

**American Bar Association
Forum on the Construction Industry**

**Straying Off Course: What You Don't Know Can Hurt You
When Working Across State Lines**

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I. Introduction

This paper, like the live presentation it was prepared to accompany, is intended to provide the authors' practical observations and recommendations concerning various issues with which inside and outside counsel deal regularly when companies cross state boundaries for business. Our thoughts are based on our collective years of experience serving as outside coordinating counsel to major national and international corporations and construction companies. The purpose of this paper is to provide the reader with practical advice and substantive knowledge on a variety of subjects germane to the construction industry, from selecting good coordinating and local counsel to managing the oftentimes conflicting states' rules and regulations pertaining to construction liens and bonds, contractor licensing, contractual indemnity, and other things.

II. Outside Coordinating & Local Counsel

The practice of hiring local counsel is nothing new for in-house and outside counsel. Everyone readily understands that different states have different laws; that – as the below real-life scenario proves – different courts have different local practices and customs; and that all of these are likely more easily navigated by local practitioners. Moreover, local counsel may be aware of political solutions to legal challenges that are unknown or unavailable to in-house counsel. Aside from these benefits, local counsel are required near universally by virtually every court in every state as the proper sponsors of motions to admit “foreign” attorneys *pro hac vice*.

While the traditional concept of local counsel is nothing new, more and more multi-jurisdictional corporations are engaging outside coordinating counsel. To some, outside coordinating counsel may seem like an unnecessary addition of another outside lawyer whose usefulness is marginal in connection with resolving a contested dispute or closing a transaction. But more and more multi-jurisdictional corporations are retaining outside coordinating counsel, finding the benefits offered more than worth the cost.

What kinds of benefits can outside coordinating counsel offer? For starters, they offer increased efficiencies. Coordinating counsel tend to develop a better understanding of a client's business goals and objectives than usually is developed by traditional local counsel, who generally are retained only for one matter at a time, and then only where it makes sense geographically. In contrast, coordinating counsel usually is retained to oversee a series of similar or related transactions regardless of geography. In this way, they are better able to “coordinate” the client's business goals and objectives in a consistent fashion across a series of similar or related transactions. Further, coordinating counsel can take on the responsibility of identifying the most appropriate local counsel, relying on their own attorney networks, which may be more robust than in-house counsel's network.

Additionally, coordinating counsel can develop and implement consistent and widespread strategies and procedures, the aims of which are to accomplish the client's business goals and objectives across multiple jurisdictions. By way of example, recently, a well-known national healthcare provider was identified as one of several apparently successful

offerors for a multi-year, multi-billion-dollar contract for the operation of a state's Medicaid managed care program. A regional healthcare service provider protested the award, arguing the state healthcare authority had violated federal law in the manner in which it had conducted the procurement and evaluated competing offers.

The national healthcare provider informally intervened in the disappointed offeror's bid protest lawsuit in federal court, in which it sought, predictably, temporary, preliminary and permanent injunctive relief. In defending the state's procurement and – by extension – its own award, the national healthcare company advanced arguments that were wholly inconsistent with its position in recently-concluded bid protest litigation in another state involving that state's managed healthcare contracts. The company's inconsistent litigation strategies and arguments were highlighted in the local media, and used by the disappointed offeror as further evidence in support of its argument that the big business awardees were focused solely on reaping profits rather than meeting the healthcare needs of the state's low-income population. Had the national healthcare company engaged national coordinating counsel for bid protest litigation, it likely would not have suffered the embarrassment and media scrutiny levied against it as a consequence of its local counsel's appropriate but inconsistent litigation strategy.

Finally, coordinating counsel assists with knowledge management. Because of their involvement in multiple engagements or disputes in combination with their in-depth understanding of client goals and objectives, coordinating counsel develops a “memory” of processes, procedures, tactics and information that are consistent from one engagement to another, which further alleviates the burden on in-house counsel to educate, train and oversee outside counsel.

Of course, not every company may be inclined to retain nor will every legal matter require the assistance of outside national coordinating counsel. What, then, should in-house lawyers and general counsel consider in locating and retaining local counsel? Obviously, outside lawyers go to great lengths and expense to develop attractive and compelling advertising. But, while public advertising and credentials are important and informative, nothing compares to word-of-mouth referrals from colleagues and acquaintances that have real-world experience working with outside counsel.

Additionally, in-house counsel should consider whether the particular legal matter for which outside assistance is needed requires a specialized practice or a combination of legal disciplines. If the latter, then a law firm offering a compliment of legal services may be preferred to a boutique. Also, are there cost limitations involved in hiring outside counsel that mitigate in favor of boutique practitioners and against a larger, full-service firm?

With appropriate outside counsel identified, vetted and retained, in-house counsel are well-advised to have frank discussions about expectations for the engagement. What deadlines are there and how are they or will they be determined? Are they hard-and-fast deadlines or is there some flexibility? How and to whom should delays and unusual circumstances be conveyed? Who comprises the legal team for the matter in question; should the general counsel be included in all discussions, or if not all, which ones?

What about billing guidelines? In what form and/or format should bills be presented? Will they be electronically submitted through third-party or proprietary software, or mailed traditionally? What level of detail needs to be included in the bills to justify the expenditures? Should time and expenses be tracked to a general billing code or to individual projects or business divisions? In matters where outside coordinating counsel are retained, should they review local counsel bills, or should they pay local counsel and include those costs in their own monthly invoices? All of these considerations will make for a more efficient, amicable and enjoyable experience.

III. State Differences That Matter

One of the ever-present challenges to in-house counsel for a company with a national (or international) presence is dealing with the various laws, rules and regulations that pertain to the company's activities in the various states, territories and countries where it does business. In many cases, thanks in part to states' adoption of model codes and procedures, these differences exist at the margins, having only a nominal effect on a company's business pursuits and standard policies and procedures. But in many other cases, states' laws, rules and procedures can vary wildly, creating serious pitfalls for the unwary or unfocused. Below we discuss many of the most prominent areas of the law where state differences can have a material adverse effect on a company's ability to conduct business profitably across state lines, and provide insight on managing these differences.

A. Liens and Bonds

Lien rights and bond rights are two areas with vastly different sets of rules and procedures in all 50 states. There are a number of questions that come up immediately when you seek to exercise one set of rights versus the other, or when you exercise both sets of rights at the same time.

Do I have bond rights and does the state follow or deviate from the Federal Miller Act?

Do I have lien rights and is the state a "full value state" or a "balance of contract state"?

What is the difference between a straight mechanic's lien and a lien on funds?

Can I exercise both lien rights and bond rights?

Bonds: Exercising rights on a payment bond is to assert rights against the Principal and the Surety under the bond, as a matter of contract and surety law, based on the terms of the bond itself.

There are a vast array of bond types (including, for example, bid bonds, payment bonds and performance bonds). For purposes of today's workshop, we will focus on payment

bonds and mechanic's liens on commercial jobs (holding residential to the side) to highlight the importance of differences across state lines.

A payment bond is a type of surety bond, with at least three parties involved: a surety, a principal, and the obligee. The principal is the party that obtains the payment bond in connection with an underlying agreement with the obligee. The mystery associated with bonds is quickly dispelled by following certain "Big Bond Rules":

- (a) Confirm with certainty that the job is in fact bonded;
- (b) Obtain a copy of the bond, and review it to determine who the Principal is under the bond (which, for example, will determine what type of notice needs to be given); and
- (c) Note that deadlines are not the same as Mechanic's Liens.

In addition to the terms of the Payment Bond itself, your client's rights will depend in part on understanding where the project is, where the dispute needs to be resolved, and whether the project is a private job or a public job.

Each state has its own Public Payment Bond Statute, often referred to as Little Miller Acts, a reference to the Federal Miller Act Payment Bond Statute which dictates your bond rights on Federal Jobs (40 U.S.C. 1331, et seq.). In order to determine your specific rights on a Public State Job, it is critical to review the applicable state statute. For an excellent treatise on payment bonds, please refer to "The Law of Payment Bonds", Second Edition, published by the Tort, Trial and Insurance Section of the American Bar Association, 2011.

Liens: Exercising mechanic's lien rights is to seek to foreclose on the actual parcel of real estate on which the project sits.

On public projects, in all 50 states, each state legislature has decided for reasons that intersect sovereign immunity and public policy that private parties cannot foreclose on the actual parcel of real estate on a public job.

If ABC Supplier is owed funds by DEF Subcontractor on the Pleasantville Elementary School, no one wants ABC Supplier to ultimately own and run the School. For this reason, all 50 states have said "No lien rights on public jobs," since your ultimate remedy if you exercise lien rights would be to assert an interest in the actual piece of real property where the project sits. Although lien rights have been taken away on public jobs on the one hand by state legislatures however, public payment bond statutes have been given with the other.

Each state also has its own Mechanic's Lien laws. For an excellent matrix, please refer to the "50 State Survey State-by-State Lien Matrix" produced by the law firm of Woods & Aitken LLP, presented at the 2009 (since updated through 2011) ABA Construction

Forum meeting in Philadelphia (as part of Plenary 2: Managing the Swell of Conflicting Regulation.”)

In sum, then, from the 30,000 foot perspective:

	PRIVATE	PUBLIC
Bonds	Maybe	Yes, Required
Liens	Yes, Permitted	No, Prohibited (But consider Lien on Funds)

Private Jobs, Bonds: Payment bonds will be required on private commercial jobs (shopping center, office building) if the contracting parties have required it as part of their contract documents. As a general rule, the larger the job and the more sophisticated the parties, the more likely that payment bonds will be required on the project.

Private Jobs, Liens: As a general rule (and even if bonds are not required as a matter of contract on private commercial jobs), your client will have lien rights on private commercial jobs.

Public Jobs, Bonds: As a general rule, there will in almost all instances be a payment bond required on a public job, with certain caveats (size of the contract, for example).

Public Jobs, Liens: You will not have lien rights against the real property on a public job, (although you may have lien rights depending on the state (NY, IL, for example), against the actual funds being used to finance the public job).

B. Indemnity

The freedom of individuals and corporations to negotiate and enter into contracts without much government interference or restriction is a hallmark of laissez faire economics. While the freedom to contract in the United States generally is broad, contractual indemnity clauses is one instance where the majority of states have imposed some measure of restriction.

Nearly every state has one or more laws affecting the validity or enforceability of contractual indemnity clauses that are contained in or collateral to construction contracts. Many states’ laws prohibit unequivocally the enforcement of any clause where one contracting party purports to indemnify the other party against losses and damages for personal injury or property damages caused by the other party’s sole negligence, willful misconduct and/or intentional act or omission.¹ Other states’ formulations void those

¹ See, e.g., Cal. Civ. Code § 2782(a); O.C.G.A. § 13-8-2(b).

indemnity clauses that purport to provide indemnification for losses and damages resulting from the indemnitee's negligence in any degree, either sole or concurrent.² At last look, only Alabama, Iowa, Maine, Nevada, Vermont, Wyoming, the District of Columbia and Puerto Rico have yet to pass a statute restricting in any way the enforceability of contractual indemnity clauses.³

With so many states having prohibited or at least restricted substantially the enforceability of contractual indemnity clauses, it has become common practice in construction contracting for the owner to require the general contractor (and for the general contractor to require its subcontractors, as the case may be) to purchase and/or maintain commercial general liability insurance for the owner's benefit (nearly always by means of an additional insured endorsement) that covers all losses for personal injury or property damage sustained on the project, regardless whether caused wholly or partially by the owner's negligence. Under ISO policy forms, this kind of coverage arises usually under the "insured contracts" exception to the "contractual liability" exclusion. Proponents of this approach maintain that these contractual insurance provisions fall outside the scope of any applicable contractual anti-indemnity statute and are, therefore, valid and enforceable.

As of the date of this paper, only a handful of states have enacted legislation closing what has become known in the industry as the additional insured loophole, though it is expected more states will follow suit.⁴ Against this backdrop, inside and outside counsel involved in the negotiation of indemnity obligations are well advised to consider the following with regard to the enforceability of contractual indemnity clauses and indemnification insurance agreements:

- What limits, if any, does the governing state law place upon the enforceability or scope of a contractual indemnity clause for the project at issue?
- What limits, if any, does the governing state law place upon the enforceability or scope of an agreement to purchase insurance covering claims caused solely or partially by the insured?

What is the true value of the protection received from the indemnitor – i.e. can the indemnitor and/or its insurer, as the case may be, satisfy the indemnity obligations that it is undertaking?

² See, e.g., Mass. Gen. Laws ch. 149, § 29C; Col. Rev. Stat. § 13-50.5-102.

³ See, e.g., ANTI-INDEMNITY STATUTES IN THE FIFTY STATES (Foundation of the Am. Subcontractors Assn. 2009).

⁴ See, e.g., Tx. Ins. Code § 151.104; Colo. Rev. Stat. § 13-21-111.5.

C. Contractor Licensing Laws

To one degree or another every state in the country requires contractors to obtain from state and/or local licensing authorities a license in one or more construction disciplines. As one might expect, contractor's licensing requirements vary widely from state to state, though all generally require some level of testing or examination and establish minimum bonding and insurance requirements.⁵ While a discussion of specific licensing requirements in any given state is beyond the scope of this paper, certain issues warrant special emphasis here.

First, with the ever-increasing scale of public and private construction projects, contractors need to assure themselves of the project jurisdiction's licensing rules with respect to joint ventures and other types of business organizations. With regard to joint ventures, for example, must each member of the venture be separately and independently licensed? With regard to business associations generally, are there types of business associations that are not eligible for a contractor's license or, conversely, are there special licensing requirements unique to the type of business seeking a license? For example, until relatively recently limited liability companies in California were unable to obtain a contractor's license. A bill passed in October 2010, Senate Bill No. 393, required the California State License Board to begin processing licenses for LLC's by no later than January 1, 2012. However, SB 392 also imposed certain bonding and insurance requirements on LLC's that are not required of other licensable business associations.

Other common questions with regard to state contractor licensing issues that inside and outside counsel routinely confront include:

- Does the jurisdiction require general contractors be licensed or only specialty contractors (including general contractors performing specialty work)?
- Is there a central, state-level licensing authority or is contractor licensing overseen by local/municipal licensing authorities?
- What licenses is a design-builder required to have in the jurisdiction?
- Does the state have a licensing reciprocity statute and, if so, what are the reciprocity rules?
- What level of involvement in a specific project must the Responsible Managing Employee (RME) or Responsible Managing Office (RMO) that holds the license (on behalf of a corporation) have?
- Do I need a license simply to submit a bid or proposal?

⁵ See, e.g., A STATE-BY-STATE GUIDE TO CONSTRUCTION & DESIGN LAW (Carl J. Circo, et al. eds., Am. Bar Assn. 2009) (1989); also Contractor's License Reference Site available at www.contractors-license.org (last visited July 14, 2012).

- How long does it take to obtain a license from the licensing authority?
- What type of grace period is there if the RME or RMO no longer functions in that capacity for the company?
- What are the penalties for performing work without a license for any period of time?

Do other legal violations (e.g. prevailing wage violations) trigger licensing suspensions?

D. Prevailing/Living Wage Laws

After having passed other statutes aimed at improving wages paid to workers on federal construction projects, in 1931 Congress passed the Davis-Bacon Act, which to this day requires contractors and subcontractors on certain federally-funded or assisted construction projects to pay workers at the site of the work no less than the prevailing wages and fringe benefits for corresponding work on similar projects in the city or county where the work is being performed. Under Davis-Bacon, the U.S. Department of Labor is charged with establishing the prevailing wage and fringe benefits for various trade classifications. Up-to-date Department of Labor wage determinations are available online at <http://www.wdol.gov/dba.aspx>.

Numerous states and many largest cities and counties also have enacted prevailing wage statutes requiring the payment of prevailing wages and fringe benefits on state- or local-funded construction projects. More recently, some of the nation’s largest cities and counties have gone a step further and mandated payment of living wages, which exceeds the commensurate prevailing wage and usually is calculated from federal poverty guidelines established by the U.S. Department of Health and Human Services.

A detailed discussion of federal or state-by-state comparison of pertinent prevailing wage rules is beyond the scope of this paper. But, like all of the topics discussed here, prevailing wage rules vary oftentimes from project to project and always from state to state. To avoid the pitfalls inherent in conflicting prevailing wage rules, the following considerations should be taken into account.

- Is the project subject to federal, state and/or local prevailing wage rules? Keep in mind, in some states certain aspects of private, commercial construction projects may be subject to prevailing or living wage rules (e.g. utility improvements)!
- If the project is subject to prevailing wages rules, how is the “site of the work” defined under those rules for purposes of determining who specifically must be paid prevailing wages?
- Become familiar with the “prevailing local area practice” and “area practice survey” from which the prevailing wage rates were set. The Wage Appeals Board has concluded that questions as to the proper classification of work performed by

laborers or mechanics on the site of the work are resolved by examining the prevailing local area practice. It is appropriate to contact a Regional Wage Specialist for guidance on the proper classification of laborers and mechanics.⁶

- With what frequency must certified payrolls be submitted to the government authority? It is not unusual certified payroll records to be submitted weekly and liquidated damages paid for each day the submission is late.
- What documentation must be kept to demonstrate compliance with applicable prevailing wage rules, and what information must be reflected in certified payroll records? Common records and information include:
 - Worker's name, address, Social Security Number, and work classification;
 - Straight time and overtime hours per day and total per week;
 - Gross wages earned by the worker on the project and on all other projects;
 - Itemization of deductions;
 - Actual per diem wages paid and actual payroll check numbers;
 - Documents reflecting ration of apprentices to journeymen.

For any employee that performs work across multiple classifications, the contractor is responsible for tracking and allocating the amount of time spent working under different wage classifications. Alternatively, contractor can choose to pay the employee at the higher rate. Whichever alternative is chosen, careful scrutiny by the contractor is required to avoid penalty.

E. Unauthorized Practice of Law

Given the present economy, albeit with signals of improvement being heard from various sectors, the dispute meter has risen dramatically. Issues in the past that have been “resolved on the next job” are no longer being resolved the same way, since there often is no next job. Disputes also seem to be more caustic, and we are seeing claims being brought up in litigations in various parts of the country that do not frequently need to be addressed in standard construction disputes.

In a recent case in Iowa, for example, a supplier client spoke to a general contractor about the financial condition of the general contractor's electrical subcontractor. The supplier ended up filing suit against the electrical subcontractor, and promptly was met with a counterclaim for slander based on the conversation the supplier had with the general contractor. The claim was resolved, based on the fact that the supplier only had spoken to the general contractor about the one job at issue (instead of the subcontractor's overall financial condition), but it was an unusual claim and added legal expense to the litigation.

⁶ See <http://www.dol.gov/whd/programs/dbra/regions.htm>.

Similarly, a supplier faced another unusual claim involving the unauthorized practice of law in a recent litigation in Georgia. The facts that led to the claim were:

Amounts Owed: Best Supplier was owed \$350,000.00 by the same subcontractor, Under Water Electrical, across 6 separate jobs in 2 different states (GA, NC).

Parties: In addition to Best Supplier and Under Water Electrical, there were separate General Contractors on each of the 6 separate jobs.

Calls: Between September 2010 and December 2010, Best Supplier's counsel, in MA, spoke four or five times directly with Under Water Electrical in GA, and also spoke directly several times with each of the six General Contractors.

What was discussed? In the conversations between Best Supplier's counsel and Under Water Electrical, everything was discussed, including contract balances per job, bond rights, lien rights, whether Best Supplier was going to exercise lien rights and whether Under Water Electrical was going to exercise its own lien rights. Best Supplier's counsel asked Under Water Electrical if it was represented by counsel, and was told it was not. Best Supplier's counsel also stated it was not representing Under Water Electrical as they discussed the General Contractors. No agreements were reached.

Lawsuit: Progress was slow. Best Supplier ended up suing Under Water and used its MA counsel to help it engage Best Supplier GA local counsel. Claims included Breach of Contract, Unjust Enrichment, Claims on Payment Bonds, and various Mechanic's Liens.

Counterclaim: In response to Best Supplier's lawsuit, Under Water named Best Supplier's MA law firm as a direct defendant in the litigation, and filed a counterclaim for Unauthorized Practice of Law. The substance of the claim was that Best Supplier's MA Counsel, having asked Under Water Electrical if it was going to file its own liens was offering advice on whether it should or should not file its own separate lien.

Each state has its own rules on practicing law within its jurisdiction. Although everyone inherently understands the obvious rules such as being admitted in a state in order to file pleadings, the questions quickly become quite nuanced.

For example, is preparing a lien in a state where you are not admitted considered practicing law in that state? The answer, of course, is it depends.

There are jurisdictions where preparing a construction lien for filing is considered the practice of law. Caution must be paid to undertaking tasks as seemingly mundane as preparing a Mechanic's Lien and or a Satisfaction of Lien for use in a jurisdiction in which you are not admitted, and it is always advisable to consult with local counsel.

Using a service also can become tricky. (In Ohio, for example, the Ohio Supreme Court held that a corporation which was preparing, signing, filing and pursuing affidavits of mechanic's liens for third parties was itself engaged in the unauthorized practice of law. See Ohio State Bar Association v. Lienguard, Inc., 2010-Ohio-3827.)

Is discussing with an adverse party that has its own lien rights offering advice about whether it should or should not? In conversations with other parties, it is always good practice to ask if they are represented by counsel. If they are, the conversation must end and you need to speak to their counsel. You also should make clear to whom your client's interests are adverse. For example, in the supplier example above, both the supplier and the subcontractor of course were adverse to each other, but each had rights against the GC. Don't leave room for any misunderstanding by an adverse party that you may be helping the adverse party pursue its own independent claims against another party. If you are representing a supplier and speaking to a sub, don't leave the sub with the impression you are helping it against the GC. If you are representing a sub and speaking with a GC, don't leave the GC with the impression that you are helping it against the Owner. It is always good practice after asking if the party you are speaking with is represented by counsel to state along the following lines: "In order that there is no confusion, our firm is not representing you in any capacity. If you have your own rights, you should seek advice on whether or not to exercise them."

Another issue that often arises is whether conducting a mediation or an arbitration in a state where you are not admitted is considered practicing law in that state? Certain mediators and arbitrators require that all parties come to their jurisdiction to avoid the issue.

In some states there is then the further issue of whether mediating is itself practicing law. (The Massachusetts Supreme Judicial Court recently held, for example, that an attorney whose resignation had been accepted for disciplinary rules could not engage as a mediator, even though "mediation does not in all circumstances constitute the practice of law." In The Matter of Anthony Raoul Bott, Mass. SJC-10935.)

The ABA Commission on Ethics is currently updating the Model Rules of Professional Responsibility in order to assist attorneys that move in and out of various jurisdictions. The proposed changes being discussed include revisions to Model Rule 5.5, which would allow attorneys admitted in on at least one state to practice in another jurisdiction while they are waiting to be admitted either by motion or by passing the bar exam.

Make sure you always consult with local counsel who can confirm, with the assistance of the applicable State Bar and Rules of Professional Responsibility, that you do not run afoul of specific state requirements. Most State Bar Associations have both websites and hotlines that you can call for specific inquiries.

F. Confidentiality

Issues surrounding confidentiality lurk in areas we don't consider frequently enough on a day-to-day basis. This brief section of the paper will focus on two such areas we deal with every day: e-mail and mobile devices.

E-mail: We all live on e-mail, which is part of the problem. Our firm regularly receives e-mails, as do many firms, that contain information they should not contain, are copied to people to whom they should not be copied, and include remote e-mail chains that should be (but are not) deleted. For starters, we offer a few rules that will help you avoid some of the traps:

1. Who is cc'd on the e-mail you received? You should reply to the sender only, unless you know who all the other parties are. If there is someone you do not recognize, delete them from your reply, even if you are using "reply to all."
2. Do you need to use "reply to all"? This can be a dangerous mistake to make. Particularly if you are in a rush, it seems to be most efficient, but the party sending you the e-mail may have had reasons for including people that you don't know. There is no obligation to reply to everyone that was copied on the e-mail in the first instance, and the better practice is to avoid it.
3. Delete chains. E-mails can, and do, go on forever. If the information below the e-mail you are sending is no longer germane, take the minute and drop the extras. I regularly receive e-mails from opposing counsel who are not careful enough to delete conversations they have had with their own clients. ("Should we offer \$55,000.00? Why don't we offer \$75,000.00 to see what they say, but grab \$55,000.00.")
4. Are e-mails confidential? The short answer, assuming of course it is a privileged communication between an attorney and his or her client, is yes. As detailed in Suffolk Construction Co. v. A Division of Capital Asset Management, 449 Mass. 444, 448-449, 870 N.E.2d 33, 37-38 (2007) "the attorney-client privilege shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice...."

The long answer is that in an e-mail, simply by virtue of including one party that is not part of the client in a cc on an e-mail, the privilege can be broken. E-mails also get forwarded, attached and moved around by clients in ways that easily break the privilege. E-mails are like publically viewed post cards, not sealed letters (remember sealed letters?), and, if you are sending an e-mail to a client where you absolutely want the communication to be and remain privileged, directly say: "Confidential and Protected by the Attorney Client Privilege", and tell your client not to forward the e-mail.

5. Settlement: Similarly, if you have an e-mail you are sending opposing counsel that constitutes settlement discussions, state right in the body of the e-mail: “For Settlement Discussions Only and Therefore Inadmissible in Any Proceeding.

Mobile Devices: We also of course all live on our cell phones, Ipads and other tablets and mobile devices which are so widely used at this point, that companies simply take that use for granted. What companies often don’t consider until it is too late, however, is how best to avoid the inadvertent disclosure of confidential or protected information. A few of these considerations follow.

Please note this abbreviated list is generously reproduced with the permission of Maureen Mulligan, a shareholder at RIW, from her full article originally written for the American Bar Association entitled “Mobile Device Use: Implement Policies to Protect Confidential Business Information” and published in TortSource Volume 14, Number 2, Winter 2012.)

1. Develop and implement a mobile device policy: It is important to have a company policy in place before confidentiality issues arise. You should consider issues such as employees’ use of their own devices for work related business, and require passwords to protect confidential information in the event the devices are lost or stolen. If the device is stolen, you also will want to make certain there is a way to lock it remotely and to wipe the device clean, since access to confidential corporate information can be quick.
2. Determine the extent of access provided to employees using mobile devices: Should employees only be allowed access to e-mail or to all other documents as well? What are the risks that documents are being forwarded without metadata being cleaned? And what are the risks that documents are being forwarded in the first instance that should not be?
3. Should e-mail have enhanced protections? You also should think through encryption. There is a distinction between e-mail which can be encrypted to the extent it is linked to your company server, and texts, which generally can’t be encrypted, since they are routed through third party networks. Consider not allowing any confidential information to be sent via text.
4. Applications? If the employee is using a device for both personal and business use, you should consider the types of applications that employees are allowed to download. Each time applications are downloaded, uninvited malware guests may come along as well, which may then have the ability to hack into a company’s server.