

Preserving The Attorney-Client Privilege And Use of the Internet

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Bloomfield Hills

There was a time when attorney-client communications were limited to face-to-face meetings, telephone calls or letters. Today, many attorney-client communications, even highly confidential ones, occur over the Internet.

While use of the Internet for confidential communications does not, of itself, impact the attorney-client privilege – indeed, federal law prohibits the reading of e-mails by anyone other than the sender or receiver – careless use of the Internet for confidential communications can result in the waiver of the privilege and have far-reaching consequences.

The threat to secrecy through illegal means is the unusual case. By far, the most common threat to the sanctity of the attorney-client privilege through e-mail communication is inadvertent disclosure. Inadvertent disclosures occur by a variety of missteps, including mislabeling e-mail addresses; failing to recognize attached documents; and sometimes simply by mistakenly hitting the reply to “all” button without attention to the recipients list.

When an inadvertent disclosure happens, and they do happen, the courts are divided about whether these mistakes waive the attorney-client privilege. Under the minority view, the privilege is destroyed by even mistaken disclosure of confidential communications. “Inadvertence” is viewed as a euphemism for negligence, and in those states a price is paid for negligent use of the Internet.

The courts in Michigan adhere to a different standard. Under the majority view, the Michigan courts hold that an inadvertent disclosure of confidential communications and documents does not waive the attorney-client privilege unless, after reviewing all of the facts surrounding the disclosure, it is determined that the producing party failed to take reasonable steps to maintain confidentiality.

What exactly those “reasonable steps” are is subject to differing interpretation, and it is possible that inadvertent disclosure will be deemed a waiver, even in Michigan. Accordingly, as in all situations involving the handling of confidential information, attorneys and their clients must not abandon good judgment or the careful attention to proper Internet procedures. Further, situations will arise when communications are so sensitive that anything other than a face-to-face exchange is unwise.

In many instances, use of e-mail remains a reasonable, timesaving and cost-effective method for many forms of communication. However, Internet users should not forget that the interests of convenience and cost savings cannot interfere with protecting privileged communications.