

## Alerts

### California Court of Appeal Holds Privilege Waived When Employee E-Mails Attorney on Employer's System

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*Lawyers for the Profession® Alert*

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

#### Brief Summary

The California Court of Appeal held that an employee's use of her employer's communications system to send e-mails discussing legal issues with her employment lawyer waives attorney-client privilege. Because the employee had been told in advance that such e-mails were subject to periodic monitoring, that e-mails were not private, and that e-mails were only to be used for company business, she could not later claim a reasonable expectation of privacy in her e-mail communications, even with counsel.

#### Complete Summary

An administrative assistant was given a handbook containing an electronic communications policy when she was hired. The policy put her on notice that employees' e-mails were not private, could be monitored, and were to be used for business purposes only. Shortly thereafter, the administrative assistant e-mailed her lawyer regarding a potential employment claim.

During the discovery process on that claim, the employer's counsel asked the administrative assistant about those e-mail communications. Her attorney objected on the basis of privilege and demanded a return of the e-mails. The defense refused, saying that the administrative assistant knowingly waived privilege when she sent the e-mails on the employer's e-mail service after acknowledging that she knew that the e-mails were not private. The employer argued that the administrative assistant could not have had a reasonable expectation of privacy given her acknowledgment that such e-mails could be monitored.

The California Court of Appeal, Third District, affirming a superior court decision, held that the privilege had been waived. The court found that the administrative assistant's decision to e-mail her attorney from work (where the communications were subject to retention, monitoring and review) rather than from home (where she could have controlled and limited the access) waived her

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privilege. The court likened her communications to consulting an attorney “in one of defendants’ conference rooms, in a loud voice, with the door open.”

### **Significance of Opinion**

This California Court of Appeal’s decision adds to the growing number of cases addressing not only employers’ rights to monitor and access their employees’ e-mails on work computers but also employers’ ability to use those e-mails in litigation, even if the communications were between an employee and her lawyer. The fact-specific nature of the attorney-client privilege analysis, which hinges in part upon whether the client had a reasonable expectation of privacy in maintaining the confidentiality of the communication, often focuses on facts akin to those in this case, including whether the employer has a written policy; whether and how the employee received and acknowledged the policy; whether the employer claims the right to monitor e-mails; whether the employer not only claims the right to monitor e-mail but also periodically exercises that right; whether the employer’s policy advises employees that personal e-mails on work computers are not private; and similar considerations.

For more information, please contact your regular [Hinshaw attorney](#).

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