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Appellate Court Finds No Legitimate Business Interest Furthered By Employer's Electronic Communication Policy

How Employers Should Respond to the Stengart *Decision*

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July 2009

While many employers worry that some court decisions will add "insult to injury," New Jersey employers must now be aware of *Stengart v. Loving Care Agency Inc., et al.*, --- A.2d ----, 2009 WL 1811064 (App. Div. 2009), approved for publication June 26, 2009, which presages adding "injury to injury." That is because it first injures employers' interests by stating that, even giving an employer "the benefit of all doubts" about the applicability and dissemination of its electronic communications policy and giving it the "broadest interpretation…permitted" by its language, an employee may reasonably assume that he/she can have private, privileged communications with personal counsel concerning matters adverse to the company, and may do so during work time using the employer's resources. 2009 WL 1811064, *9. And if that were not injury enough to the employer's interests, in having employees actually work on company business while at the office using the company's resources, the *Stengart* Court then goes on to add another possible injury—on remand, the trial court should consider disqualifying the company's counsel for not immediately returning to the departed employee (or her counsel) all copies of such communications. *Id.* at *10. The *Stengart* decision demands that New Jersey employers not only revisit their written policies, but also that they consider how such policies are actually being applied and enforced.

Background

Plaintiff Marine Stengart was the Executive Director of Loving Care, Inc., a home care services agency, who resigned and the sued Loving Care for constructive discharge under the New Jersey Law Against Discrimination. Stengart was issued a company laptop computer. Despite some factual discrepancies between the parties as to the content and dissemination of certain policies, the Appellate Division also assumed for

its analysis that the company had a well-publicized electronic communications policy that made all aware that the employer's computer and system (including those allowing for internet access) were all company property, to be used for company business, and that the company believed that there was no reasonable expectation of privacy in any communications that an employee had through such equipment or system because the communications were, as announced in the policy, subject to monitoring, were considered the property of the company, and were embedded within the company's physical property. Stengart, nonetheless, used her company computer to communicate with her personal counsel through her Yahoo account. Such communications were discovered by her former employer on that computer after her termination. Loving Care's counsel did not immediately disclose the existence of such communications to Stengart or her counsel, and instead referenced and included those of relevance to a response to a later discovery request.

The Court's Analysis

The Appellate Division's analysis is driven by two basic factors, one case specific, one more general, on the issue of whether a privilege ever existed or was waived.

Of specific concern to the Court was Loving Care's written policy, which clearly stated that "E-mail and voice mail messages, internet use and communication and computer files are considered part of the company's business and client records," that "such communications are not to be considered private or personal to any individual employee," that the company reserved the right to "review, audit, intercept, access and disclose" all matters found on the company's computers, servers and systems, and that "the principal purpose of electronic email (email) is for company business communications." But it also stated that "occasional personal use is permitted." 2009 WL 1811064, *1-2. The Court, "assuming the policy…was in effect," and despite language in the policy that specifically applied to "internet use and communication" in addition to e-mail, found that "an objective reader" might not conclude that that the policy applied to using a work computer to access a personal, password-protected Yahoo account. *Id*. at *1-3. Moreover, the Court held that the company's reasonable statement that "occasional personal use" of the company email would be tolerated somehow further frustrated the company's effort to thwart the creation of any reasonable expectation of privacy.

But, more generally, the *Stengart* Court found that the interests protected by the attorney-client privilege outweighed employers' interests in enforcing electronic communications policies. In doing so, the Court seemed to ignore the fact that privileged communications require an expectation of confidentiality, and none should have arisen on the facts of this case, where the Court was giving an employer "the benefit of all doubts" about the applicability and dissemination of its electronic communications policy and giving it the "broadest interpretation…permitted" by its language. *Id*. at *9. The Court's analysis suggests strongly the policy's provision allowing for occasional "personal" use somehow created an expectation of privacy, ignoring the distinction between "private" and "personal." In *Stengart*, the terms were

used interchangeably, even though the words do not necessarily carry the same connotation.

The rhetoric of *Stengart* implies that a policy cannot be written that would have led this Court to have found any claim of privilege inert or waived. That reading is certainly furthered by the Court's remand to consider whether the employer's counsel should be disqualified under RPC 4.4(b) for having kept and reviewed the communications.

Takeaways and Next Steps

The decision leaves employees with several questions that we will try to help you answer:

1. *Do you, as an employer, want a policy that reaches otherwise privileged or private communications?* You do. Though the *Stengart* Court says that "no legitimate business interest" is furthered by transforming all private communications into company property, 2009 WL 1811064, *7, the Court misses the important point that many legitimate business interests are furthered by stemming private communications during work, the most basic being the employer's interest in having work being done at work. Indeed, the very examples of what is accessible instantly "with the touch of a keyboard or a click of a mouse" (*e.g.*, medical records, bank accounts, phone records, and tax returns) illustrate full well that these are the very sort of personal items that an employer has a great interest in keeping from being disclosed in or to the workplace. *Id*. In warning employees that what is personal and private will be neither if brought into the workplace, employers are protecting themselves and their employees, and also assuring that they are not paying employees to come to work to work on personal medical, financial or other matters between lunch breaks and coffee breaks.

2. *Does Stengart allow for the creation of such a policy?* It does. But drafting and then upholding that policy against legal challenge will take great care. We know this because a close reading of *Stengart* leaves the careful room to operate. For instance, *Stengart* says that "when an employee, at work, engages in personal communications via company computer, the company's interest….is not in the content of those communications," but in the fact that such personal communicative conduct is occurring. *Id*. at *7. Of course, overlooked by the Court is that one cannot define the communicative activity as one outside the employer's business interests without knowing the content that would show that. Thus, the *Stengart* Court's distinction between communicative conduct and communicative content fails analytically, which is implicitly acknowledged by the Court's noting that an employer may have an interest in certain types of personal content as reflected in previously decided cases. *Id*. As the *Stengart* Court states, the "specificity" of a policy's subparts "negates any expectation the employee may have" as to "engaging in those types of communications." *Id*. at fn. 7. Therein lies one key to employers' reaction to this decision—make your policies specific and detailed, and work with counsel experienced in helping one express that specific policy appropriately. At a minimum, this means documenting specifically that "personal" use means non-business, but does not mean "private" or "confidential."

3. *With or without a new policy, what do you do if you find attorney-client communications on a departed employee's computer?* The first thing that one must do is collect, segregate and preserve such communications. Once that has been done, whether by one's internal IT staff or outside IT consultants, the existence of such documents should be made known to outside counsel. Then things get a little more complicated. If the employer is already in litigation, it would appear that *Stengart* compels one to either then turn over all copies to the plaintiff and his/her counsel or present them to the court for *in camera* review as to whether or not they are privileged or if privilege has been waived. 2009 WL 1811064, *9-10. Because fully reviewing the documents at issue after becoming aware that they are arguably privileged raises the possibility of later disqualification under RPC 4.4(b), an employer may even consider retaining special counsel separate from regular employment counsel to handle the application to the court, and to advise the client concerning the issues that have arisen without running the risk of having primary defense counsel disqualified from the matter. An even more sensitive, nuanced analysis will be required if that matter is not yet in litigation, and there is no already designated third party decisionmaker available. At that point, the employer, along with employment counsel and possibly special counsel, must carefully weigh a number of practical, legal, ethical and business factors before determining how to approach the relevant issues. Having both employment counsel and possibly special counsel familiar with those issues and the new landscape defined by *Stengart* will be essential to avoiding damaging ones position concerning claims that the departed employees are expected to file.

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