



Karyl Roberts Martin  
Direct dial: 603.627.8292  
Fax: 603.641.2394  
kmartin@sheehan.com

## Good Company

### Email and “Inadvertent” Waiver of the Attorney-Client Privilege

Friday, January 26, 2007

As email becomes a primary method of communication in the workplace, two recent decisions from the Business Litigation Session of the Massachusetts Superior Court raise issues concerning the attorney-client privilege that have important implications for both employers and employees.

The first case, *National Economic Research Associates, Inc. v. Evans*, No. 04-2618-BLS2, 21 Mass. L. Rptr. 337, 2006 WL 244008 (Mass. Super. August 3, 2006) (hereinafter “NERA”), involved an employee’s use of his work computer to correspond with his private attorney using his personal Yahoo! account. The employee used the laptop issued to him by his employer to send emails to his attorney regarding legal matters concerning his planned departure from the company. Unbeknownst to him, when he accessed his Yahoo! account through the Internet, information was copied via a “screen shot” onto temporary Internet files that were stored on the laptop’s hard drive. Although these files are not easily retrievable by the average computer user, computer forensic experts were able to retrieve some of the emails from the laptop’s hard drive after the employee returned the laptop to the company. The Court noted that the employee never intentionally copied any of the emails to the hard drive, nor did he forward them to his work email account. Prior to returning the laptop, the employee deleted his personal files (though not his work files) and ran a disk defragmenter program in an attempt to prevent later recovery of the deleted files.

The second case, *TransOcean Capital, Inc. v. Fortin*, No. 05-0955-BLS2, 21 Mass. L. Rptr. 597, 2006 WL 3246401 (Mass. Super. October 20, 2006) (hereinafter “TransOcean”), involved a corporate officer who corresponded with his privately-retained attorney using his work email account. The company later recovered the emails through its computer server and read them. On at least one occasion, the employee also intentionally disclosed the substance of the advice he received from counsel to a third party.

In *NERA*, the Court held that the employee had not waived his attorney-client privilege by corresponding with his attorney using his work computer because the employee did not know, nor could he have reasonably known, that the files were recoverable from the laptop’s hard drive. Likewise, the Court held in *TransOcean* that the employee did not waive the privilege by using his work email account to correspond with counsel because the company did not have an explicit policy retaining the right to review emails sent through the company’s network server. The Court did find, however, that the employee waived the privilege when he intentionally disclosed the

content of his attorney's advice to a third party.

These decisions provide important guidance for employers who wish to retain the right to read and review employees' email communications and Internet activities. In both cases, Judge Gants carefully scrutinized the companies' written policies and procedures concerning the use of computer resources and email accounts to determine whether the employee reasonably should have expected that the communications were made in confidence. NERA had a detailed Policies and Procedures Manual that was posted on the company's Intranet. Among other things, the Manual provides that all computer resources are property of the company and that the company, at its discretion, can review any information sent or stored using company equipment. The Manual also provides that emails "are not confidential" and may be read during "routine checks," and that emails "deleted in the ordinary course of business may be retrieved." *NERA*, 2006 WL 244008, at \*2. With respect to Internet usage, the Manual provides that "all Internet access is logged by user" and "misuse of Internet resources can be easily traced." *Id.* at \*3. Despite all of these explicit warnings, the Court found that NERA had failed to warn its employees that the content of email communications sent through personal, Internet-based email accounts could be retrieved from the computer's hard drive and read by the company. Because NERA did not tell its employees that it could monitor email sent over the Internet from personal email accounts, the Court concluded that the employee reasonably could have expected his communications with counsel to remain private.

In contrast, TransOcean made the mistake of not even having an explicit policy concerning the use of company email accounts. TransOcean attempted to rely upon the employee handbook of the company that handled its human resource matters, including payroll. That handbook provided that all communications transmitted, received or stored through the company's information systems belonged to the company and could be monitored to ensure proper usage of the systems. The Court found that if TransOcean had provided that handbook to its employees or expressly informed them that it was adopting the handbook as its own, then the employee would have waived the privilege by using his work email account to correspond with his attorney. As there was no evidence that the employee knew that TransOcean had a policy or practice of reviewing emails sent over its system, the Court found that he had not waived the privilege through use of his work email account.

These cases highlight the importance of having explicit, detailed policies and procedures governing employees' use of the company's information systems and email accounts. The policies should be reviewed and updated periodically to keep pace with changes in technology that give employers additional tools for monitoring and reviewing activity on the company's computer resources. The policies also should be posted on the company's Intranet and/or distributed to employees on a periodic basis to ensure that they have adequate warning that their use of company resources can be monitored.

#### **LESSONS FOR EMPLOYEES**

Judge Gants' decisions also contain valuable lessons for employees who wish to communicate with privately-retained counsel over email. First, because most employers retain the right to review communications sent through a company email account or over the company's server, a court is likely to find that the privilege is waived if any of these resources are used. Indeed, in both cases, the Court noted that if the employee had used his work email account *and* the employer had retained the right to review communications sent through that account, the privilege would have been waived.

Second, although the Court found in *NERA* that the employee could not reasonably be expected to know that screen shots of emails sent from a private Internet account are stored on a computer's hard disk, the case serves as a warning to employees who use their work computers to access the Internet for personal use. Judge Gants noted that he did not know, prior to this case, that screen shots are routinely stored on a computer's hard drive – but he certainly knows it now, as does anyone who reads his decision. As electronic discovery grows and proliferates in litigation, the expected knowledge base of an "average user" will continue to expand. Certainly, other judges may be less inclined to rely upon an opinion issued by the American Bar Association in 1999 concerning the "reasonable expectation of privacy" that can be enjoyed when communicating through an Internet email account, given the changes in technology in the intervening years.

CELEBRATING

75<sup>yrs</sup>

SPBG

SHEEHAN  
PHINNEY  
BASS +  
GREEN PA

*the business law firm*

Finally, the Court held in *TransOcean* that even though the company failed to adopt an explicit policy covering use of its computer resources, the employee nonetheless waived the privilege when he disclosed the content of his attorney's advice to a third party. The employee could have avoided this outcome if he had simply told the other party that he was choosing a particular course of action "after consultation with counsel." However, by disclosing in significant detail the substance of his attorney's advice, the employee waived the privilege as to that advice (though not as to all of his communications with counsel). Likewise, a court is likely to find the privilege waived through actions such as forwarding an email to a third party or carbon copying another party on an email sent to counsel. Employees must take every reasonable step to ensure that their private communications with counsel over email remain private.

***This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and Sheehan Phinney Bass + Green or the Sheehan Phinney Capitol Group. The opinions expressed in Good Company are those of the authors of the specific articles.***