

## ABA Ethics Opinion: Lawyer's Duty to Protect Confidentiality of Email Communications with Client

By Susan A. Ardisson, Esq.

Counsel, are you emailing your client at work? Or does your client access the email you send to her personal account from her office computer or BlackBerry? Addressing the possibility that the confidentiality of these communications may be “jeopardized” in such situations, on August 4, 2011, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 11-459. The Opinion provides that lawyers have a duty to warn a client about “the significant risk” that email sent, received or accessed on a work computer or other device may be read by an employer or other third party. Recognizing that many employers’ policies permit the employer to access all company-owned computers, smartphones and other electronic devices, and recent cases on the waiver of attorney-client privilege such as *Scott v. Beth Israel Medical, Inc.* 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007) (see insert) and *Stengart v. Loving Care Agency, Inc.*, 990 A2d 650 (N.J. 2010), the Opinion states that:

A lawyer sending or receiving substantive communications with a client via email or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device or email account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyers communications via email or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another party.

Citing Model Rules 1.1 and 1.6(a) regarding the obligation to provide competent representation and duty to

refrain from revealing information relating to the representation of a client, the ABA Opinion provides that a lawyer should take “protective measures” to prevent the disclosure of such confidential communications. These measures include “refraining” from sending emails to the employee’s work account and “cautioning” the client against using a business computer or other company-owned device to send, receive or access confidential communications.

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### “When Company Policy Prohibits Personal Email Use: Looking over an Employee’s Shoulder”

It feels like a private communication - arriving at the office early in the morning before any co-workers, answering email, including an email from your lawyer about quitting your job. No one else has access to the computer. But there is a company policy stating that its computers and communication systems are to be used for business purposes only and employees have no personal privacy rights regarding their email. According to a recent case, the effect of such an employer email policy “is to have the employer looking over your shoulder each time you send an email.” *Scott v. Beth Israel Medical Center, Inc.*, 2007 WL 305451 (N.Y. Sup. Ct. 2007). The result is these communications are not privileged, and may be reviewed by the company and used in subsequent litigation.

(To review the December 2007 issue of qubit on the *Beth Israel* decision, please [click here](#).)

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