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N.J. Justices: E-mails to Attorney From Work Computer Privileged

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Does an employee have a right to privacy when communicating with her attorney while using her employer's computer? That was the question the New Jersey Supreme Court recently grappled with in *Stengart v. Loving Care Agency Inc.*

According to the court's opinion, Marina Stengart engaged in e-mail communications with her attorney about issues she was having with her employer, Loving Care Agency Inc., while using her personal, password-protected, Yahoo e-mail account on a company-issued

laptop. Upon leaving her employment with Loving Care, Stengart returned the laptop. She and her lawyer subsequently filed claims of employment discrimination against Loving Care.

Unbeknownst to her, the images of the web pages she had visited on the laptop were saved on the hard drive of the computer. Loving Care hired a forensics expert to retrieve those files in anticipation of discovery. When Loving Care's attorneys discovered the e-mails between Stengart and her attorney, not only did they read them but they used them to defend the case. Stengart's attorney requested that the e-mails be disregarded, returned and destroyed, but Loving Care's attorneys refused to do so, the opinion said.

The issue of whether Loving Care had violated Stengart's reasonable expectation of privacy in accessing and reading her e-mails and the issue of whether Loving Care's attorneys had breached their ethical duty wended its way through the New Jersey courts, and eventually up to the New Jersey Supreme Court. Recognizing that the use of computers at work is only increasing, and that employees have increasing concerns about privacy in their online activities, the court wrote a thoughtful and detailed opinion to support its decision in favor of Stengart.

The court acknowledged that e-mail communications between a client and her attorney are covered by the attorney-client privilege. Since it is the client who owns the privilege, it was essential to determine whether Stengart had waived the privilege by essentially leaving a trail for her employer to find.

The court emphasized Stengart's subjective expectation of privacy, evidenced by the fact that she took steps to protect the privacy of the e-mails by using her personal, password-protected e-mail account and not saving the login information on the computer.

The court took heed of the plaintiff's certification that she is "unsophisticated in the use of computers." such that she

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did not realize that all of her e-mails were saved in a cache folder and could be retrieved by a forensics expert. Knowledge of a company's forensic capabilities is not established merely by using a company computer. One of the reasons the communications were not deemed waived hinged on the fact that Stengart did not exhibit any indifference toward the privacy of the e-mails between her and her lawyer.

An additional key fact was consideration of the long-standing tradition and breadth of the attorney-client privilege. The existence of the standard warning at the end of the lawyer's e-mails indicating the privacy of the communication also added credence to Stengart's expectation that the communications were private. However, the court pointed out that this may not, on its own, protect a communication. Of course Loving Care had a policy that allowed it to monitor and review employee use of company computers. To help determine whether Loving Care's policy covered these e-mails, and again evidencing the seriousness the court took in considering this issue, the court granted amicus curiae status to the Employers Association of New Jersey, the National Employment Lawyers Association—New Jersey, the Association of Criminal Defense Lawyers of New Jersey and the New Jersey State Bar Association. The organizations gave advice based on their views of workplace privacy, the attorney-client privilege, and the increasing use of technology in the workplace.

According to the opinion, Loving Care's policy did address the ability of the employer to monitor use of company e-mail accounts and to review all matters on the company's media system and services. However, there was nothing to indicate that the employer could produce an image of the hard drive. Further, the policy stated that occasional personal use of computers was allowed, including personal use of e-mail. There was also nothing in the policy to indicate that copies of personal e-mails would be saved on the hard drive. After much discussion, the court decided that the policy was not sufficiently clear to put employees on notice that private e-mails could be retrieved.

An employer's ability to rewrite electronics policies around this could be difficult, however. The court stressed the important policy concerns regarding the attorney-client privilege, even going so far as to say that it would not enforce a company policy that forbids personal computer use and provides clear notice that e-mail communications with an attorney could be retrieved. The court found no reason for an employer to review contents of attorney-client privileges even if an employee is taking up an excessive amount of the work day engaging in such communications.

Finally, the court said that Loving Care's lawyers violated the Rules of Professional Conduct by reviewing and using privileged communications and not returning them to Stengart. No finding of bad faith was made, however, since the lawyers seemed to be legitimately relying on the belief that Loving Care's policy allowed them to utilize these e-mails. The court remanded the determination of sanctions to the trial court.

The significance of this opinion is that it emphasizes the importance of the attorney-client privilege in general, in e-mails, and in e-mails that are written on a company computer. It also addresses the fact that there can be a reasonable expectation of privacy in personal e-mails even if on a company computer. However, the holding is quite narrow as it only specifically addresses the privacy of attorney-client communications. The case will still likely be relied on by employees asserting their rights to privacy, and used by employers as a guide in drafting electronic communication policies. •

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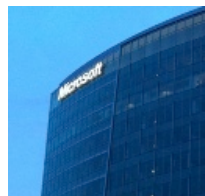
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