

Attorney-Client Privilege Waived as to Emails on Client's Office Email

Susan Ardisson, Esq.

As employees increasingly use their office computers to send and receive private communications, including emails with counsel, the courts in various jurisdictions are considering whether the use of these office computers results in a waiver of the attorney client privilege and work product doctrine. Most recently in *Alamar Ranch, LLC v. County of Boise*, 2009 WL 3669741 (D. Idaho Nov. 2, 2009), the court addressed whether a county employee's emails sent to and from her attorney on her office computer and via her county work email address were protected from disclosure under the attorney client privilege. The county's email policy provided that it could review, audit and disclose all employee email. Looking to recent decisions in other jurisdictions, and applying a four factor test, the *Alamar* court held that that it was "unreasonable" for an employee to contend in "this technological age" that her email communications to her attorney on her office

Alamar also subpoenaed records from Kirkpatrick, and her employer, the Idaho Housing and Finance Association (IHFA). In response to the subpoena to IHFA, Alamar obtained various emails between Kirkpatrick and Charney using Kirkpatrick's IHFA email address: "JeriK@IHFA.org." Alamar notified Charney and Kirkpatrick that it had obtained the emails which were potentially privileged, and Charney moved for the return of the privileged emails.

The court began its analysis of the case by reviewing IHFA's email policy which stated that the IHFA "reserved and intends to exercise the right to review, audit, intercept, access, and disclose all messages created, received, or sent over the email system for any purpose." In a declaration, Kirkpatrick said that she was "unaware that her computer emails were ever monitored by the IHFA,

"The Alamar court held that that it was 'unreasonable' for an employee to contend in 'this technological age' that her email communications to her attorney on her office email would not be stored and available for retrieval by the county."

email would not be stored and available for retrieval by the county. Accordingly, the *Alamar* court held that the attorney client privilege was waived and that the plaintiff was entitled to use the emails.

In this case, the plaintiff Alamar Ranch sued Boise County under the Fair Housing Act for its alleged improper blocking of a permit to construct a treatment facility for troubled youth. According to Alamar, Boise County's decision was "swayed" by a citizen's action group called Opponents of Alamar. Although Opponents of Alamar was not a party to the litigation, Alamar subpoenaed records from its attorney, Dennis Charney. Charney was originally hired by Jeri Kirkpatrick to oppose the Alamar project and appeared before the Boise County Planning Commission.

although she was aware of one other employment-related case of another IHFA employee where monitoring occurred." According to the *Alamar* court, the "IHFA put all employees-including Kirkpatrick-on notice that their emails would (1) become IHFA's property, (2) be monitored, stored, accessed and disclosed by IHFA, and (3) should not be assumed to be confidential." The court rejected Kirkpatrick's argument that she was not aware of the policy, stating instead that:

This issue of qubit and past issues are available on our website at:
www.bit-x-bit.com

Attorney-Client Privilege Waived as to Emails on Client's Office Email

(Cont. from p. 1)

it is unreasonable for any employee in this technological age-and particularly an employee receiving the notice Kirkpatrick received- to believe that her emails, sent directly from her company's email address over its computers, would not be stored by the company and made available for retrieval.

Noting that there were no decisions in the Ninth Circuit "on-point," the *Alamar* court looked to the factors developed in *In re Asia Global Crossing, Ltd*, 332 B.R. 247

client privilege had been waived as to all emails sent to Kirkpatrick's work email by Charney.

The *Alamar* court also addressed the recent New Jersey court decision, *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54 (2009) where the court rejected a company's claim that it had the right to review and use an employee's emails sent from a personal password-protected email account on work laptop to counsel in a discrimination case. According to the *Stengart* court, "the company had no greater interest in those communications than it would if it had engaged in the highly impermissible conduct of electronically eavesdropping on a

"According to the court, 'there is no question that her address – JeriK@IHFA.org – clearly put Charney on notice that he was using her work email address. Employer monitoring of work-based emails is so ubiquitous that Charney should have been aware that the IHFA would be monitoring, accessing and retrieving emails sent to that address.'"

(S.D.N.Y. 2005) where the court balanced the expectation of privacy against the "lack of confidentiality." The four factors are:

(1) Is there a company policy banning personal use of emails?; (2) Does the company monitor the use of its email?; (3) Does the company have access to all emails?; and (4) Did the Company notify the employee about these policies?

Based on these factors, the *Alamar* court concluded that Kirkpatrick was on notice that the emails that she sent through her work email address were IHFA property and that she had waived any claim of attorney client privilege.

Next the court considered whether the emails sent by Charney were subject to a waiver. According to the court, "there is no question that her address- "JeriK@IHFA.org" – clearly put Charney on notice that he was using her work email address. Employer monitoring of work-based emails is so ubiquitous that Charney should have been aware that the IHFA would be monitoring, accessing and retrieving emails sent to that address." The court therefore ruled that the attorney

conversation between plaintiff and her attorney while she as on a lunch break." (For a discussion of the *Stengart* decision, please see the October 2009 issue of qubit, "Court Rejects Employer's Claimed Right to 'Rummage Through' Employee's Private Emails Sent to Her Attorney via Company Laptop.") The *Alamar* court distinguished *Stengart* on the basis that it involved a personal password-protected email account stating the "Court leaves for another day" whether there would be a waiver in such circumstances.

◇ ◇ ◇ ◇

For questions or comments regarding this issue of qubit, please contact Susan Ardisson at Susan.Ardisson@bit-x-bit.com.

qubit \ˈkyü -bit\ n. a quantum bit, the counterpart in quantum computing to the binary digit or bit of classical computing. Just as a bit is the basic unit of information in a classical computer, a qubit is the basic unit of information in a quantum computer.
whatis.com

This publication is for informational purposes only and is not meant to be, nor should it be, construed as legal advice.

© 2009 bit-x-bit, LLC. All rights reserved.