THE MOST CAREFULLY CRAFTED COMPUTER POLICY WILL NOT TRUMP AN EMPLOYEE'S ATTORNEY-CLIENT PRIVILEGE

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Does a policy that warns employees that they have no right to privacy when using the company's computers, and that the company may access and monitor all computer usage effectively trump any expectation of privacy that an employee might otherwise have in personal communications? Not entirely.

On March 31, 2010, the New Jersey Supreme Court held that a company policy that informs employees that their computers may be accessed, and their usage reviewed and monitored by the company can not operate as a waiver of the attorney-client privilege as to communications an employee has with her attorney using the company's computer. *In Stengart v. Loving Care Agency, Inc.,* (A-16-09, March 31, 2010), Chief Justice Rabner, writing for a unanimous Supreme Court, held that certain ambiguities in the company's policies regarding personal use of company computers could have left the employee with a subjective and objectively reasonable expectation of privacy over her communications with her lawyer. Significantly, however, the Supreme Court went a step further and held that even a more carefully crafted company policy that specifically advised that attorney-client communications using the company's computers would be accessed and read by the employer would not be enforceable.

Marina Stengart used a company-issued laptop to communicate with her lawyer through her personal, password protected, web-based e-mail account regarding legal issues that she faced at work. After Ms. Stengart filed an employment discrimination lawsuit and turned in her company-issued laptop, her employer retained a computer forensic expert who successfully retrieved e-mails between Ms. Stengart and her lawyer from a "cache" file, a folder of temporary internet files. The company's attorneys disclosed the e-mails to the employee's attorney, but not before reviewing them.

The company had in place a policy regarding use of the company computers that disclosed that the company reserved the right to "review, audit, intercept, access, and disclose all matters on the company's media systems," and that "e-mail . . . internet use and communication and computer files are considered part of the company's business and client records." The policy went on to state that while the principal purpose of e-mail is for company-business communications, "[o]ccasional personal use is permitted."

The trial court held that the company's computer policies put the employee on notice that her internet usage was not private and therefore operated as a waiver of the attorney-client privilege. The Appellate Division disagreed, and held that the company's counsel violated the Rules of Professional Conduct by reading the

communications between Ms. Stengart and her attorney.

The Supreme Court held that Ms. Stengart had a reasonable expectation of privacy in her e-mail communications with her attorney sent from her company laptop, but over a password protected, web-based e-mail account. The Court reasoned that because Ms. Stengart sent the e-mails not from her company e-mail account, but from her personal account, and because the company's policy permitted the "occasional personal use" of the company's computers and did not forbid use of personal, web-based e-mail accounts, Ms. Stengart's expectation of privacy was both subjectively and objectively reasonable. However, perhaps most significantly, the Supreme Court took a step not before it, and further advised that even a more clearly written company policy which banned all personal computer use, and which provided unambiguous notice to employees that the employer could retrieve and read an employee's communications with her attorney sent over a personal, web-based account would be unenforceable.

The lesson from *Stengart* is that even though an employer is entitled to adopt and enforce policies relating to computer usage to protect its assets, reputation and the productivity of its business, and may discipline employees for violating those policies, an employer may not read the specific contents of attorney-client communications, even if those communications are exchanged in violation of company policies.

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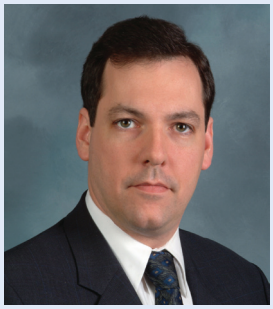

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