Non-Compete Caution: Protecting the Attorney-Client Privilege

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When non-compete and trade secrets lawyers are advising an employee who is preparing to transition from one employer to another, ensuring that the client's intentions remain confidential is paramount. Often, the overriding concern is making sure that the individual's present employer does not discover the employee's intentions before he or she is ready to "jump." For this reason, many of us have admonished individual clients over the years to be sure they do not communicate with counsel from their present employer's telephones or computers. A recent Formal Opinion issued by the ABA Standing Committee on Ethics and Professional Responsibility offers yet another reason for non-compete lawyers to be sure they offer this advice to clients.

Formal Opinion 11-459 outlines a lawyer's duty to advise an individual client about the dangers of communicating with counsel from the individual's workplace. It focuses on the fact that communications from an employer's computer or telephone may be readily discoverable by the employer (both by policy and by technological tools), which may lead to a finding that the client and counsel have not taken adequate steps to ensure the confidentiality of their communications for privilege purposes. The Opinion's opening paragraph summarizes the Committee's conclusions:

"A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party".

Formal Opinion 11-459 at p. 1.

In light of this Opinion, non-compete lawyers may wish to review their intake procedures for such matters. An effective approach might include making it a point to tell individual clients in an initial discussion that they should only communicate with counsel from their personal cell or home phone, and that they should not access their personal email from their work computers if they are going to be communicating with counsel via that personal email account. To memorialize this conversation, counsel may also consider adding some new language into their engagement letter for this type of matter, to focus the client's attention on the need to preserve confidentiality of communications in order to maintain the ability to assert the protections of the attorney/client privilege. Here is a sample with some key language in bold:

"Communications between clients and attorneys are generally privileged and cannot be inquired into by third parties. That privilege may be lost, however, if you disclose the contents of otherwise privileged communications with your counsel, or if you do not take reasonable steps to protect the confidentiality of our communications. You should refrain from disclosing to third parties the contents of any of the communications you have with us. This includes refraining from oral disclosures as well as not permitting others to view copies of our written correspondence. If we communicate by email, you should never forward our emails to anyone else. **In addition, you should never communicate with us from your present employer's telephones or computers or from any public computer such as a library or hotel business center computer. These systems are not likely to be secure and confidential. Even accessing your personal web-based email account (such as your gmail, yahoo or other personal internet service provider) from a company-owned computer may result in inadvertently leaving the substance of those communications on the computer in a manner that is recoverable by your present employer. This could lead to a court finding that you have waived the confidentiality of our communications. As a result, you should only communicate with us using your personal phones or computers. For the same reasons, you should not access any documents from us (such as Word documents, Excel spreadsheets, or PDFs) on anything other than a personal device.** These and any other practical steps you can take to ensure that our attorney/client communications are not disclosed to third parties will be invaluable in protecting your right to claim the full protections of confidentiality under the attorney/client privilege."

Attorneys representing individual employees in transition may want to incorporate something along these lines into their intake procedures when representing clients who are still working for their soon-to-be-former employer.

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