

## **EMPLOYER AND ITS ATTORNEYS HAD NO RIGHT TO REVIEW EMPLOYEE'S PRIVILEGED EMAILS SENT VIA EMPLOYER'S COMPUTER, APPELLATE DIVISION HOLDS**

An employer had no right to possess or review attorney-client emails that were sent through an employee's personal, password-protected, web-based email account via a company computer, the Appellate Division ruled on June 26. Reversing a Law Division order, the court held that "the policies undergirding the attorney-client privilege" substantially outweigh the employer's interest in enforcing a unilaterally imposed workplace rule. Furthermore, the employer's attorneys contravened Rule of Professional Conduct 4.4(b) by reading the emails and using them in discovery without giving adversary counsel a chance to seek a ruling from a judge. The attorneys' actions could result in disqualification or other sanctions. Stengart v. Loving Care Agency, Inc., 408 N.J.Super. 54 (App.Div. 2009).

### **Employee Used Company Laptop to Communicate With Her Attorney**

Marina Stengart was Executive Director of Nursing at Loving Care, Inc. at the time of her departure from the company. She filed suit against the company claiming, among other things, constructive discharge and violations of the Law Against Discrimination. Shortly before her departure, she communicated by email with her attorney at Budd Lerner about the anticipated suit. The emails were sent through Ms. Stengart's personal, password-protected Yahoo account via a laptop provided to her by the company.

After Ms. Stengart filed suit, the company extracted and created a forensic image of the computer hard drive. The company's attorneys, Sills, Cummis & Gross, P.C., then reviewed numerous communications between Ms. Stengart and her attorney without advising adversary counsel (Budd Lerner) that it had come into possession of the emails. Many months later, the company referenced and included some of the attorney-client emails in answers to interrogatories. When Budd Lerner asked Sills Cummis to immediately identify all other similar communications, to return the originals and all copies and to identify all persons responsible for collecting them, Sills Cummis refused.

### **Law Division Judge Found No Privilege, No Impropriety**

A Law Division judge ruled that the emails became the property of the company by virtue of an electronic communications policy it claimed to have adopted (Ms. Stengart denied being subject to any such policy). The purported policy stated, among other things, that the company had the right to review, intercept and access all matters on the company's media systems; that email, Internet communications and computer files were considered "part of the company's business and client records," and that they were "not to be considered private or personal to any individual employee"; and that the principal purpose of email was for company business but that "occasional personal use" was permitted.

The Law Division judge also found no impropriety in Sills Cummis's conduct.

### Appellate Division Reverses

In reversing, the Appellate Division concluded that even if the company had adopted the policy it claimed to have adopted through the distribution of an employee handbook, and even if that policy applied to Ms. Stengart, the personal emails did not become company property. For an employer's rules and policies to be enforced, they must be reasonable: "We reject the company's ownership of the computer as the sole determinative fact in determining whether an employee's personal emails may become the company's property." The Appellate Division noted that "many highly personal and confidential transactions are commonly conducted via the Internet" at the click of a mouse. "Regardless of where or how those communications occur, individuals possess a reasonable expectation that those communications will remain private."

Furthermore, the emails in question were subject to the attorney-client privilege. That venerable privilege trumped the company's claimed interest in ownership of or access to the communications based on the purported electronic communications policy.

As for the conduct of the company's attorneys, the Appellate Division concluded that "counsel's actions were inconsistent with the obligations imposed by RPC 4.4(b)." That rule provides that when representing a client, "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." The court remanded the matter to a Chancery Division judge to conduct a hearing to determine whether Sills Cummis should be disqualified or otherwise sanctioned.

The appeal was argued by **Donald P. Jacobs**, a Budd Larner shareholder who often briefs and argues appellate matters. On the brief with Mr. Jacobs was **Allen L. Harris**, another Budd Larner shareholder.