
INTELLECTUAL PROPERTY ALERT

ROBINSON BRADSHAW & HINSON

JULY 2009

# New Jersey Court Further Confuses Scope of Employer's Rights in Employee E-mail

**By Robert M. Bryan and John M. Conley**

In its June 26, 2009 decision in Stengart v. Loving Care, Inc., New Jersey's intermediate appellate court (the Appellate Division of the Superior Court) gave conflicting signals about the enforceability of an employer's policy on personal e-mails. The plaintiff was executive director of nursing at a nursing home company. Before resigning, she had consulted with a law firm about suing the company for discrimination, using a company-provided laptop to communicate with the law firm through her personal e-mail account. When she resigned and filed the suit, the company and its outside lawyers obtained a "forensic image" of the hard drive of Stengart's firm laptop. The company's law firm found and read Stengart's e-mails to and from her lawyer -- privileged communications under ordinary circumstances. When Stengart's lawyers learned of this during discovery, they demanded the return of the e-mails and the disqualification of the company's law firm, citing ethical rules on the accidental disclosure of privileged communications.

Citing relevant provisions in an employee manual, Loving Care argued that the e-mails were not privileged because the company owned the laptop and e-mail system and any messages that employees sent or received. But the court was not convinced that the manual created an enforceable policy, given that numerous drafts had been in circulation and apparently never finalized. There were also some inconsistencies in the wording of the relevant provisions. It also suggested -- but did not actually hold -- that it might be unwilling to enforce a unilateral policy that made personal e-mails the property of the company. The court ultimately concluded that, regardless of the status of the alleged policy, it would have to yield to the attorney-client privilege, and the company would have to return all copies of the e-mails. The case was sent back to the trial court to determine whether the company's lawyers would be disqualified.

Under unusual circumstances like these, most courts would probably give deference to the attorney-client privilege -- judges are lawyers, after all. The practical significance of this case lies instead in the court's ambivalence about the enforceability of Loving Care's e-mail policy. The court identified three problems, each of which is avoidable. First, it was unclear whether any particular version of the policy was ever effectively communicated to the employees. Second, the language of the policy was ambiguous in stating what employees could and could not do, and what their expectations of privacy should be. And third, the court had reservations about the company's unilateral imposition of a very one-sided policy.

To avoid the first problem, make sure that you control your policy drafting process, to avoid partial drafts being circulated, and that you clearly communicate the official version of your policy to every affected employee. On the second issue, write the policy in plain English, and make sure that different provisions do not contradict each other. You should also think through the scope of your policy. Would your wording clearly include personal e-mail transmitted through personal accounts (such as G-mail) but stored on computers owned by the company?

The third concern is more difficult to deal with, but it may help to communicate the policy to every employee at the time of initial hire and/or whenever the employee receives a promotion, change in compensation, or periodic review. In that way, the policy stands a better chance of being treated as part of the terms and conditions of employment. Some companies take this a step further by requiring employees to sign a simple computer system access agreement, including the policies, at the time of hire.