

Employees Cannot Expect Privacy in E-Mail Using Employers' Computers

Privileges can be lost when employees use work computers and the employer has reserved its right to access such e-mail

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Employees who believe their e-mail communications with their attorneys are privileged may actually be waiving the attorney-client privilege each time they send or receive e-mail via computers owned by their employer, according to a growing body of law.

For example, in *Scott v. Beth Israel Medical Center*, a New York trial court recently held that e-mails that a physician sent to his personal attorney via a computer system owned by his physician's employer were not protected by the attorney-client privilege. The physician was employed by the defendant hospital, which had an e-mail policy mandating that computer and e-mail systems could be used solely for business purposes and warning that employees had no expectation of privacy in any communication that was created, received, saved, or sent using the hospital's computers.

The physician argued the e-mails were privileged because they pertained to ongoing litigation between him and the defendant hospital. However, in rejecting the physician's privilege claim, the court stated that the "effect of an employer e-mail policy, such as that of [Beth Israel], is to have the employer looking over your shoulder each time you send an e-mail. In other words, the otherwise privileged communication between [the plaintiff and his personal counsel] would not have been made in confidence because of the [Beth Israel] policy." The court added that the physician had no reasonable expectation of confidentiality, because the hospital had published a "no personal use" e-mail policy, the hospital reserved the right to monitor all e-mails, and the physician knew of these policies.

Former Section Chair Gregory P. Joseph, New York City, warns that although lay people might perceive such a rule as unfair, attorneys should know otherwise. "When you're at work, it's not your computer," he says. "If it's clearly set out that employers have to be able to monitor what employees do . . . then it's only logical that means there is nothing confidential regarding what employees do using electronic communications at work."

Many employers maintain access to their employees' workplace electronic communications because they know they can be held liable for any wrongdoing by the employee in the workplace, Joseph notes. "Once the access is granted, the confidentiality is gone."

Daniel J. Capra, New York City, reporter to the Judicial Conference Advisory Committee on Evidence Rules, says that in determining whether an expectation of privacy exists, a key concern is whether the employee had reason to know that his employer could review his e-mails. "I

would think in most cases, the answer is 'yes.' If it's a published policy, you are deemed to reasonably know there could be this oversight by employers."

Capra says the legal principle espoused in the attorney-client privilege e-mail cases is based on the same reasoning used by courts in determining that employees' Fourth Amendment rights were not violated by employers who monitored their employees' computer usage pursuant to published company policy.

By analogy, Capra says, e-mails sent to an attorney by a client whose employer has a no-personal-use policy for office e-mails and computers are tantamount to spoken conversations between the client and attorney

that occur as if the employer were in the room. In such a case, there is no expectation of privacy because the attorney-client privilege would have been waived by the presence of a third-party (the employer), Capra says. □

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Resources:

Scott v. Beth Israel Medical Center Inc., 847 N.Y.S.2d 436 (N.Y. Sup. 2007).

John Gergacz, *Employees' Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege*, 10 COMP. L. REV. & TECH. J 269, 274-75 (2006), available at www.smu.edu/csr/articles/2007/Summer/SMC302.pdf.

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