

November 7, 2007

MEMORANDUM TO: Clients and Friends of the Firm

FROM: James Q. Walker
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RE: Employers Need To Revisit E-Mail Policies In Light Of Court Decision Rejecting Attorney-Client And Work Product Privileges¹

In the second of two recent decisions significantly narrowing the availability of the attorney-client privilege in connection with electronic communications,² New York State Supreme Court Justice Charles E. Ramos ruled that e-mails between an employee and his personal attorneys are not privileged because they were transmitted over the employer's e-mail server. The Court reasoned that the employer's computer use and monitoring policy eliminated the expectation of confidentiality necessary to protect privileged communications, and inclusion in the e-mails from the employees personal attorneys of a *pro forma* "privileged and confidential" notification was not enough to protect the privilege.³

The ruling in *Scott* raises important issues regarding a company's e-mail use policies and a private lawyer's means of communicating with clients. E-mail use and monitoring policies promote important company objectives, including deterring employees from sending personal e-mails from work, controlling the ways in which employees communicate with the company's clients and business partners, and facilitating the ability of companies to monitor e-mail communications and investigate misconduct. These policies, however, are not intended to inhibit, or make discoverable by adversaries, an employee's communications with personal attorneys—especially when those attorneys have been retained at the company's request to assist the employee's cooperation with a government investigation or civil litigation. Yet, after the decision in *Scott*, in-house counsel may discover that their company's computer use policies create exactly those consequences. In addition, outside counsel may find that they are eliminating the privileged status of some of their client communications.

Below we summarize the background of the case, analyze its holding and the implications for the attorney-client and work product privilege, and suggest strategies that in-house and outside attorneys may consider in light of the decision.

¹ In some jurisdictions, this memorandum may constitute attorney advertising. This memorandum was prepared as a service to clients and other friends of RK&O to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied upon as legal advice.

² On October 17, 2007, our firm circulated a memorandum to clients reporting on a recent federal court decision, *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789 (E. D. La. 2007), that significantly limits the application of the attorney-client privilege over e-mails between in-house counsel and their fellow employees. To review this memorandum, please visit our firm website at www.rkollp.com.

³ *Scott v. Beth Israel Medical Center*, -- N.Y.S.2d --, 2007 WL 3053351 (N.Y. Sup. Oct. 17, 2007). A copy of this decision may be found at http://decisions.courts.state.ny.us/fcas/FCAS_docs/2007/OCT/3006027362004011SCTV.pdf

Case Background

The lawsuit concerns a wrongful termination claim brought by Dr. W. Norman Scott, a physician previously employed by Beth Israel Medical Center ("Beth Israel"). Dr. Scott contends that Beth Israel terminated him without cause, and therefore owes him \$14 million in severance under the terms of his employment agreement. He moved for a protective order seeking the return of e-mails with his personal attorneys that were transmitted over Beth Israel's e-mail server. Relying primarily on New York CPLR § 4548, which provides that communications do not lose their privileged status solely because they are sent by e-mail,⁴ Dr. Scott argued that his e-mails with attorneys were protected by the attorney-client privilege. He also maintained that any e-mails drafted in anticipation of litigation were protected by the work product privilege.

The Attorney-Client Privilege

Justice Ramos ruled that the attorney-client privilege does not attach to the relevant e-mails because Beth Israel's e-mail policy gave notice that employees have no personal privacy rights to communications sent through the company's e-mail server.⁵ In concluding that Dr. Scott's e-mails with his attorneys were not sent with a reasonable expectation of confidentiality, Justice Ramos applied the four-part test set forth in *In re Asia Global Crossing, Ltd.*⁶ Under this test, the attorney-client privilege is inapplicable if

- The company maintains a policy banning personal or other objectionable use;
- The company monitors the employee's use of the computer or e-mail;
- Third parties have the ability to access the employee's computer or e-mails; and
- The company notifies the employee, or the employee is aware, of the use or monitoring policies.

Justice Ramos held that the *Global Crossing* factors had been satisfied. Regarding the first two factors, Beth Israel's e-mail policy provided that its electronic mail systems should be used for business purposes only and that employees had no personal privacy right in any material

⁴ The relevant language of CPLR § 4548 provides that "no communication under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

⁵ Beth Israel's e-mail policy, which applies to everyone who works at the hospital, "and all other persons who use or have access" to its communications systems, provides that (1) "All Medical Center computer systems, telephone systems, voice-mail systems, facsimile equipment, electronic mail systems, Internet access systems, related technology systems, and the wired or wireless networks that connect them are the property of the Medical Center and should be used for business purposes only;" (2) "All information and documents created, received, saved or sent on the Medical Center's computer or communications systems are of the Medical Center. Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice." *Scott*, 2007 WL 3053351, at *2.

⁶ 322 BR 247 (S.D.N.Y. 2005).

created or sent through the company's e-mail server. The third factor had been rendered inapplicable by CPLR 4548, which provides that potential access to e-mails by third parties does not invalidate the attorney-client privilege. As to the fourth factor, Beth Israel's e-mail policy gave the company the right to access and disclose e-mails sent through its server "at any time without prior notice." Accordingly, Dr. Scott's communications with his attorneys were not made with a reasonable expectation of confidentiality, and the attorney-client privilege was inapplicable.

The Work Product Privilege

Justice Ramos also ruled that the work product privilege had been waived. Work product privilege is waived when a communication from an attorney to a client prepared in anticipation of litigation "is disclosed in a manner that materially increases the likelihood that an adversary will obtain the information."⁷ Although an inadvertent production of privileged work product generally will not waive the privilege, there is an exception if the party's conduct is deemed so careless as to suggest a lack of concern with protecting the privilege.⁸ In *Scott*, Justice Ramos surprisingly rejected the argument that the standard e-mail caution that accompanies e-mails from attorneys – and which accompanied the e-mails from Dr. Scott's lawyers⁹ – was sufficient to protect e-mails from Dr. Scott's attorneys. "[W]hen client confidences are at risk, [a lawyer's] *pro forma* notice at the end of the e-mail is insufficient and not a reasonable precaution to protect its clients."¹⁰

Implications of the *Scott* decision

The *Scott* decision has important implications both for in-house and outside counsel. In-house counsel should note that, while this case involves a lawsuit in which a former employee and employer are adverse to one another, the court's ruling is equally applicable where the interests of employer and employee are aligned. For example, where employer and employee are both sued in the same civil litigation, or are both being investigated by the SEC, DOJ or some other regulatory or governmental agency, the employee frequently obtains separate counsel due to existing or potential conflicts. In those instances, despite the conflict situation, the interests of employee and employer often are largely parallel. Yet, based on the *Scott* decision, the adverse civil litigant, or prosecutor or regulator, could seek production of the employee's electronic communications with his personal attorney (to the extent they are sent over the employer's e-mail server). As the employer's liability is often derivative of the employee's conduct, producing those e-mails could have adverse consequences for both parties.

⁷ See *Scott*, 2007 WL 3053351, at *5 (citing *Bluebird Partners, L.P. v. First Fidelity Bank, N.A., New Jersey*, 248 A.D.2d 219, 225, 671 N.Y.S.2d 7, 12-13 (1st Dept. 1998)).

⁸ See *SEC v. Cassano*, 189 F.R.D. 83, 85 n. 4 (S.D.N.Y. 1999).

⁹ Dr. Scott's lawyers appended cautionary language to each e-mail noting that it was "intended only for the use of the Addressee and may contain information that is *privileged and confidential*." *Scott*, 2007 WL 3053351, at *5.

¹⁰ See *Scott*, 2007 WL 3053351, at *8. See also N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004) (cautioning that lawyers must use "reasonable care" in e-mail communications to ensure no inadvertent disclosure of confidential information), reprinted at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6871.

Outside counsel should take note as well. Indeed, Justice Ramos has effectively issued a warning that unless an outside attorney knows that his client's employer protects the privileged communications of its employees, e-mailing a client at his work e-mail address may be deemed so careless as to waive any privilege protection that might otherwise apply.

Actions for In-House Counsel to Consider

Computer use and e-mail policies are tailored to address a range of company objectives depending on the size of the company, the nature of the business, and the manner in which e-mail is used in the particular industry. Given the effect that these policies may have on the attorney-client and work product privileges in light of the *Scott* decision and other decisions narrowing the privilege, in-house counsel may wish to review these policies to ensure that they are narrowly crafted to accomplish the company's goals, and undertake a risk-benefit assessment to the extent that these policies may create unexpected and adverse consequences. The following are a few steps that in-house counsel may consider:

- Amend the company's computer use and e-mail use policy to
 - 1 clarify that employees have a privacy and confidentiality right to communications with their personal attorneys;
 - 2 provide that the company does not intend to monitor, review or disclose communications between employees and their personal attorneys; and
 - 3 require that employees notify their employer of the names of any personal attorney with whom they intend to communicate through the company's e-mail server in order to decrease the likelihood that the company inadvertently reviews those e-mails or produces them to adverse parties.
- Advise employees to designate as privileged all confidential e-mails with private lawyers.
- Include a caution on company e-mails that the firm monitors employee e-mails except those it is on notice are confidential communications with personal counsel.
- Enter into a clawback agreement during civil litigations, and include a provision expressly providing that either party may give notice of an inadvertent production of privileged employee e-mails, and that recipients agree not to use the information contained in the e-mails in the litigation and to return or destroy any copies.¹¹

¹¹ A "clawback" agreement establishes a mechanism whereby privileged communications produced inadvertently will not be deemed waived provided that the producing party identifies the mistakenly produced documents pursuant to the terms of the agreement. The receiving party is obligated to return or destroy the documents upon notification, and agrees not to assert that the production constituted a waiver of the privilege. Newly amended Rule 26(b)(5)(B) of the Federal Rules of Civil Procedures, which will become effective on December 1, 2007, codifies the practice of entering into clawback agreements, or similar agreements, to further protect the privilege.

Actions for Outside Counsel to Consider

The *Scott* decision has immediate implications for the ways in which outside counsel protects its confidential communications with clients. To avoid risking any waiver of applicable privileges, outside counsel should consider the following steps:

- Explain the attorney-client and work product privileges to your client, and the risk to those privileges when communicating by e-mail. This includes discussing the accessibility of e-mail by third parties and the risk of inadvertently e-mailing confidential information to someone who stands outside the privilege.
- Find out whether the client's employer has an e-mail or computer use policy, and obtain a copy of the policy. After reviewing the relevant policy, discuss with the client whether it is advisable to communicate via company e-mail and, if so, whether any limitations should be placed on those communications.
- Be cognizant of the potential personal risk with respect to e-mail communications with clients. Failure to take steps to protect client confidences is a violation of an ethical duty owed to clients, and could lead to disciplinary action against the attorney.¹²
- Advise your clients to place any saved e-mails with counsel into a segregated folder marked "attorney" or "privileged."
- Mark all e-mail communications with clients "privileged and confidential."

Conclusion

As Justice Ramos warned, the effect of many employer e-mail policies is to "have the employer looking over your shoulder each time you send an e-mail."¹³ Both in-house and outside counsel therefore would be wise to consider carefully the far-reaching consequences of the *Scott* decision — as well as the larger trend to narrow the privileged status of e-mail communications — and to develop and implement strategies to ensure that the attorney-client privilege is appropriately asserted and maintained. For more information about the issues presented in this memorandum, please contact the authors, James Q. Walker and Daniel C. Zinman.

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¹² See New York Code of Prof'l Responsibility, DR 4-101 [22 N.Y.C.R.R. § 1200.19(1990)]; ABA Model Rules of Prof'l Conduct, R. 1.6 (2000).

¹³ *Scott*, 2007 WL 3053351, at *6.