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State E-Discovery

ESI Waivers and Intentional Deletion of Even Irrelevant Emails

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SHUTTERSTOCK

Warning—two recent Appellate Division, First Department decisions highlight the obstacles in preventing the disclosure of electronically stored communications between a client and personal counsel, and the lack of any reasonable expectation of privacy, where such communications are transmitted using an employer's email system or are stored on an employer-owned laptop (and which obstacles may well extend to employer-owned mobile devices or devices where the monthly service charges are paid for by the employer).

Where the employer has a broad policy concerning the use of its electronic assets, including, for instance, having the right to review and/or disclose personal employee emails, courts make clear that, even if such communications are allegedly privileged and password protected, no reasonable expectation of privacy may exist for such personal communications when utilizing employer assets. Under those circumstances, courts are finding the *attorney-client* and *spousal privilege* waived. However, "standing alone," such personal use of an employer's system by an employee may not result in the waiver of *attorney work product* protections where there is no evidence of any other actual disclosure of such privileged communication. Counsel should be aware that disputes concerning disclosure of allegedly privileged personal electronic communications will likely be reviewed by the court in camera.

Warning—a recent First Department decision makes clear that a party's admitted intentional destruction of emails from a personal email account, after the duty to preserve had been triggered, may well result in the imposition of spoliation sanctions in the form of attorney fees for opposing counsel's email review and the concomitant motion practice, even where only one of the deleted emails is found to be relevant.

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'Peerenboom'

The First Department in *Peerenboom v. Marvel Entertainment*, 148 A.D.3d 531 (1st Dep't 2017), modified a motion court's order, and denied a protective order on the ground of marital privilege and directed the employer to produce to the court all items identified on its employee's privilege log in which the employee asserts attorney work product protection, and remanded the matter for an in camera review to determine whether such documents are protected attorney work product.

Attorney-Client Privilege. The First Department found that the employee "lacked any reasonable expectation of privacy in his personal use of the email system of Marvel, his employer, and correspondingly lacked the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege."

The court noted that:

> [a]mong other factors, while Marvel's email policies during the relevant time periods permitted "receiving e-mail from a family member, friend, or other non-business purpose entity … as a courtesy," the company nonetheless asserted that it "owned" all emails on its system, and that the emails were "subject to all Company rules, policies, and conduct statements." Marvel "reserve[d] the right to audit networks and systems on a periodic basis to ensure [employees'] compliance" with its email policies. It also "reserve[d] the right to access, review, copy and delete any messages or content," and "to disclose such messages to any party (inside or outside the Company)." Given, among other factors, Perlmutter's status as Marvel's Chair, he was, if not actually aware of Marvel's email policy, constructively on notice of its contents.

Spousal Privilege. The First Department also held that the employee's "use of Marvel's email system for personal correspondence with his wife waived the confidentiality necessary for a finding of spousal privilege."

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Attorney Work Product Protection. Lastly, the First Department held that "[g]iven the lack of evidence that Marvel viewed any of [the employee's] personal emails, and the lack of evidence of any other actual disclosure to a third party, [the employee's] use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections."

'Miller'

In *Miller v. Zara USA*, 151 A.D.3d 462 (1st Dep't 2017), the First Department modified a motion court's order granting a protective order precluding defendant from accessing plaintiff's personal documents on an employer-owned laptop, and denied so much of the order that sought protection of attorney-client privileged materials. The court further directed plaintiff to produce to the motion court all items in the employee's privilege log in which he asserts attorney work product protection, and remanded the matter for *in camera* review to determine whether such documents are protected attorney work product.

Relying on *Peerenboom*, the First Department held that "plaintiff lacked any reasonable expectation of privacy in his personal use of the laptop computer supplied to him by defendant Zara USA, his employer, and thus lacked the reasonable assurance of confidentiality that is foundational to attorney-client privilege." The court noted that:

> [a]mong other factors, Zara's employee handbook, of which plaintiff, Zara's general counsel, had at least constructive knowledge, restricted use of company-owned electronic resources, including computers, to "business purposes" and proscribed offensive uses. The handbook specified that "[a]ny data collected, downloaded and/or cre-

ated" on its electronic resources was "the exclusive property of Zara," emphasized that "[e]mployees should expect that all information created, transmitted, downloaded, received or stored in Zara's electronic communications resources may be accessed by Zara at any time, without prior notice," and added that employees "do not have an expectation of privacy or confidentiality in any information transmitted or stored in Zara's electronic communication resources (whether or not such information is password-protected)."

Plaintiff, however, claimed and defendant did not dispute, "that, while reserving a right of access, Zara in fact never exercised that right as to plaintiff's laptop and never actually viewed any of the documents stored on that laptop." Thus, the court held, given the lack of any "'actual disclosure to a third party, [plaintiff's] use of [Zara's computer] for personal purposes,'" that standing alone, such usage did not constitute a waiver of attorney work product protections.

'Zacharius'

In *Zacharius v. Kensington Publ.*, 2015 N.Y. Misc. LEXIS 325 (Sup. Ct. N.Y. Co. Sept. 1, 2015), *aff'd*, 2017 N.Y. App. Div. LEXIS 7071 (1st Dep't 2017), the First Department affirmed the motion's court grant of spoliation sanctions in the form of attorney fees and the costs incurred in reviewing a certain email account and in making the spoliation motion, where the record:

> demonstrated that plaintiff was in control of her own email account; was aware, as an attorney, of her obligation to preserve it at the time it was destroyed, with or without service of defendants' litigation hold notice upon her, since she commenced the action; and had a "culpable state of mind," as she admitted that she intentionally deleted well over 3,000 emails during the pendency of the action.

Zacharius, 2015 N.Y. Misc. LEXIS 325 at *8-9 ("Defendants contend that the emails recovered from Plaintiff's Yahoo account contain admissions by Plaintiff that she intentionally—not 'inadvertently'—deleted thousands of other emails … . (11/7/13 email from Plaintiff to Yvonne Moritz with the subject 'Just deleted over 3,000 emails!!!!!' and stating 'I feel free. Have to go through about 2,000 more. I'm just pressing delete. I'm keeping only important ones that have to do with my case...').").

The court held that "[d]estroyed evidence is automatically presumed 'relevant' to the spoliator's claims when it is intentionally deleted." *Zacharius*, 2015 N.Y. Misc. LEXIS 325 at *14 ("While Plaintiff's self-serving attestations give the Court some pause, particularly in light of her failure to provide timely discovery at other junctures in this drawn-out disclosure process, the Court nonetheless feels constrained to deem the presumption of relevance partially rebutted as to the Yahoo documents. To the extent that Plaintiff indeed deleted only junk emails having no conceivable relevance to the issues presented in this case from that account, *VOOM HD Holdings LLC* counsels that Plaintiff should not be subject to the "extreme sanction" of striking her pleading or the imposition of an adverse inference charge.").

The court, however, rejected plaintiff's assertion that the emails intentionally deleted were all irrelevant where defendants had recovered at least one email that was pertinent to the allegations in the complaint.

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