The Bar Report

Weekly news from the New Jersey State Bar Association

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A privileged position

Case tests bounds of attorney-client talks

The privacy of what an attorney and client discuss has always been reverentially guarded in the legal world.

Yet, the advent of technology means that the sensitive details of a case are often discussed using faxes, text messages or even e-mails.

Now, the state's highest court must determine whether the traditional relationship relationship should be redefined given changes in the way people communicate. Last week, the New Jersey Supreme Court heard arguments on a case that goes to the heart of every conversation between an attorney and client. In *Stengart v Loving Care Agency*, the high court must decide if the attorney-client privilege is breeched if a client opens an attorney's e-mail on a work computer, rather than a personal one.

The case has the potential to change the way attorneys and clients relate in an increasingly technology-driven world, the New Jersey State Bar Association argued in a friend-of-the-court brief.

"A decision in this case would likely—and perhaps profoundly—implicate the ethical obligations of New Jersey attorneys to preserve the confidences and privacy of a client so as to encourage an open atmosphere of trust," states the brief, written by Douglas Brierley, Fruqan Mouzon and Thomas Hoff Prol and signed by State Bar President Allen A. Etish.

In addition to the state bar association, the Association for Criminal Defense Lawyers of New Jersey and the Employers Association of New Jersey are also *amicus curiae* in the case.

AN ANCIENT TRADITION

The attorney-client privilege can be traced back to Roman times. It is the oldest privilege known to common law.

The concept is rooted in the belief that clients need to have open discussions with their attorney, holding nothing back, even if the details could be damaging.

The privilege "remains an essential ingredient of our legal system," the state bar association argued.

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Mock trial group revises policy to allow religious accommodations

Foundation championed inclusivity, change for 10 years

By Ellen Dweck

After a decade of pressure from the New Jersey State Bar Foundation, the creation of a rival competition and other legal action, the National High School Mock Trial Championship announced last week it would accommodate teams with weekend religious obligations.

Starting with the 2010 tournament, the national organization will permit scheduling modifications so teams can take part in the entire tournament, even if students have religious conflicts.

The 25-year-old annual national competition traditionally held its tournament over a Friday and Saturday.

Starting this year, a team can request an adjustment to the competition schedule because of students' religious observances. If granted the request, the students will be allowed to begin competition on Thursday.

"In the event that the firmly held religious beliefs and practices of any of the members of a registered team's official competition roster conflict with the traditional Friday/Saturday schedule, an accommodation may be requested," according to a policy document from the national group.

State Bar Foundation President Richard Badolato applauded the news. Foundation officials also indicated they expect consider a proposal to once again send state winners to the group's national competition.

"We are very pleased that the board of the national competition has done an about-face on an issue that never should have become one in the first place," Badolato said. "In an increasingly diverse society, this was always a matter of fairness. Our position has been vindicated."

Added Angela Scheck, executive director of the New Jersey State Bar Association and Foundation: "The mock trial program teaches high school students about law and justice. As an organization we are committed

Students from Torah Academy of Bergen County celebrate winning New Jersey's mock trial competition. File photo.

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Hundreds of attorneys were sworn-in at the Trenton War Memorial last week. New Jersey State Bar Association president Allen A. Etish took part in the ceremony. State Supreme Court Justice Barry T. Albin delivered keynote remarks. Photos by Christopher Barth

Mock Trial

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to inclusion and fought for many years for this accommodation. We are pleased that finally students of all faiths will have a chance to take part in future competitions."

INCLUSION EXCLUDED

The New Jersey efforts to change the competition rules to accommodate observant students began in 1999, when bar foundation officials noticed an uptick in the number of Jewish Orthodox schools entering the state's Vincent J. Apruzzese High School Mock Trial Competition. Predicting the possibility of a team being precluded for participating because of conflicts between their religious beliefs and the competition schedule, the bar foundation requested that the national organization change the schedule. The organization's board denied that request.

The situation intensified with passing years. The issue was raised again in 2004, when Seventh-Day Adventists and Islamic schools, with similar religious conflicts, also began taking part in the competition.

In 2005, Torah Academy of Bergen County won the state title. They hoped to compete in Charlotte, N.C., at the national tournament. But competition organizers said they would not rearrange the tournament to allow the team of Orthodox Jewish students to compete. The students could not compete during the Sabbath, which runs from sundown Friday to sundown Saturday.

At the time, bar foundation officials sent a letter of protest to the national tournament, arguing the exclusion was "insensitive and offensive" to students of many religious faiths. The national group offered only to allow the school to compete in the early rounds, but said it would have to forfeit eligibility for the championship.

After negotiations, intervention from U.S. Rep. Steve Rothman (D-9th Dist.), and consent from that year's tournament host, the North Carolina Academy of Trial Lawyers, the team was eventually allowed to compete on Thursday.

Later, the national mock trial group's board voted to not make any future schedule accommodations for participants. As a result, in the fall of 2005, the state bar foundation's board of trustees voted unanimously to withdraw from the competition.

AMTI UPS THE ANTE

In 2006, the New Jersey bar foundation and North Carolina lawyers group, now known as the North Carolina Advocates for Justice, established the American Mock Trial Invitational, as an alternative national competition. The competition rounds were held on weekdays and open to qualifying high school mock trial champions throughout the United States and abroad.

The tournament has grown each year. This May, almost 400 people from 26 teams represented 12 states and two foreign countries took part in the fourth annual invitational. It was held at the Middlesex County Courthouse in New Brunswick.

HISTORY REPEATS ITSELF

Meanwhile, problems continued for the national championship.

Earlier this year, it declined to accommodate another Orthodox Jewish school, Maimonides School of Massachusetts. Attorneys representing the parents filed a complaint with the U.S. Department of Justice.

The Georgia State Bar Association was hosting the tournament, and eventually Chief Judge Doris L. Downs of the superior court of Fulton County, said the court would withdraw use of its facilities if Maimonides School could not participate fully and fairly.

Tournament organizers then allowed the team to participate.

HAPPY ENDING

Last week, after its Special Committee on Religious Accommodation studied the issue, the National High School Mock Trial Championship said it changed its policy. Allowing "requested religious accommodation" was "in the best interest of the continued viability of the tournament," the organization said.

The head coach of the Torah Academy's 2005 mock trial team took great pleasure in the reversal.

"It is heartening that the board of the National Mock Trial Competition finally decided to formally and officially accommodate religious schools that cannot otherwise compete on either Friday or Saturday," said Yigal Marcus, who continues as head coach. "I thank all of those who have helped champion this cause during the past 10 years, including and especially the New Jersey State Bar Foundation. An institution which calls itself 'national' must be inclusive of all, and this is a giant step forward in accommodating teams of all religions." ■

The successful pursuit of religious accommodations

1999 – As more Jewish Orthodox schools enter the New Jersey State Bar Foundation's High School Mock Trial Competition, officials realize these students will not be able to compete in the national competition from sundown Friday to sunset Saturday, which they observe as the Sabbath. A request that the National High School Mock Trial Championship change its schedule is denied.

2004 – Students from Seventh -Day Adventist and Islamic schools also take part in the New Jersey competition, leading foundation officials to again ask for a change of the national competition schedule. The request is deferred.

March 2005 – Torah Academy of Bergen County, a Jewish Orthodox school from Teaneck, wins the statewide mock trial title. School and foundation officials ask for a schedule allowing students to participate fully in the competition.

April 2005 –After negotations between New Jersey officials, the national championship board and Congressman Steve Rothman (D-NJ), and a decision by the North Carolina Academy of Trial Lawyers, the team is allowed to compete on Thursday. A survey of other states shows no willingness to make a blanket change to accommodate observant students.

May 2005 – Torah Academy makes history as the first Jewish Orthodox school to participate in the National High School Mock Trial Championship.

October 2005 – After the National High School Mock Trial Championship votes to maintain its traditional schedule, the New Jersey foundation's board of trustees unanimously votes to withdraw from the national competition.

2006 – the North Carolina Advocates for Justice and the New Jersey State Bar Foundation join forces to establish the American Mock Trial Invitational (AMTI). AMTI is conducted on weekdays, and is open to qualifying high school mock trial champions throughout the United States and abroad.

May 2009 – Almost 400 people from 26 teams take part in the fourth annual American Mock Trial Invitational. It was held at the Middlesex County Courthouse.

November 2009 – The National High School Mock Trial Championship announces it has changed its policies and will now accommodate students whose religious obligations may conflict with the traditional competition schedule.

Privacy

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However, technology is also an essential ingredient of the workplace.

Over 68 million people use e-mail at work, and at the same time, a growing number of companies are also using software to block workers from accessing certain websites or monitoring electronic communications.

A POLICY QUESTION

The case before the Court looks at the collision between privilege and technology's progress. It centers on a series of e-mails between Marina Stengart and her attorney.

Stengart was the executive director of nursing at Loving Care, a home health company in Ft. Lee. In 2008, she resigned and filed a lawsuit two months later charging she had been the subject of sexual harassment and discriminated against as a female, Russian Jew.

To prepare the lawsuit, Stengart and her attorney regularly sent e-mails to each other. At various points, Stengart used a work-issued laptop to review the e-mails sent to her Yahoo account.

After she filed the claims, Loving Care's attorneys copied the hard drive of her laptop, including images of the e-mails with her attorney. The lawyers felt they were justified in reading the messages because the company's e-mail policy told employees they had no expectation of privacy when using a work computer.

She "could not have had a reasonable expectation of privacy where she used the company's laptop and network to access the Internet in order to reach her Yahoo e-mail account," wrote Loving Care's attorney Lynne Anne Anderson.

However, lawyers for Stengart dismiss the charges. They argued Stengart had been given permission to use the computer for private reasons.

The import of the attorney-client privilege should be respected, they argued. Further, Stengart "had every reason to believe that her communications were privileged and confidential," wrote her attorney, Donald Jacobs, in a brief.

While a trial court agreed with the company that its e-mail policy meant Loving Care's attorneys had the right to read the e-mails, a state appeals court disagreed.

A PROPOSED SOLUTION

In its brief, the state bar association said there could not be a hard-and-fast rule about when clients have waived the privilege.

Rather, it encouraged the Court adopt a policy that recognizes the central value of attorney-client privilege while also including "the practical realities of the present state of technology in the workplace and its use by both employees and employers."

The bar association suggested judges consider several issues when determining whether the privilege no longer protects communications. Among those issues are: the measures taken to prevent disclosure; the way e-mails were retrieved; whether the company has an electronic communication policy; how well the employee understands the policy, and the location of the computer.

"The question of waiver of attorney-client privilege must rest on the client's intent to keep the communication private," the state bar said.

As is its custom, the Court reserved decision. ■