

LEGISLATIVE UPDATE

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New Jersey Supreme Court Finds Attorney-Client Privilege Trumps Employer's Computer Use Policy

E-mail messages between an employee and her attorney sent via the employee's personal, password-protected e-mail account, but using her employer's laptop computer, are protected by the attorney-client privilege regardless of the company's computer use policy. Affirming an intermediate appellate court, the Supreme Court of New Jersey has held that a company's electronic communications policy did not transform the employee's private e-mails with her attorney into the company's property or otherwise waive the attorney-client privilege. *Stengart v. Loving Care Agency, Inc. et al.*, No. A-3506-08T1 (March 30, 2010).

The Facts

In February 2008, after resigning her employment, Marina Stengart sued her former employer, alleging discrimination based on a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. In an effort to preserve the information stored on Stengart's employer-issued laptop computer, the company "imaged" the computer's hard drive. The forensic recovery process uncovered e-mail messages sent by Stengart to her attorney, using her personal, password-protected e-mail account, relating to her anticipated lawsuit against the company. The messages were stored in the temporary Internet files "cache" of the computer's browser software. Relying on the employer's computer-use policy, which stated, in part, that the company "may review, access and disclose all matters on the company's media systems and services at any time" and that all information on the computer was the company's property, counsel for the employer reviewed the e-mail messages and used them in pre-trial discovery. In response, Stengart sought a court order to compel the company to turn over the e-mail messages, asserting they were protected by the attorney-client privilege and to disqualify the company's attorney for reviewing the messages. The company argued that the plaintiff waived the attorney-client privilege when she used the company's computer to communicate with her attorney. Alternatively, it contended that the attorney-client privilege never attached because the employee did not have a reasonable expectation that her communications with her attorney were private.

Lower Court Decisions

The trial court agreed with the company, holding that "the e-mails were not protected by the attorney-client privilege because the company's electronic communications policy put plaintiff on sufficient notice that her e-mails would be viewed as company property." Reversing, the appellate division concluded that the interests underlying the attorney-client privilege substantially outweighed the employer's interest in enforcing its "unilateral" electronic communications policy.

New Jersey Supreme Court Decision

The New Jersey Supreme Court affirmed, finding the employee had a reasonable expectation of privacy in the e-mails she exchanged with her attorney while using the company's laptop computer. The Court found that the employee took reasonable steps to protect the privacy of the messages, including using a personal (as opposed to company-provided) e-mail account and not saving her personal account's password on the company's computer. Further, because the company's policy permitted limited,

personal use of its computers, it was unclear whether the company intended to review those messages and whether the messages became the company's property. Moreover, the e-mails contained generic language warning the reader that the information was only intended for the designated recipient and contained privileged attorney-client communications. Thus, the Court concluded that the messages were covered by the attorney-client privilege and that the employee had not waived her privilege. In addition, by reading e-mails and failing to notify the employee promptly about them, the Court found the company's counsel violated the Rules of Professional Conduct applicable to lawyers and remanded the matter for the determination of an appropriate sanction against counsel and/or the law firm. In addition, although the ambiguity of the company's computer use policy influenced the Supreme Court's decision, the Court noted that even a policy that banned all personal computer use and stated unambiguously that private, attorney-client privileged e-mails sent using a personal, password-protected e-mail account may be reviewed would *not* waive the privilege. Although an employer may discipline an employee for violating reasonable workplace rules, the Court found employers were not entitled to the content of privileged communications.

The Court, however, seemingly left open the question of what would be a "reasonable workplace rule" by stating it did not encourage a zero-tolerance policy which banned all personal use of a company's computer system, finding such a policy "can be unworkable and unwelcome in today's dynamic and mobile workforce."

Tread Carefully

While several courts to have considered the question have reached a conclusion similar to the New Jersey Supreme Court's, others have found such communications were not privileged. See *Scott v. Beth Israel Med. Ctr. Inc.*, 2007 NY Slip Op. 27429 (N.Y.S. 2007) (no expectation of confidentiality when company e-mail used to send attorney-client messages); *Banks v. Mario Indus.*, 274 Va. 438 (2007) (employee waived attorney-client privilege by using employer computer to draft document for counsel, even though he subsequently deleted the document).

Whether the attorney-client privilege has been waived is a fact-intensive inquiry which depends on the law of the jurisdiction and an analysis of a variety of factors, including:

- i. were the communications sent using a personal e-mail account or the company-provided e-mail account;
- ii. does the company's policy clearly put the employee on notice that communication may be monitored;
- iii. does the company regularly monitor communications; and
- iv. was the employee connected to the employer's computer system when the communications were made.

Following *Stengart*, it is even more important for employers and their counsel to be careful when they uncover potentially privileged communications between an employee and his or her counsel. Although this decision may turn out differently if the employee were using her company-provided e-mail account (as opposed to a personal e-mail account), in view of the Court's emphasis on the important public policy concerns underlying the attorney-client privilege, any hasty assumption that the attorney-client privilege had been waived is risky.