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DALLAS MAIN OFFICE
1999 Bryan St., Suite 825, Dallas, TX 75201
(214) 744-9300 • (800) 456-5484
Fax: (214) 741-2325
Advertising email:
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When Technology Helps Waive Privilege

BY STEVE THOMAS

Long ago, there was time to reflect. Printing, signing, licking the envelope, applying postage, dropping it into the outbox—sometimes hours would pass before the letter disappeared into the postal system. Producing documents took even longer.

Now, an impulsive click on the "send" button can trigger frantic claw-back emergencies, vitriolic motion practice, sleepless nights, and painful conversations with the client.

New rules and attitudes have helped. TRE 511 and TRCP 193.3(d) offer protections against inadvertent waiver of the attorney-client privilege, as do FRE 502 and FRCP 26(b)(5)(B). Judges now

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are more willing to enter protective orders with claw-back language. Attorneys discovering inadvertent waivers by their opponents more readily realize that the same thing could happen to them.

But technology offers so many opportunities for inadvertent disclosure, and of course waiver of the attorney-client privilege isn't the only concern. Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct prohibits any unauthorized disclosure of client "confidential information," which encompasses far more than privileged material.

Consider the nightmare of losing a smart phone, tablet, or laptop that lacks password protection, encryption, or remotely-activated self-erasing software. "Reply All," Autofill, and Forward are all traps for the hasty clicker. Those who still BCC clients on emails to opposing counsel should stop now before it's too late.

Here are three examples of how technology helped waive the attorney-client privilege.

1. *Preserving forgotten data.* In *Alpert v. Riley*, the U.S. District Court for the Southern District of Texas considered a situation where an attorney shared office space and a network with his business partner, a CPA.

An old computer of the CPA's was set up as a storage server on the shared network, and the attorney, without informing the CPA, placed a large "Legal" folder on that computer, then set up administrative permissions such that only the attorney knew about, and

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had access to, that folder. He then, apparently, forgot all about it.

Two years later, the attorney and the CPA sued each other, settled, and parted ways. As part of that business divorce, the CPA had IT experts break through the administrative permissions of the attorney's various computers on the network and capture data. The attorney complained bitterly, eventually negotiating for the return of his computers and the data as part of the settlement. But the "Legal" folder had always been, and remained, on the CPA's old computer. The attorney never asked for it to be returned.

Three years after that, the attorney was embroiled in litigation with a trust grantor and beneficiaries who claimed he had improperly exercised authority over trusts. The grantor contacted the CPA, and through investigation they found the "Legal" folder. The CPA happily turned it over to the grantor, and the waiver battle ensued.

The attorney claimed that his actions in restricting access to the folder constituted reasonable steps to avoid disclosure. But the court focused on the business divorce—when the CPA broke through the permissions on the attorney's computers and captured data from them, the attorney should have known that the "Legal" folder on the CPA's old computer was also at risk. The court said the attorney should have taken immediate steps to protect that data.

"It was not reasonable for him to remain silent after he knew that others could gain access to those files."

The court made clear that "knew" meant "knew or should have known"—the attorney's memory lapse was no excuse.

2. *Making unreadable documents readable.* In a large document production, the plaintiff's attorneys in *Amersham Biosciences Corp. v. Perkinelmer* produced 579 privileged documents. Of those, 542 were produced because they were part of a Lotus Notes structure, which, unlike Outlook, would preserve deleted documents in the metadata of the file structure, allowing the defendant's IT consultants to discover them.

The other 37 were not Lotus Notes documents. Rather, they were unreadable and unintelligible because the plaintiff's attorneys did not have the software to open them. But they produced them anyway. The plaintiff's IT consultants used processing software that read the documents and converted them into TIFF images, exposing the privileged communications for the opposing counsel's reading pleasure.

The federal magistrate judge ruled that the 542 Lotus Notes documents were produced inadvertently and the privilege was preserved, but that the privilege had been waived as to the 37 non-Lotus-Notes documents.

On review, the district judge reversed and remanded to the magistrate as to the 542 Lotus Notes documents because they were privileged on their face. The district court said the magistrate had not properly considered this fact in his analysis.

But as to the 37 non-Lotus-Notes documents, the district court affirmed. He agreed with the magistrate that "turning over unintelligible or unreadable documents to an adversary evidences a lack of reasonable precaution."

3. *Using the company computer.* In *Holmes v. Petrovich Development Company*, an employee believed that she was being sexually harassed and consulted an attorney, but instead of using a computer at home she used her office computer. The company's policy manual said employees had no right of privacy when using company computers.

The employee argued that she believed the emails were private and that she never intended that they be reviewed by the employer, but to no avail. The court concluded that "the emails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." The court ruled that the privilege had been waived. TTL

Steve Thomas is a shareholder with McGuire, Craddock & Strother in Dallas. He serves on the firm's technology committee. His practice includes commercial litigation in state and federal courts and administrative agencies on behalf of telecommunications and technology companies. Contact Steve at sthomas@mcslaw.com.