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Attorney-Client Privilege Trumps Workplace Computer Data Regulations

By Sean T. Carnathan, Litigation News Associate Editor – September 11, 2009

According to a recent decision of the New Jersey Superior Court, Appellate Division, the attorney-client privilege trumps workplace regulations declaring computer data the employer's property.

The court also held that the employer's counsel had violated New Jersey Rule of Professional Conduct 4.4(b) by retaining and using privileged emails against the employee without notifying her counsel had the emails. The court remanded the case with instructions to conduct further proceedings regarding whether the employer's counsel should be disqualified for the violation..

Background
In *Stengart v. Loving Care Agency*, an employee used her web-based, password-protected Yahoo email account via her employer's computer to communicate with her attorney regarding her planned lawsuit against her employer. After she sued the company, it created a forensic image of the computer's hard drive and recovered numerous communications between the attorney and her lawyer.

The employer's counsel reviewed them but did not notify the employee that it had them. Months later, counsel used the emails in answering the employee's interrogatories.

Decision
The trial court denied the employee's motion to restrain use of the emails and compel their return. The appellate division granted leave to appeal and reversed in a detailed opinion that surveys prior case law on the issue.

"We . . . reject the philosophy . . . that because the employer buys the employee's energies and talents during a certain portion of each workday, anything the employee does during those hours becomes company property," the court opinion says.

Balancing the employer's interest in enforcing its regulations against the employee's "considerable interest in the confidentiality of her communications with her attorney," the court held that the attorney-client privilege outweighs the employer's interest under these circumstances.

An Evolving Issue

"Stengart is an example of the still developing law on the issue of whether an employee's emails to her attorney, made through an employer's computer, will enjoy an attorney-client privilege," says Erica L. Calderas, Cleveland, cochair of the ABA Section of Litigation's Pretrial Practice and Discovery Committee.

Although "[c]ourts have been somewhat inconsistent in their approach to this issue, . . . "the lesson for employers here is to have properly drafted email policies which are clearly disseminated to employees," says Calderas.

Balancing Act

"The most interesting thing about this opinion is that . . . the court assumed that the policy was in force as to the plaintiff and nonetheless invalidated it on the ground that, as to plaintiff's situation, the employer had no legitimate business justification for applying the policy under the circumstances, especially in light of the importance of the attorney-client privilege," says John P. Higgins, Atlanta, GA, cochair of the Section's Intellectual Property Litigation Committee.

"I haven't yet seen a case in which the court engaged in this kind of balancing test—the employer's legitimate business interests versus the type of information the employee sought to keep private. That's a pretty novel approach," says Higgins.

Ethical Implications

"The ethical lesson for litigators depends on the state under which you are licensed to practice law," notes Higgins.

The Model Rule of Professional Conduct 4.4 requires an attorney who receives a communication that he or she knows was received inadvertently to give the sender notice of the mistake, but it does not require the attorney to refrain from reading it.

New Jersey Rule 4.4(b) goes farther than the Model Rule, and requires the attorney to stop reading and return the document. "Some states require only notice to the disclosing party," says Higgins. "Some states require notice and that you follow the disclosing party's instructions. Other states don't require any notice at all," he says.

"This can be tricky where, for example, the employer discovers the emails in its pre-suit investigation of an employee's potential misconduct," says Calderas.

"The employer may be preparing to sue and have the "smoking gun" email in hand but not be sure of what it can do with it. This can be particularly troubling where the potentially privileged email is what gives the employer the good faith belief, under Rule 11, that it has grounds to sue," she says.

When in doubt, suggests Calderas, "take the 'high road.'"

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