Court of Appeals found that a trial judge had erred in dismissing a husband's claim, based on wrongful interference with property by his wife's matrimonial attorneys. During ongoing ancillary relief proceedings, the wife had intentionally interfered with her husband's possession of his personal documents and her attorneys allegedly read and copied those documents.

Appellant Marco Pierre White, a well-known chef and restaurateur, alleged that his wife, Matilde White, intercepted his mail, including business and personal communications, and kept it from him. After Mrs. White intercepted the documents, she passed them along to her attorneys, who maintained them. Among the documents allegedly taken were a business contract awaiting Mr. White's signature and a touching letter from his daughter pleading with her father to spend more time with her.

Following a review of the facts, the Court of Appeals held Mrs. White had directly and immediately interfered with her husband's possession of the documents. It did not matter whether she took documents that were left lying around or whether she intercepted them before her husband had a chance to take them into his possession. The Court noted that the lawyer might also be liable for Mrs. White's tortious conduct, if the facts, which needed to be established at trial, led to a finding of joint and several responsibility. If it was established that the lawyer took possession of the documents from Mrs. White knowing that she was a trespasser, his doing so and subsequent handling the documents might also constitute trespass.

**Comment**: The New York Appellate Division recently confronted a similar issue in a divorce proceeding where the wife obtained, mostly improperly, e-mails between her husband and his attorney. In *Parnes v. Parnes*, ___ N.Y.S. 2d ___, 2011 WL 102664 (N.Y.App.Div.3d Dept. Jan. 13, 2011), the wife's counsel used those documents in a deposition. Although the trial court prohibited the wife from using the privileged e-mails and disqualified the wife's lawyer, the Appellate Division reinstated the lawyer, finding that suppression of the e-mails was a sufficient remedy. Similarly, in 2001, after his client stole work-product documents from the adverse attorney's briefcase during a deposition, attorney Wisehart instructed the client to copy and then return the documents, and proceeded to attempt to use them to force a settlement. He was suspended for two years. *In re Wisehart*, 281 A.D.2d 23 (1st Dept. 2001).

Whereas the wife's counsel in *Parnes* only narrowly avoided disqualification, if the New York courts were confronted with the facts of the *White* case, it is quite possible that the attorneys making use of improperly obtained information could find themselves defending against a civil claim, as well as professional discipline. The courts' tolerance of attorney misuse of information is likely to be limited even when it is based on initial impropriety by the client.

**Risk Management Solution**: These cases provide examples of disputes that are arising more frequently, when lawyers are confronted with purloined access to otherwise confidential information of an opposing party or witness. Because serious sanctions, ranging from disqualification, disciplinary sanctions, to civil liability can all result from unlawful and unethical handling of improperly obtained information, at a minimum, lawyers need to pause and consider all applicable law and ethics rules *before* making use of information that may have been obtained improperly.

## Termination of Engagements—Need for Disengagement Letter to Commence Limitations Period

### *Hipple v. McFadden,* No. 398028II, 2011 WL 1653194 (Wash. Ct. App. Apr. 28, 2011)

**Risk Management Issue**: What actions must a law firm take in order to ensure that representation of a client has been terminated, in order for the statute of limitations on potential malpractice claims to begin to run?

**The Case**: Roger Hipple sued Carolyn Elsey and Deborah McFadden (Elsey/McFadden), two attorneys with the Pierce County Department of Assigned Counsel, for legal malpractice. Hipple had been jailed for contempt for failure to pay child support in April, 2005. The county appointed Elsey/McFadden to represent him in May. In June, apparently without the two attorneys' involvement, the court changed Hipple's punishment to electronic home monitoring. Hipple alleged that he thereafter attempted to communicate with Elsey /McFadden about his case in writing and by telephone, but never heard back from them. In June of 2006, another attorney secured Hipple's unconditional release and the termination of all terms of his contempt citation.

In June 2009, nearly four years after that attorneys were first appointed to represent him, and just under three years from when the other attorney appeared for him on the contempt charges, Hipple sued Elsey/McFadden for legal malpractice.

Elsey and McFadden moved to dismiss the action, arguing that any legal malpractice occurred when they were appointed in 2005 and that Hipple's statute of limitations period began to ran as early as May 2005, when he tried to reach the attorneys to no avail. The trial court ruled that the continuous representation rule applied to toll the limitations period until the attorneys' representation ended, which arguably occurred only when the other attorney appeared for Hipple in June, 2006 (which was within the three year limitations period). The court rejected the attorneys' argument that the continuous representation rule could not apply where the alleged malpractice was that they failed to represent Hipple.

The Washington appellate court affirmed the trial court, finding that a factual issue existed as to when the representation ended (and also, possibly, as to when Hipple should have discovered the attorneys' malpractice). Noting that "the test for determining whether an attorney's representation of a client regarding a specific subject matter continues is a matter of first impression in Washington," and that there is no "bright line rule," the Washington appellate court rejected the notion that the limitations period commences with the first break in continuity of the relationship, and adopted the rule that the representation ends when the "client actually has or reasonably should have no expectation that the attorney will provide further legal services" (citing to *Gonzales v. Kalu*, 140 Cal. App. 4th 21, 43 Cal. Rptr. 3d 866 (2006)). In essence, the appellate court found that the trial court had been correct to deny a dismissal but had incorrectly applied the continuous representation rule, which presented an issue of fact.

**Risk Management Solution**: When law firms agree to represent a client, or whenever a lawyer is appointed to do so, they should clearly indicate the scope of the engagement in their engagement letter. Equally important, on the conclusion of every matter, law firms need to send closing letters that unequivocally inform the client that the engagement has terminated and that no further services will be provided on the matter. Absent such a writing, if a client has reason to believe he is still being represented in that particular matter, it will be a factual question as to whether the belief was reasonable—which will require a trial to be resolved. Only by clearly defining the scope of engagement, and then documenting the conclusion of a matter, will law firms be able to avoid confusion, and the possible tolling of the limitations period.

# Former Client—Meaning and Scope of Duty of Loyalty

## *Oasis West Realty LLC v. Goldman, 51 Cal. 4th 811 (2011)*

**Risk Management Issue:** What policies and procedures are required if law firms are to avoid breaches of the duty of loyalty to former clients?

**The Case**: Attorney Goldman, acting in a personal capacity as a private citizen after termination of the attorney-client relationship, took actions to oppose the same project in connection with which he had previously represented Oasis West Realty, LLC (Oasis West), his former client. The Supreme Court of California held that Oasis West had established by inference under the "minimal merit" test of California's anti-SLAPP statute that Goldman had violated his fiduciary duty by using Oasis West's confidential information in his subsequent efforts as a private citizen to oppose the former client's project—notwithstanding the fact that Oasis West did not prove Goldman made actual disclosure of any confidential information to anyone, and notwithstanding the fact Goldman was indisputably acting in his personal capacity, and not acting on behalf any other client.

Between 2004 and 2006, Goldman represented Oasis West in its effort to obtain approval of a redevelopment project from the Beverly Hills City Council. In 2008, two years after Goldman's representation of Oasis West terminated, Goldman, in his capacity as a private citizen, became involved in an effort to solicit signatures on a referendum petition to overturn the City Council's approval of the project. Through the efforts of Goldman and his wife, approximately 20 signatures were collected. There was no evidence that the attorney disclosed any of Oasis West's confidential information, nor that Goldman disclosed to anyone that he had previously represented Oasis West. The citizens successfully placed the referendum on the ballot, but the referendum was ultimately unsuccessful in overturning the City Council's decision.

Oasis West sued Goldman and his law firm for breach of fiduciary duty, professional negligence, and breach of contract. Goldman and his firm filed a special motion to strike (Anti-SLAPP) contending that Oasis West's claim challenged Goldman's constitutional right to petition or to free speech, and therefore was protected activity.

The Supreme Court of California concluded that Goldman's motion should be denied. Citing to *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, the Court noted that Goldman, as an attorney, was a fiduciary and owed a duty of loyalty and confidentiality to his client, duties which continued even after the representation ended. Noting that the effective functioning of the fiduciary relationship requires the client's trust and confidence in counsel, the courts will act to protect the client's legitimate expectations of loyalty. Thus, the attorney, after severing the relationship with a former client, must not do anything which will injuriously affect the former client in any matter in which the attorney formerly represented the client; nor will the attorney use against the former client, at any time, any knowledge or information acquired by virtue of that previous relationship.

The Supreme Court noted that Oasis West's burden to survive dismissal was only to proffer sufficient evidence for an inference under a "minimal merit" standard that Goldman used confidential information in his opposition to the project as a private citizen. The Court found that because Goldman did receive confidential information from Oasis West during his representation, and then decided to publicly oppose the same project, it was reasonable to infer that his opposition to the project developed over the course of the representation—and was fueled by the confidential information he gleaned from it. Because Oasis West established that it incurred damages to investigate, and then in attempting to stop Goldman's actions, Oasis West met its burden to establish a probability of prevailing on its claims.

**Comment:** To the extent that the decision rests on the allegation that Goldman used (or may have used) confidences obtained in the course of representing Oasis West, the decision merely reaffirms lawyer's duties not to reveal confidences even after the termination of representation. What is notable and troubling about the case, however, is the suggestion repeated throughout the opinion that there is some broader duty of loyalty to former clients—the scope of which is left vague and undefined in the California Supreme Court's decision. On the other hand, the Court explicitly declined to extend this decision to situations where knowledge might be imputed to bar an attorney from taking private actions that might somehow harm a former client of another lawyer in the firm.

**Risk Management Solution**: The implications of this decision—particularly what it did not define—are difficult to fathom. Clearly lawyers need to understand and abide by their duty to preserve the confidences of current and former clients, and not to use those confidences in ways that can harm even former clients. Law firms need to assure that their lawyers undergo regular, periodic professional responsibility training as to their ethical duties to current and former clients. As the *Oasis West* case progresses through the court system, however, it may become clear that law firms must necessarily review whether their efforts to assure that their lawyers comprehend and abide by their continuing duties to former clients are adequate, and may be forced to find ways in which to expand their efforts to obtain compliance.