

## Courts Open Window to Expand Employees' Rights to Privacy in Electronic Communications

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For years, the courts have been chipping away at employees' privacy rights, particularly with regard to email and other electronic communications sent while the employee was on the clock or via the employer's computer system. However, the courts are giving some of these issues a second look, including the Supreme Court, which granted certiorari today to review a decision of the U.S. Court of Appeals for the Ninth Circuit that police officers had a constitutional expectation of privacy in their pager or cell phone text messages, even though they were on their work pagers. See *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 910-11, (9th Cir. 2008).

Additionally, in *Convertino v. U.S. Dept. of Justice*, No. 2004-CV-0236 (RCL) (D.D.C. Dec. 10, 2009), the United States District Court for the District of Columbia settled the question of whether an agency can access emails sent by an employee to his personal attorney using the agency's email system. The answer, at least according to this court, is no, an agency cannot obtain emails sent by one of its employees to his or her attorney on the agency's email system because those emails remain protected by the attorney-client privilege.

In *Quon*, the Ninth Circuit reversed the grant of summary judgment to the defendant, a text messaging contractor, on plaintiffs' claims that it improperly turned over to their employer their archived text messages sent over employer owned pagers.

The plaintiffs signed an "Employee Acknowledgment," indicating that they had "read and fully understand" the City's of Computer Usage, Internet and E-mail policy, which stated that the City reserves "the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources."

Two years later, the employer informed the employees that pager messages "were considered e-mail." Under the employer's contract, each pager was allotted 25,000 characters, after which the employer was required to pay overage charges. The employer demanded the employees pay for any overage. The court held that, under these facts, the employees had a reasonable expectation of privacy in their text messages and the employer's search of their archived messages was improper.

In *Convertino*, the judge ruled that a Department of Justice (DOJ) employee, a prosecutor, who consulted with his personal private attorney over DOJ's email system, did not lose his expectation of privacy in the emails he sent to his attorney. "[T]he question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable." *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y. 2005).

A party may waive attorney-client privilege by disclosing confidential information to a third-party. However, a party does not waive the privilege if: 1) the disclosure is inadvertent; and 2) the holder of the privilege took reasonable steps to prevent disclosure. See Fed. R. Evid. 502(b).

The court found that the employee's disclosure was inadvertent because he had no intention of allowing the DOJ to read the e-mails he was sending to his attorney through his work e-mail account. The employee also took steps to delete the e-mails—failing to realize that DOJ had the e-mails. DOJ maintains a policy that does not ban personal use of the company e-mail, and although it has access to all e-mails sent on its system, the employee was unaware that DOJ would be regularly accessing and saving his person e-mails. Thus, because of these facts, the court ruled that the employee's expectation of privacy was reasonable. Because his expectations were reasonable, the private e-mails remained protected by the attorney-client privilege.

While it is too early to speculate how the Supreme Court will rule in Quon or whether the Convertino decision will be appealed, these two decisions finding employees had a reasonable expectation of privacy in electronic communications represent a marked shift from prior decisions on these same issues.