Employment Law

ABA Opinions Clarify Ethical Obligations in E-Mail Interception

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One of the "trending" topics in employment law circles and blogs revolves around employees communicating by e-mail with their lawyers while on the clock and the extent to which such communications may be privileged. Recent judicial decisions have been defining the appropriate means for employers to monitor employees' computer and phone usage, including when an employer's interception of attorney-client communications violates employees' privacy.

On Aug. 4, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued two opinions that address attorneys' ethical obligations concerning these issues based on an analysis of the ABA Model Rules of Professional Conduct.

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Formal Opinion 11-460, "Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel," explains that ABA Model Rule 4.4(b) does not impose any requirement on the employer's counsel to notify one of its employees of the requisition of attorney-client e-mails. According to Formal Opinion 11-459, "Duty to Protect the Confidentiality of E-mail Communications with One's Client," lawyers have a duty to warn and advise clients about the risks of third parties intercepting or later finding privileged e-mail correspondence.

As many practitioners know, ABA Model Rule 1.6(a) prevents attorneys from revealing information about a client without consent and requires attorneys to protect confidential client information. Comments to the rule require lawyers to safeguard client information from inadvertent or unauthorized disclosure, and to take reasonable precautions to prevent information from reaching unintended recipients.

As a general rule, the ABA explains, lawyers should advise clients on protecting the confidentiality of communications and instruct them not to use an employer-issued computer, phone or other electronic device to receive or transmit confidential communications. Despite e-mail becoming a common replacement for letters and in-person meetings, the risks inherent in e-mail communications without safeguards can be the same as having a confidential conversation in a setting where it can be overheard.

The ABA pointed to various factors that an attorney should keep in mind that would increase the importance of warning clients against using business devices for communications with their own counsel. Clients should be warned if they have engaged in e-mail communications; if the client's employment provides access to workplace communication devices; if by some circumstances a third party has access to e-mail; or if the client's employer does not have sufficient policies in place to protect those communications.

It has become standard practice to include a disclaimer on e-mail communications that the recipient should inform the sender if an e-mail was inadvertently sent to the wrong person. There is no express requirement in the Model Rules, however, that counsel for an employer who finds an e-mail or document must alert the sender. Model Rule 4.4(b) only requires counsel to alert the sender of an inadvertently sent communication. An e-mail is "inadvertently sent" when it is accidentally transmitted to an unintended recipient.

The rule does not apply when an e-mail is retrieved by a third person from where it was stored or left. However, if an employer's counsel finds an employee's confidential communications, the employer should be consulted about whether to disclose the information. The ABA opinion makes it clear that using that information, however, may be a violation of state laws or ethical rules.

The ABA opinions provide guidance as to how to interpret rules of professional conduct. However, the opinions are not entirely consistent with the various judicial rulings on this subject.

The opinions specifically point to *Stengart v. Loving Care Agency Inc.* as an example of this. In *Stengart* , which I discussed in an April 23, 2010, article, the court found that the discovery of and use of confidential employee e-mails violated New Jersey's version of Model Rule 4.4(b). The employee used her employer's computer to send e-mails to her attorney through her personal e-mail account. The employer's attorney later discovered the e-mails and used them to defend the case. Under the New Jersey rule, employer-attorneys must notify the employee's counsel of finding this information.

The Model Rules and the ABA formal opinions provide guidance, but the local laws, ethical rules and case law are controlling. Attorneys should pay attention to developments on these issues, particularly in the employment law context where it is common for employers to have access to employees' electronic communications.

For those practitioners who have not already started cautioning clients about the dangers of e-mail interception, I make the simple suggestion to include the following language in your engagement letters:

"Many employers monitor their employees' e-mails, Internet usage, voicemails and other electronic storage media. To preserve the attorney-client privilege and to avoid having any third parties gaining access to our confidential communications, please do not e-mail us from work and do not e-mail anyone else about your matter/dispute from work — this includes logging into your private e-mail account from work, from a work laptop computer or from any company-owned equipment (e.g., Blackberry, PDA, cell phone, etc.). In addition, do not post anything related to your employment on the Internet, such as postings on blogs, social networking sites, chat rooms, Facebook or Twitter."

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