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[Matthew D. Austin](#)

[Charles Dyas, Jr.](#)

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CAN EMPLOYEE HAVE SECRET COMMUNICATIONS WITH PRIVATE ATTORNEY ... ON A COMPANY COMPUTER!?

Provided that you have a good technology use policy, signed off on by employees when they begin employment, and uniformly enforced, what happens on your company computers belongs to the company. The company can reasonably monitor employees' use and, when it finds employee wrongdoing, take appropriate action in response. *Right?*

That has normally been the case, but several cases in recent years call this principle to the question. The basic scenario is this: Employee communicates with employee's personal attorney in whole or in part using the employer's technology. Employer has occasion to review employee's technology use - usually but not always after employee has been terminated - and learns of these communications, and employee's lawyer immediately seeks to protect the communications as privileged.

The understandable reflex response of employers is that, if the policy described above is in place, there is no expectation of privacy in communications undertaken with company technology. Therefore, the employee knew the company had the right to monitor those communications, and in effect waived the attorney/client privilege when the employee chose to undertake those communications on technology resources he/she knew were not private. Several courts have in fact followed that analysis.

The New Jersey Supreme Court's March 30, 2010 decision in *Stengart v. LCA Holdings, Inc.*, however, represents an increasingly common view on this issue. Following her resignation, Marina Stengart sued the employer, Loving Care, alleging among other things a hostile work environment leading to her constructive discharge in violation of discrimination laws. Loving Care had provided Stengart with a laptop computer and a work e-mail. She had communicated with her attorneys about her anticipated lawsuit against Loving Care via e-mail sent from the laptop, by accessing her personal Yahoo! account. After she filed suit, Loving Care

discovered and read numerous communications between Stengart and her counsel.

During the lawsuit, Loving Care referenced some of these communications. Stengart's counsel requested the immediate identification of similar communications, the return of the originals and all copies, and the identification of the individuals responsible for collecting them. The trial judge, however, found that the e-mails were not protected by the privilege. Specifically, the court held that the company's electronic communications policy put Stengart on sufficient notice that her e-mails would be viewed as company property -- the result most businesses would expect. However, the appeals court and now the state's Supreme Court found that Stengart could reasonably expect that her communications would remain private despite the company's policy. While Ohio is not yet among the states to have weighed in on this question, the case represents an increasing trend of courts to carefully scrutinize technology use policies, and calls for all organizations to carefully examine these policies.

RELATED RESOURCES

[Review of case law](#)

[Stengart decision](#)

[Video of Stengart argument](#)

[Sample technology use policy](#)

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[Federal wiretapping statutes](#)

- [18 U.S.C. 2510](#)

- [18 U.S.C. 2701](#)

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