

Client Alert: Attorney-Client Privilege May Be at Risk when Directors Use Third-Party Email Accounts

The confidentiality of electronic attorney-client communications may not be guaranteed in all circumstances, as demonstrated by a recent Delaware court decision that focused on the email accounts used by directors. Directors, officers, employees, and others using another organization's email account (for example, directors of corporate foundations using a company email, officers of a private foundation using family entity emails, or volunteers using their own business emails) should take special note of this decision.

In the recent case,¹ directors and employees of a parent company used email addresses belonging to a related third party—a majority-owned subsidiary in which the individuals had overlapping roles—to discuss the legal affairs of the parent company with attorneys. *The court found that these communications were not protected by attorney-client privilege.*

The Court determined that the individuals did not have *a reasonable expectation of privacy* when using the subsidiary email address. The factors relevant to the determination were whether the third party (here, the subsidiary): (1) maintained a policy banning personal or objectionable email use; (2) monitored use of the computer or email; (3) had a right of access to the computer or emails; and (4) notified the individual of the use and monitoring policies (or whether the individual was aware of the policies). The Court emphasized that the directors did not take *"significant and meaningful steps"* to guard their communications, such as shifting to a personal account or encrypting the communications.

Like other issues, attorney-client privilege is addressed by courts on a case-by-case basis and varies based on state precedent. Nevertheless, it is clear that the "cyber hygiene" of an organization and its volunteers and staff is of critical importance in the current digital age. Best practices that may help protect the confidentiality of electronic communications include:

- Reviewing the assignment and use of email accounts for individuals who hold overlapping roles between parent and affiliate entities;
- Developing internal policies that instruct directors, officers, volunteers, and staff—particularly individuals with overlapping roles—and any others to use only the relevant company's email accounts;
- Implementing agreements between related organizations that exempt outside email accounts from monitoring policies and limit any third-party rights to access;
- Utilizing confidential board portals to share information and documents;
- Encrypting emails; and
- Encouraging the use of personal email accounts for exempt organization business.

¹ *In re WeWork Litigation*, 2020 WL 7624636, at *2 (Del. Ch. Dec. 22, 2020).

As this case demonstrates, failure by exempt organizations to tend to “cyber hygiene” could lead to significant negative outcomes if and when litigation or controversy arises.

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