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Federal Court Holds That E-Mail Received By Employee From Lawyer on His Work E-Mail System Is Not Privileged

In a recent decision, Judge Roslynn Mauskopf, United States District Judge for the Eastern District of New York, denied defendant Christopher Finazzo's motion *in limine* to preclude the government from introducing an allegedly privileged e-mail that Finazzo's personal attorney sent to Finazzo's work e-mail account at the clothing retailer Aéropostale, Inc. ("Aéropostale"), his former employer.[1] In the e-mail, Finazzo's attorney attached a list of Finazzo's assets that the attorney prepared for the purpose of creating a will.[2] Finazzo was asked to review the values listed in the attachment, and the lawyer would draft a revised will based upon information received from Finazzo.[3] The government sought to use the e-mail in support of its case against Finazzo for, among other things, mail fraud, wire fraud, and conspiracy.[4] It contended that the e-mail was not privileged, because (i) Aéropostale's policies regarding use of its e-mail accounts provided that (a) the e-mail system should generally be used for Company business only; (b) employees have no expectation of privacy in the use of the Company's e-mail system; and (c) Aéropostale reserves the right to monitor or review employee e-mails, and (ii) Finazzo was aware of Aéropostale's policy.[5]

Finazzo argued that the e-mail was privileged, that Aéropostale's policy regarding its corporate e-mail accounts did not defeat Finazzo's reasonable expectation of privacy, and that Finazzo did not ask his attorney to send the privileged e-mail to his Aéropostale account.[6] The Court disagreed, finding that Finazzo had no reasonable expectation of privacy or confidentiality in any communication made through his Aéropostale e-mail account because of the way in which Aéropostale drafted and implemented its computer, e-mail, and Internet usage policy, which was explained in Aéropostale's Employee Handbook that Finazzo acknowledged reading.[7]

We have written previously about whether the attorney-client privilege protects an employee's personal documents and e-mails stored on a company computer or sent through a company's network.[8] Courts generally have found that documents or e-mails created on or sent through a company computer may be confidential and/or privileged if the employee possesses a subjective expectation of confidentiality in those documents that a court finds objectively reasonable.[9] A four-factor test (or some derivative thereof) is used to make this determination:

1. Is there a company policy banning personal use of company e-mail?
2. Does the company monitor the use of its e-mail?
3. Does the company have access to all e-mails? and
4. Did the company notify the employee about these policies?[10]

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This is the test that the *Finazzo* court used as well.[11]

So, in light of a fair number of decisions on this subject, what makes this decision important is the fact that Finazzo's attorney, not Finazzo himself—who was not bound by Aéropostale's e-mail policy—sent the e-mail that the Court deemed non-privileged. Although many Courts have examined whether an employee who has sent and exchanged privileged e-mails with his or her lawyer may rely upon an expectation of privacy in light of an employer policy that restricts the personal use of the company's e-mail system,[12] we are unaware of any Court which has previously held that the attorney-client privilege is waived by an employee's mere *receipt* of a privileged e-mail from his or her lawyer.

Generally, an attorney cannot unilaterally waive the privilege for his or her client.[13] However, here, the Court found that Finazzo's having admitted he previously corresponded with his attorney via his Aéropostale e-mail account and having never told his attorney not to send privileged information to his Aéropostale e-mail account were important considerations in determining that Finazzo did not ensure and preserve the confidentiality of communications with his attorney[14] as required to prevent a waiver.[15] This was despite the fact that Finazzo asserted that he never asked or authorized his attorney to send any confidential, sensitive, or privileged materials to his Aéropostale e-mail account.[16] Finazzo also asserted that, immediately upon receiving the e-mail, he forwarded it to his personal e-mail account, deleted the e-mail from his inbox, and instructed his attorney only to send confidential information to his personal e-mail address.[17] The court was unpersuaded by these arguments as well because, by forwarding the e-mail to his personal account, he sent it back through Aéropostale's e-mail servers, providing Aéropostale another opportunity to see the e-mail.[18]

Although not mentioned in the opinion, the decision is consistent with the American Bar Association's Formal Opinion 11-459 (the "ABA Opinion"), which states that lawyers have a duty to warn their clients not to use a workplace computer, network, or device to communicate with their personal lawyer. The ABA makes clear that, whenever a lawyer communicates with a client via e-mail, he/she must consider the risks associated with a third party gaining access to those communications, caution the client about this risk, and instruct the client on how to minimize the risk. The attorney in the Finazzo case clearly did not comply with the ABA Opinion. You can obtain more information on the ABA Opinion in our article entitled *Ethical Electronics: New Guidance on Protecting the Confidentiality of Attorney-Client E-mails*.[19]

It is clear from the *Finazzo* opinion that whether an e-mail is sent by an employee or his/her lawyer to the employee's work e-mail account, there is a risk that such an e-mail will be considered non-privileged and discoverable in a subsequent litigation.

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1. *United States v. Finazzo,* No. 10-cr-457, 2013 U.S. Dist. LEXIS 22479 (E.D.N.Y. Feb. 19, 2013).
2. *Id.* at *3.
3. *Id.* at *3-4.
4. Finazzo was convicted of 14 counts of mail fraud and one count each of conspiracy and wire fraud on April 25, 2013.
5. *Id.* at *10-14.
6. *Id.,* at *21-22.
7. *Id.* at *33-34.
8. J. Poluka and M. Gitlitz Courtney, *Whose E-mail Is It Anyway, For the Defense* (June 2007), reprinted in *Privacy & Data Security Law Journal,* vol. 2, no. 9, at 775 (Aug. 2007); J. Poluka and M. Gitlitz Courtney, *Whose E-mail Is It Anyway…It Depends, For the Defense* (February 2010), reprinted in *Mondaq* (March 2010).
9. *In re the Reserve Fund Secs. & Deriv. Litig.,* 275 F.R.D. 154, 160 (S.D.N.Y. 2011) (employee did not have a reasonable expectation of privacy in e-mails he sent or received over the company's system, because the company banned personal use of its e-mail system, the company reserved its right to access employee e-mail, the company warned employees that e-mail sent over the company's system might be subject to disclosure to regulators and the courts, and the employee was aware of the e-mail policy); *see also Stengart v. Loving Care Agency, Inc.,* 201 N.J. 300 (2010) (Stengart, who communicated with her lawyer via a personal password-protected Yahoo! e-mail account utilizing a company laptop, did not waive the attorney-client privilege, notwithstanding the company's policy

on electronic communications which provided that e-mails, Internet communications, and computer files are "the Company's business records" and that the company could review and access "all matters on the Company's media systems at any time."); *Alamar Ranch, LLC v. County of Boise,* No. CV-09-004, 2009 U.S. Dist. LEXIS 101866 at *11 (D. Idaho Nov. 2, 2009) ("It is unreasonable for any employee in this technological age…to believe that her e-mails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval."); *Sims v. Lakeside Sch.,* No. C06-1412RSM, 2007 U.S. Dist. LEXIS 69568 at *2-3 (W.D. Wash. Sept. 20, 2007) (where the defendant advised all employees that they did not have a reasonable expectation of privacy in their company laptops, plaintiff's e-mails sent on the employer's e-mail account were not privileged; however, web-based e-mails sent by plaintiff to his counsel from the same laptop were protected by the attorney-client privilege); *Kaufman v. SunGard Inv. System,* No. 05-cv-1236, 2006 U.S. Dist. LEXIS 28149 (D.N.J. May 10, 2006) (holding that employee had waived the attorney-client privilege by communicating with her attorney over a work e-mail system, where the company policy clearly notified employees that e-mails were "subject to monitoring, search or interception at any time . . . ."); *In re Asia Global Crossing, Ltd.,* 322 B.R. 247, 257 (S.D.N.Y. 2005) (use of a company's e-mail system by an employee to send personal e-mails to the employee's counsel did not waive the attorney-client privilege).

10. *Id.*

11. *United States v. Finazzo,* 2013 U.S. Dist. LEXIS 22479, at *22.

12. *See e.g., Goldstein v. Colborne Acquisition Co.,* 873 F. Supp. 2d 932 (N.D. Ill. 2012); *In re the Reserve Fund Secs. & Deriv. Litig.,* 275 F.R.D. 154; *Aventa Learning, Inc. v. K12, Inc.,* 830 F. Supp. 2d 1083 (W.D. Wash 2011); *Hanson v. First National Bank,* No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935 (S.D.W.V. Oct. 31, 2011); *Kaufman,* 2006 U.S. Dist. LEXIS 28149; *Long v. Marubeni Am. Corp.,* No. 05-cv-639, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. Oct. 19, 2006); *In re Asia Global Crossing, Ltd.,* 322 B.R. 247.

13. *Republic Gear Co. v. Borg-Warner Corp.,* 381 F.2d 551, 556 (2d Cir. 1967); *Schnall v. Schnall,* 550 F. Supp. 650, 653 (S.D.N.Y. 1982).

14. *United States v. Finazzo,* 2013 U.S. Dist. LEXIS 22479, at *35.

15. *Id.* at *17, *21 (citing *U.S. v. Mejia,* 655 F.3d 126, 134 (2d Cir. 2011) (party asserting the attorney-client privilege must demonstrate that the communication "was intended to be, and in fact was kept confidential" by making a showing that they took "some affirmative action to preserve confidentiality."); *U.S. v. DeFonte,* 441 F.3d 92, 94-95 (2d Cir. 2006) (it was appropriate for district court to consider whether otherwise privileged communications were treated in "such a careless manner as to negate [any] intent to keep them confidential"); *In re Horowitz,* 482 F. 2d 72, 81 (2d Cir. 1973); *Diversified Group, Inc. v. Daugerdas,* 304 F. Supp. 2d 507, 515 (S.D.N.Y. 2003) ("It is axiomatic that voluntary disclosure of confidential communications constitutes a waiver of the attorney-client privilege.") (internal citations omitted)).

16. *Id.* at *4.

17. *Id.*

18. *Id.* at *39.

19. J. Poluka and M. Gitlitz Courtney, *Ethical Electronics: New Guidance on Protecting the Confidentiality of Attorney-Client E-mails, For the Defense* (November 2011).

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