Are Lawyer-Client E-mails Sent on the Computer of Client's Employer Privileged?

By Jeffrey P. Lewis

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This author previously reported on a New York case, *Scott v. Beth Israel Medical Center, Inc.*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (2007), where an employee unsuccessfully argued that he had sent confidential communications to his counsel on his employer's Web-based e-mail account, which was installed on a computer owned by the employer. In that instance, the employer, a medical center, had a formal e-mail policy that the employer's computer system should be used for medical center business only, declaring that employees have no personal privacy right "in any material created, received, saved, or sent using Medical Center communication or computer systems." The court found that this policy overrode any expectation of privacy held by the employee, notwithstanding that his e-mail contained the now almost standard notice that: (i) it is intended for the use of the addressee; (ii) it may contain information that is privileged and confidential and (iii) if inadvertently directed, it should be erased by the recipient.

Nonetheless, the *Scott* court found waiver where the employee used the employer's e-mail account on his employer's computer to communicate with his lawyer. Would the court have reached the opposite conclusion if the employee had used his employer's computer but used his own personal, password-protected, Web-based e-mail account? A New Jersey court recently considered the question of waiver under these circumstances.

In *Stengart v. Loving Care Agency, Inc.*, 408 N.J.Super. 54, 973 A.2d 390 (Superior Ct., A.D. 2009), the employer had provided to an executive employee a laptop computer with a work e-mail address for her use. The employee owned her own personal, password-protected Yahoo e-mail account. She had loaded Yahoo software onto the computer so that she could access her personal e-mails. She then exchanged several e-mails with her lawyer concerning a discrimination claim, which she asserted against her employer after she had resigned. In each instance of communicating with her lawyer on her employer's computer, she had used her Yahoo, not her work, e-mail address.

In *Stengart*, overruling the discovery judge, a unanimous three-judge panel of the Superior Court of New Jersey, Appellate Division, held that the employee had not waived her attorney-client privilege in communicating with her counsel in this way. Unlike in *Scott*, there was a disputed factual issue with respect to whether the employer had a policy in place prohibiting use of the employer's computer for private purposes and, even if so, whether it applied to executives. The court held that, regardless of whether such a policy did exist and did apply to executive employees, it would make no difference in the result. The court would not enforce a company policy "that purports to transform private e-mails or other electronic communications between an employee and the employee's attorney into company property. This requires a balancing of the company's right to create and obtain enforcement of reasonable rules for conduct in the workplace against the public policies underlying the attorney-client privilege."

The court analogized the employee's use of a personal, password-protected, Web-based e-mail account on the employer's computer to the employee's placing a sealed envelope containing personal, confidential information in a filing cabinet at the office. Because no policy can be enforced that would render the contents of that envelope the employer's property merely because the employee placed it in the employer's filing cabinet, likewise with respect to the contents of a password-protected account contained in the employer's computer. The court cites *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 832 N.Y.S.2d 873, 864 N.E.2d 1272 (2007) for the proposition "that a computer in this setting constitutes little more than a file cabinet for personal communications."

The holding in *Stengart* has potentially staggering consequences for the employer because it may ultimately lose its counsel as a result. The employer's counsel had read the e-mails in question, contending that they were not privileged, which the appellate court considered a violation of Rule 4.4(b) of the New Jersey Rules of Professional Conduct (substantially the same as Pennsylvania's version) because they "should have cease[d] reading or examining the document, protect it from further revelations, and notify the adverse party of its possession so that the attorney's right to retain or make use of the document may thereafter be adjudicated by the court." Therefore, the court remanded with instructions to the trial court to conduct a hearing to determine whether employer's counsel should be disqualified. This would depend upon the extent to which these e-mails contain information that would not otherwise be available to the employer from other sources.

What is the moral of the story in *Stengart*? Certainly that the institution of a formal policy by the employer with respect to the content of its computers provides no guarantee that it may permissibly access every file contained therein. Moreover, under the right circumstances, employees may communicate with their personal counsel by e-mail on their employer's computer without waiving privilege. But there is no reported Pennsylvania decision to date with respect to this issue. Therefore, there is no guarantee that the holdings in *Scott* or *Stengart* will be followed in this commonwealth. Certainly the court in each instance will conduct a fact-intensive inquiry to determine whether the employee had a reasonable expectation of privacy. Not only would this include consideration of whether the employer maintained a policy against personal use but also whether it monitors the employee's computer or e-mail, whether third parties have a right of access to same and whether the employee was placed on notice of the policy.

The moral for counsel to the employer is clearer. If doubt exists as to privilege, leave it for the court to decide. Otherwise counsel may find him- or herself disqualified from the matter and potentially disciplined as well.