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S&C memo

September 19, 2022

Twitter v. *Musk* Discovery Ruling Highlights Issues for Executives Using Work Email for Non-Work-Related Privileged Communications

Executives Considering Using Work Email for Personal Legal Communications or for Privileged Communications Regarding Another Company Should Remain Mindful of the Risk of Waiver

SUMMARY

A recent discovery ruling in *Twitter* v. *Musk* raises interesting issues related to whether an executive using company email for personal matters or matters related to another company has waived any attorney-client privilege that might apply to those emails.[1] Certain aspects of the decision are fact-specific, but it nevertheless highlights circumstances where executives—particularly very senior executives—may have more success in seeking to protect these types of privileged emails from being disclosed in Delaware litigations.

For executives, these issues often arise where work email is used to discuss privileged non-work-related matters that later become the subject of discovery requests in litigation. Delaware courts faced with these issues historically have applied a four-factor test to determine whether an employee has an objectively reasonable expectation of privacy in their work emails.[2] In general, if a company warns employees that emails on company systems belong to the company and are subject to monitoring, and if the company in fact monitors those emails, courts typically find that employees do not have an objectively reasonable expectation of privacy (and thus that any attorney-client privilege belonging to the employee has been waived).

Here, Twitter sought emails regarding the Twitter transaction that Musk had sent using his Tesla and SpaceX email addresses, and Musk asserted attorney-client privilege over certain of those emails. Twitter noted that Tesla and SpaceX had policies stating that emails on company systems were company property, that employees should have no expectation of privacy or confidentiality in their work email and that work emails may be monitored, and argued that Musk thus did not have an objectively reasonable expectation of privacy and that any attorney-client privilege had been waived.

The Court acknowledged that the language of the Tesla and SpaceX policies was substantively similar to language that other courts had cited in finding that the attorney-client privilege had been waived, but held that other factors here warranted a different result:

- Tesla and SpaceX had other policies stating that employee emails would be accessed only with approval from Legal or HR, and only in certain circumstances (e.g., to comply with a legal request or investigate potential claims).
- Musk submitted a declaration stating that he believed his work emails could not be accessed without his consent except to the extent legally necessary (e.g., in response to a subpoena).
- Tesla and SpaceX executives submitted declarations stating that Musk was not subject to the generally applicable company email policies and that Musk's work emails had not been accessed without his consent except to the extent legally necessary.

Interestingly, the Court noted the unique circumstances of Musk's roles at Tesla and SpaceX but did not expressly limit this ruling to the facts of this case. Although certain aspects of this ruling may be more broadly applicable, any executive considering using work email for personal legal communications or for privileged communications regarding another company should remain mindful of the risk of waiver. To the extent an executive anticipates using company email for communications the executive would like to maintain as privileged, the executive should consider getting confirmation from the company's general counsel that such communications will retain their privileged character notwithstanding any general corporate policy allowing corporate review and access.

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ENDNOTES

[1] *Twitter, Inc.* v. *Elon R. Musk, et al.*, C.A. No. 2022-0613-KSJM, memo. op. (Del. Ch. Sept. 13, 2022).

[2] *See In re Asia Global Crossing, Ltd*., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005).

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