



Communications May Still Be Privileged Despite Recovery Through Computer Forensics

An opinion from the Superior Court of Massachusetts held that communications between an employee and his attorney maintained their status as privileged despite the fact that they were recoverable by the employer by means of computer forensics.

In the case of *National Economic Research Associates, Inc. v. Evans, et al.*, 2006 WL 2440008 (Mass. Super. 2006), David Evans and his subsequent employer, LECG Corp., were sued by Evans' former employer, National Economic Research Associates, Inc. ("NERA"). The details of the cause are not provided, but presumably the action arises out of a nonsolicitation agreement signed by Evans while with NERA. During his employment with NERA, Evans had possessed and used a NERA-owned laptop computer. While planning his departure, Evans had various email communications with his personal attorney regarding his departure. These emails were communicated solely through Evans' personal password-protected Yahoo account, not his company account. Evans accessed the emails using his company-issued computer but never downloaded files to the computer. When Evans left NERA, he returned his computer, but before doing so, he deleted personal files and ran a "disk defragmenter," which he understood would prevent recovery of the deleted personal files. Unknown to Evans, his personal emails nevertheless remained on the computer's hard drive as temporary Internet files. After Evans' resignation, NERA retained a computer forensics expert, who searched the hard drive and recovered the privileged emails. Due to this recoverability, the parties disputed the privileged nature of the emails and whether the privilege had been waived.

The Court, relying heavily on the language of NERA's internal policies and procedures manual, held that the emails were privileged and not waived. This manual provided that emails may be ordered to be disclosed in litigation; that emails deleted in the ordinary course of business may be retrieved; that computer resources are the property of NERA and could be reviewed by NERA; that emails were not confidential and could be reviewed by NERA; and that Internet access logs were kept and could be reviewed by NERA. In light of these provisions, NERA argued that privilege could not exist because Evans should have recognized that the computer's hard disk belonged to NERA and was subject to its review, and thus Evans could not have made the communications "in confidence" - a requirement of attorney-client privilege. The Court disagreed, holding that the language of the manual was not sufficient to destroy the "confidential" nature of the emails. The Court clearly indicated the result would have been different if Evans had used his company email address, as the manual warned that these could be reviewed. However, all of Evans' emails at issue were sent via a personal Yahoo account, and the manual did not sufficiently state that NERA would review such personal emails. Nor did the manual state that NERA would review the *content* of Internet communications; it only stated that NERA would monitor the Internet sites visited. The Court rejected NERA's argument that a reasonable person would have know that the computer makes "screen shots" of all it sees and saves

these images as temporary files that could be retrieved by a computer forensics expert.

Regarding waiver of attorney-client privilege, the Court held that Evans had taken sufficient steps to ensure the confidentiality of the emails, and that any disclosure was thus inadvertent, which defeated a claim of waiver. Here, the Court looked to the fact that Evans never sent any privileged emails from his company email account, never downloaded these files to the hard drive, deleted personal files before returning the computer, and even ran a "disk defragmenter" in an attempt to ensure the personal files could not be retrieved.

The opinion herein illustrates the importance of the company's policies in establishing an employee's reasonable expectation of confidentiality. The authors recently reported on a case where the U.S. District Court for the District of New Jersey relied on the employer's internal policies in holding that the any attorney-client privilege in emails sent through the company's email system had been waived. See *Kaufman, et al. v. SunGard Investment Systems, Inc.*, 2006 WL 1307882 (D. N.J. 2006). The Court in the present case even stated that privilege, under the circumstances of this case, would not exist if the company had plainly communicated to its employees that 1) emails sent through personal email accounts but accessed with the company's computer are stored on the hard disk in a "screen shot" temporary file, and 2) the company reserved the right to retrieve and review such temporary files. Employment attorneys are advised to take these recent opinions into consideration when assisting companies in drafting companies' policies.