INTERNATIONAL LAWYERS NETWORK

September 27, 2011 by Epstein Becker & Green

ABA Opinion Limits Lawyers' Ethical Duty To Notify Opposing Counsel Upon Receipt Of Adverse Party E-mail Communications With Counsel

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When defending a litigation filed by a current or former employee, it is now routine practice for the employer's counsel to review the employee's workplace e-mails and computer for information relevant to the employee's claims or the employer's defenses. This, of course, is consistent with the principle that the employer's e-mail and computer systems are the property of the employer and employees have no expectation of privacy with respect to electronic communications sent or received via their employer's systems. If, however, an employee has communicated with his counsel using his work-issued e-mail address or computer, does defense counsel have an obligation to notify opposing counsel of his or her possession of the communications?

According to the American Bar Association's Formal Opinion 11-460 (August 4, 2011), if an employer's lawyer receives copies of an employee's communications with counsel, which the employer located in the employee's work e-mail or on the employee's workplace computer, neither Rule 4.4(b) nor any of the other Model Rules of Professional Conduct imposes an ethical duty on defense lawyers to notify opposing counsel of the receipt of such communications.

Rule 4.4(b) states that "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The ABA concluded that Rule 4.4(b) does not apply because e-mails between an employee and his or her counsel are not "inadvertently sent" by either party. The ABA also declined to conclude that Rule 4.4(b) implicitly addresses this situation, despite the fact that several courts have found that the principles underlying Rule 4.4(b) have required disclosure in analogous situations. For example, the Supreme Court of New Jersey, in Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010), held that defense counsel violated New Jersey's version of Rule 4.4(b) by failing to disclose their discovery of communications between the plaintiff and her lawyer on her personal, password protected e-mail address, found on the plaintiff's work-issued computer.

The ABA also made clear, however, that while the Model Rules do not independently impose an ethical duty to notify opposing counsel of such communications, if the applicable jurisdiction has recognized a legal duty in this situation (as New Jersey did in *Stengart*) then a lawyer may still be subject to discipline for not disclosing these communications.

Moreover, as the ABA also advised, even if there is no notification obligation in a specific jurisdiction, it is often in the employer's and the employer's counsel's best interest to give notice of the discovery to opposing counsel, or to seek the court's guidance on how to proceed before using or reviewing the communications. This approach will help avoid the costly motion practice that may result from failing to disclose the communications when first discovered. This approach will also avoid the possibility that the jurisdiction will take a tougher approach than the ABA, as New Jersey has, and hold that the failure to disclose the communications when first discovered violates that jurisdiction's ethical rules.