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Ethical and Legal Issues Relating to E-mail Use, BYOD, and Social Media

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Company E-mail Usage

- Employee Use of Employer's Email Systems and Computer Equipment for Non-Business Purposes
 - Is there a reasonable expectation of privacy?
 - Are employee emails with personal lawyers protected by the attorney client privilege?
 - Waiver?
 - Is there a company email policy?

Company E-mail Usage

- Does the policy provide notice of monitoring?



Kevin had a funny feeling that his
boss was monitoring his emails

CartoonStock.com

Company E-mail – Ethics Issues

- Relevant Ethics Rules
 - ABA Model Rule 1.1 (Competence)
 - ABA Model Rule 1.6 (Confidentiality)
 - ABA Model Rule 4.4 (Receipt of Inadvertently Sent Information)
- ABA Ethics Opinions
 - Formal Op. 11-459, *Duty to Protect the Confidentiality of E-mail Communications with One’s Client* (2011)
 - Formal Op. 477, *Securing Communication of Protected Client Information* (2017)
 - Formal Op. 11-460, *Duty When Lawyer Receives Copies of a Third Party’s Email Communications with Counsel* (2011)

Company E-mail and Privilege

- Factors Assessed by the Courts:
 - (i) Does the company maintain a policy banning personal or other objectionable use?
 - (ii) Does the company monitor the use of the employee's computer or e-mail?
 - (iii) Do third parties have a right of access to the computer or e-mails?
 - (iv) Did the company notify the employee, or was the employee aware, of the use and monitoring policies?

In re Asia Global Crossing, 322 B.R. 247 (S.D.N.Y. Bankr. 2005)

Company E-mail – Privilege Hypotheticals

- **Hypothetical A**

- Employment discrimination case. Plaintiff former employee used company email to communicate with personal lawyer and company had policy stating that there was no expectation of privacy and email could be monitored.
- Privileged? Ethics violations?

- **Hypothetical B**

- Theft of trade secrets case against former employee. Plaintiff is former employer. Defendant used company issued laptop to communicate with personal attorney using personal, password-protected, web-based email account. Company policy stated that it had right to review data/comms transmitted on company's media systems. Company used forensic expert to access personal emails with lawyer.
- Privileged? Ethics violations?

Company E-mail – Cases

- Representative Cases:
 - *Curto v. Med. World Commc’n, Inc.*, No. 03 CV 6327, 2006 WL 1318387 (EDNY May 15, 2006)
 - *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010)
 - *Scott v. Beth Israel Med. Ctr., Inc.*, 17 Misc. 3d 934 (N.Y. Sup. Ct. 2007); see also *Peerenboom v. Marvel Entm’t, LLC*, 148 A.D.3d 531 (NY 1st Dep’t 2017)
 - *Holmes v. Petrovich Dev. Co.*, 191 Cal.App.4th 1047 (3rd Dist. 2011)
 - *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1084 (W.D. Wash. 2011)
 - *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 587 F. Supp. 2d 548 (SDNY 2008)

BYOD Policy Issues



Company BYOD Policies

- Close to 50% of all companies now have BYOD (“Bring Your Own Device”) policies
- By 2025, millennials will be 75% of the global workforce
- Pros: employee flexibility and device familiarity, lower tech costs for company, etc
- Cons: security, employee privacy issues, employee absorption of costs, increased discoverability and related costs, etc.

BYOD – Discovery Implications

- If policy states that data on BYOD is owned by Company, it is thus within Company's possession, custody, and control
- Litigation holds must extend to BYOD; should have collection procedures
- Personal Email and Text Messages Discoverable?
 - Not if company had no right under policy to obtain such messages upon demand. *Matthew Enter. V. Chrysler Group LLC* (N.D. Cal. 2015); *Ewald v. Royal Norwegian Embassy* (D. Minn. 2013); see also *Cotton v. Costco Wholesale Corp.* (D. Kan. 2013)
 - Yes if personal email or texts used for Company business and policy gives Company right to all Company-related data on device. *H.J Heinz Co. v. Starr Surplus Lines Ins. Co.* (W.D. Pa. 2015)

Company Email & BYOD

- Considerations and Best Practices
 - Have a written BYOD policy and consent form Integrated with other data security and privacy policies
 - Define what data is owned by Company (ie, all data on servers that are accessed by employee)
 - Right to remotely access or wipe device clean if stolen/lost
 - Company should specify security requirements (to be installed/verified by IT)
 - Mobile Device Management (MDM) software or system (to control and track device)
 - Prohibit use of certain app that are prone to cyber attack; exit and litigation protocols
 - Consider segregation of personal and company data

Company Email

- Have a Company email policy which is specific and clear and is consistent with BYOD and other policies. New employees should acknowledge. Maybe pop-up notice on network
- Company Email -- have email encryption system
- Explore all technology for data security
- Have a cybersecurity policy and consider appointing a CISO
- GDPR (new EU data protection/privacy regulation)

Metadata – What is it?



Metadata Mining

- Hypothetical
 - Company A is negotiating an agreement for the licensing of a patent to Company B. Asst GC B sends proposed draft agreement. Asst GC A sends back a revised draft in MS Word form. Deputy GC B has Company B's IT staff forensically analyze document, and discovers internal A comments (track changes) in the metadata regarding validity of patent and its value. This aids B in negotiations.
- Is it ethical, in a non-discovery context, to search for (“mine”), review, and use embedded metadata (which may reveal confidential information of an adversary)?
- If materially significant information is discovered in metadata, is there an obligation to notify sender?

Metadata Mining – Ethics rules

- Relevant Ethics Rules
 - ABA Model Rule 1.1 (Competence)
 - ABA Model Rule 1.6 (Confidentiality)
 - ABA Model Rule 4.4(b) (Receipt of Inadvertently Sent Information)
 - ABA Model Rule 8.4(c) (Prohibiting Dishonest Conduct)

Metadata Mining – Ethics Opinions

- Mining Not OK
 - NY State Bar Ass’n Committee on Professional Ethics, Opinion 749, *Use of Computer Software to Surreptitiously Examine and Trace E-Mail and Other Electronic Documents* (2001); see also AL, AZ, FL, ME, NH, NC etc.
- Metadata Mining OK
 - ABA Formal Ethics Opinion 06-442, *Review and Use of Metadata* (2006)
 - Notification to sender. ABA Formal Ethics Opinion 05-437, *Inadvertent Disclosure of Confidential Materials* (2005)
 - See CO, MD, OR, VT, WA, WI.
 - See also TX (no duty to notify)

Social Media Issues

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Signs of the social networking times.

Social Media

- LinkedIn
 - Widespread use in a professional context for networking, business and professional development, thought leadership
- Facebook
 - Mostly personal use, but some business use
- Twitter
 - Mixed personal and business use

Social Media Policy

- Implement and disseminate a policy that applies to all employees
- Take into consideration any business uses of social media
- Prohibit certain activity and provide examples:
 - Defamatory, hateful, inappropriate content
 - Protection of confidential company and client info
- Company affiliation = reflection of Company
- Cannot communicate on behalf of company (other than on company sites); views are only one's own (encourage disclaimer)
- Provide notice of monitoring; training; internal contact person

Social Media – Attorney Ethics

- Social media competence. R. 1.1(a)
- Do not provide specific legal advice. R. 7.1
- Do not reveal confidential client info. R. 1.6
- Do not directly solicit business from public. R. 7.3 (outside counsel)
- Positional conflicts. Avoid situations where communicated positions on legal issues are inconsistent with those advanced on behalf of firm clients. R. 1.7, 1.8
 - Be careful with thought leadership
 - Similarly, social media policies should discourage employee social media activity which might reflect poorly on the organization or conflict with organizational positions
- Avoid activity that adversely reflects on lawyer's honesty, trustworthiness, fitness. R. 8.4

Social Media – Attorney Ethics

- Represented Parties. Generally ok for lawyer to review public portion of represented party's social media profile
- Juror. No communications with prospective or sitting juror. R. 3.5.
 - But lawyer may research a prospective or sitting juror's public social media profile and posts. ABA Formal Op. 466 (2017)
 - Auto Notification could be deemed improper communication in NY. ABA and other states would disagree. Compare NYCLA Formal Op. 743 (2011) & NYCBA Formal Op. 2012-2, with ABA Formal Op. 466
- No communications with a represented person. R. 4.2
 - Auto Notification (LinkedIn network setting) could be deemed improper communication in NY. ABA and other states would disagree.

Social Media – Attorney Ethics

- Review of social media of unrepresented party
 - Ok for attorney using real name/profile to communicate with unrepresented party, access social media content, send a “friend” request, connect on LinkedIn to gain info. R. 4.3; NYCBA Op. 2010-2
 - Other states – must disclose additional info about identity and intention with a “friend” request (NH, Ma, Philadelphia Bar Ass’n). Oregon – must provide additional info if requested
 - Cannot engage in deceit or misrepresentations. R. 4.1, R. 8.4
 - Cannot misrepresent identity, use third party to do what attorney cannot otherwise do, etc.

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