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No Attorney-Client Privilege For E-mail Sent From Employer's Computer

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Yesterday the Third District California Court of Appeal created important new precedent on a controversial issue, finding that where an employee used her employer's computer to send e-mails to her attorney about a potential lawsuit against her employer, the attorney-client privilege did not apply.

The court wrote that e-mailing legal counsel using an employer's computer was "akin to consulting [a] lawyer in [the] employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of [their] complaints about [their] employer would be overheard."

In *Holmes v. Petrovich Development Company, LLC* (Jan. 13, 2011) __ Cal.App.4th ___, plaintiff Holmes divulged to defendant Paul Petrovich – whom she worked for as his executive assistant – that she was four months pregnant, and was planning to take six weeks of maternity leave when the baby arrived. Holmes told Petrovich this news one month after her employment began. She later told Petrovich that she planned to start her maternity leave earlier than previously anticipated, and that she could be out for as long as four months. In response, Petrovich expressed that, while he was not going to violate the law or the plaintiff's rights, her request was an extreme hardship on the business, and that he felt taken advantage of and deceived that Holmes had not been forthcoming about her pregnancy when she was interviewing for her job. Holmes explained that she had not told

anyone about her pregnancy until she received her amniocentesis results, in part because she had had two prior miscarriages. Petrovich, concerned that Holmes might quit her job, forwarded her e-mail to certain company employees in the Human Resources Department, which further upset Holmes and caused her to feel "harassed" and believe that her privacy rights were violated.

Holmes then e-mailed an attorney from her employer's computer to inquire about a possible lawsuit against her employer. Her attorney advised her to delete the e-mails from her employer's computer system, which she did. After meeting with her attorney, Holmes resigned from her employment, telling defendant Petrovich, "your feelings about my pregnancy . . . leave me no alternative but to end my employment here." A lawsuit for pregnancy discrimination, sexual harassment, and a violation of the plaintiff's right to privacy followed. During the trial, the defendants showed the jury several e-mails between Holmes and her attorney, which the trial court allowed into evidence. Following a defense verdict, Holmes appealed, arguing that the e-mails she sent to her attorney were attorney-client privileged and should not have been shown to the jury.

The Court of Appeal disagreed, concluding that the e-mails did not constitute "confidential communication between client and lawyer" within the meaning of California Evidence Code section 952. In reaching its conclusion, the Court of Appeal considered that (1) Holmes had been told of the company's policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail, (2) Holmes had been warned that the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages . . . at any time," and (3) Holmes had been explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message." The Court of Appeal noted that because of the employer's ability to monitor e-mail communications, the communications to the plaintiff's attorney were made to third persons to whom disclosure was not reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer was consulted.

This case reminds employers of the need to have clear personnel policies clearly and expressly notifying employees that (1) computers are company property to be used only for company business (2) the company has the right to monitor and inspect computer usage and e-mails and (3) employees have no right of privacy with respect to information or messages contained on the employer's computer. Manatt has significant experience in helping employers draft computer usage policies as well as litigating issues relating to attorney-client privilege in the context of employee computer usage.

[back to top](#)