IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| ILLINOIS COMPUTER RESEARCH, LLC., )<br>)<br>Plaintiff and Counterclaim Defendant )<br>)<br>v. )<br>)<br>FISH & RICHARDSON P.C., )<br>)<br>Defendant, Counterclaimant and )<br>Third-Party Plaintiff, et al. )<br>)<br>) | Case No. 07 C 5081<br><br>Judge Rebecca R. Pallmeyer<br>Mag. Judge Maria Valdez |

**SCOTT HARRIS' MOTION FOR A**
**PROTECTIVE ORDER REGARDING PRIVILEGED E-MAIL**

Pursuant to Fed.R.Civ.P. 26(c), Scott C. Harris requests a protective order (1) precluding Fish and its counsel from accessing attorney client communications between Scott C. Harris and counsel; (2) compelling Fish and its counsel to return any and all such communications; and (3) precluding Fish and its counsel from referencing or otherwise using such communications.

Scott Harris has learned that Fish & Richardson ("Fish") deliberately accessed and copied password-protected email communications between himself and his counsel; email which were clearly privileged on their face. Fish maintains that it has the right to access Mr. Harris' emails because of a purported email policy. As addressed below, Fish's position is contrary to law.

## I. BACKGROUND

Scott Harris suspected that Fish had deliberately accessed his password-protected email communications with his counsel (the Niro firm and other attorneys). Pursuant to the Court's Order, he requested all such communications, and on

December 3, 2007, Fish produced scores of them: documents which obviously are attorney-client communications on their face. Knowing that Fish was justifying its actions under a so-called "email policy", Mr. Harris requested that policy.

Mr. Harris also requested evidence sufficient to show when – if ever – Fish had accessed the email account of another attorney. (Exhibit A). Mr. Harris requested that information because, as demonstrated below, it is relevant to whether Mr. Harris had a reasonable expectation that his communications would remain confidential. Fish at first feigned ignorance as to what Mr. Harris was seeking, then it simply refused to provide the information. (Exhibit B). It is believed that Fish is refusing to provide the information because Fish has not accessed (prior to Mr. Harris) another attorney's email. Indeed, Mr. Harris is aware of only one other instance in which Fish accessed an employee's email account: in 2004 Fish accessed a paralegal's email only after first obtaining the paralegal's permission to do so. (Exhibit C at ¶¶ 4-5).

The policy itself states in pertinent part:

> It is the policy of Fish & Richardson P.C. to support Internet Service access and E-Mail access policies of its suppliers of Internet and E-Mail connectively and the Firm will enforce those policies to the best of its ability. ***The Firm also supports*** those elements of Internet and E-Mail policies that demand network etiquette and ***due consideration for user's rights to privacy*** . . . . exposure to offensive material.
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> The Firm's Internet or E-Mail services may not be used for any purposes which violate U.S. or state laws and regulations. Access which is not expressly allowed is considered to be denied.
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> The firm encourages exploration of the Internet and E-Mail usage, but ***if it is for personal purposes, it should be done on personal, not***

> ***company time. Use of computing resources for these personal purposes is permissible so long as it does not:***
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> a) consume more than a trivial amount of personal and system resources;
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> b) interfere with worker productivity; or
>
> c) pre-empt any business activity;
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> * * *
>
> Fish & Richardson P.C. reserves the right, at its discretion, to view, capture and use Internet and/or E-Mail correspondence, personal file directories and other information stored on its computers as it deems necessary for business-related purposes including, but not limited to, operational, maintenance, auditing, security and investigative activities and to comply with subpoenas and orders of courts and administrative agencies.

(Exhibit D; emphasis added).

Scott Harris never saw this policy, and was not even aware of its existence. (Exhibit C at ¶ 2). He is not aware of any instance in which Fish accused another attorney's email. He also was informed that when Fish accessed a paralegal's email, it first obtained permission. (Id. at ¶¶ 4-5). For these reasons, Mr. Harris at all times believed that his email communications with his attorneys would remain confidential (Id. at ¶ 3). He never gave Fish permission to access his email. (Id. at ¶ 6).

## II. ARGUMENT

Given the pervasive reliance on email for communication, courts have made clear that a company's email policy is not all dispositive as to an employee's expectation of privacy. Moreover, such a policy cannot trump the attorney-client privilege.

Recently, in Sims v. Lakeside School, 2007 WL 2745367 (W.D. Wash. Sep. 20, 2007), the court confronted a situation much like this one. There, an employer

contended that an employee had no reasonable expectation of privacy in a laptop issued by the employer, including emails sent and received on his email. The Court held:

> ***To the extent that the laptop contains web-based e-mails sent and received by plaintiff Sims and any other material prepared by plaintiff Sims to communicate with his counsel, the Court agrees with plaintiff that such information is protected under the attorney-client privilege*** and the marital communications privilege***. Notwithstanding defendant Lakeside's policy in its employee manual, public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence.*** *See e.g., United States v. Louisville & Nashville R.R.,* 236 U.S. 318, 336, 35 S.Ct. 363, 369 (1915) (recognizing that the attorney-client privilege is predicated upon the belief that it is in the public interest to encourage free and candid communications between clients and their attorneys, by protecting the confidentiality of such communications).

Id at 2; emphasis added. In Sims, the employee signed the employer's policy; here, Mr. Harris was not even aware of it. (Ex. C at ¶ 2).

The conclusion that Mr. Harris' password-protected email is protected is even more appropriate here, because Mr. Harris created and received the email in California, which has statutorily protected the sanctity of privileged email communications. See Cal. Evid. Code § 917(b) ("A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication").

In People v. Jiang, 31 Cal. Rptr., 227, 2005 Cal. App. LEXIS 1095 (6$^{TH}$ Dist. 2005), the government contended that it had the right to access privileged communications contained on a company-issued laptop. The government contended

that a signed "Employee Proprietary Information and Inventions Agreement" -- which gave the employer the right to inspect the laptop -- eliminated any reasonable expectation of privacy. Cal. App. LEXIS 1095 at 48. The court disagreed:

> We are convinced that defendant's belief in the confidentiality of his attorney-client information was an objectively reasonable one.
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> * * *
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> The agreement was designed to protect Cadence's intellectual property, not to invade the privacy of its employees. ***And nothing in the Cadence agreement barred employees from using their employer-issued computers for personal matters.***
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> * * *
>
> Second, the Legislature's recent enactment of *Evidence Code section 917, subdivision (b),* while not directly applicable here, suggests that the Legislature did not intend to preclude the attorney-client privilege from extending to stored electronic versions of what otherwise would be confidential communications simply because certain third parties may technically have access to these stored versions. *Evidence Code section 917, subdivision (b)* provides that a privileged communication "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." (*Evid. Code, § 917, subd (b).)*

Id at 52; emphasis added.

Here, Fish's policy, like that addressed in People v. Jiang, expressly allows for the use of email for "personal purposes". (Exhibit D). It also references a "user's rights to privacy", and states its right to view such email was confined to certain business-related activities. Presumably, a deliberate search for attorney-client communications is not a legitimate business purpose. Presumably, if, in the course of a legitimate business review, Fish encountered material which was clearly privileged, its obligations

would be no different than the recipient of a clearly privileged document in a document production.

Moreover, Fish has overstated the breadth of its policies. While Fish contends that it "owns" everything pursuant to a Confidentiality Policy (Fish Br. In Support of Motion to Compel at 10), at least one court has rejected Fish's broad ownership contentions. In Bedwell v. Fish & Richardson, P.C., 2007 WL 4258323 (S.D. Cal. Dec. 3, 2007) (M.J. Adler), the court held:

> The Court finds first that Defendant is taking too broad a view of its Confidentiality Policies and Procedures. The Court has carefully reviewed the policies and procedures and does not find that they prohibited Plaintiff from printing the subject e-mails and retaining them for her personal use, even if the e-mails were transmitted on and printed from the firm's computers. These e-mails do not relate to the representation of a firm client, but rather relate to Plaintiff's individual relationship with her employer. Defendant's policies do not conclusively establish that Defendant is the sole owner of these documents, and the ***Court finds that the e-mails cannot be swept into the broad category of property which belongs to the firm.***

Id. at 2.

Other key factors in the analysis are whether Harris knew of the policy, and whether it was implemented. In In re: Asia Global Crossing, Ltd., 322 B.R. 247, 259 (Bankr. S.D. N.Y. 2005), the court identified four factors to measure the employee's expectation of privacy in his computer files and e-mail: (1) does the corporation maintain a policy banning personal use; (2) does the company monitor the use of the employee's computer or e-mail; (3) do third parties have a right of access to the computer or e-mails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies. Each of these factors favors Mr. Harris.

As addressed above, Fish's policy expressly contemplates the personal use of email. Given that employees are expressly allowed to use email for "personal uses", Harris had the same expectation of privacy in his e-mails that he would have regarding his office, desk and file cabinets. O'Connor v. Ortega, 480 U.S. 709, 719 (1987) ("[W]e accept the conclusion of the Court of Appeals that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets").

The second factor likewise favors Harris, as Fish decidedly did not have a practice of monitoring or auditing its attorneys' email. In fact, during his 14 years employment at Fish, Mr. Harris had never heard of Fish accessing any attorney email. (Ex. C at ¶ 4). And Fish's refusal to provide discovery on this issue (Ex. B) should bar Fish from attempting to argue otherwise. Due to the lack of enforcement, Harris maintained an expectation of privacy in his personal e-mails. See Leventhal v. Knapek, 266 F.3d 64, 74 (2d Cir. 2001)(employee had reasonable expectation where the employer did not have a general practice of routinely searching office computers, and maintenance of computers was "normally announced".).

As to the fourth factor, Fish did not inform Harris of any alleged monitoring policy. By not informing Harris of the alleged policy and not actively monitoring e-mail accounts, Fish lulled Harris into a false sense of security that his e-mails were private. Curto v. Medical World Communications, Inc., 2006 U.S. Dist. LEXIS 29387 at * 25-*26 (E.D. N.Y. May 15, 2006) (holding that "in light of the few instances of actual monitoring by [defendant] and the surrounding circumstances thereof, together with the fact that many [defendant] employees had personal e-mail accounts at work, including the

President, [defendant's] employees were lulled into a 'false sense of security' regarding their personal use of company-owned computers.").

Finally, Scott Harris was informed – before the privileged communications at issue – that in the only instance in which Fish deliberately overrode a password to access an employee's email – in that case, a paralegal – Fish obtained the employee's consent in advance. (Ex. C at ¶ 4). This affirmative conduct further confirms that Mr. Harris' expectation of confidentiality was both subjectively and objectively reasonable.

Since Harris had a reasonable expectation of privacy in his password-protected email, the e-mail is privileged. Indeed, given all of the factors pointing to confidentiality, Fish's deliberate invasion of Mr. Harris' privileged communications, and its zeal to place them before the Court, suggest bad faith. A protective order is necessary to address this wrongful conduct.

## III. CONCLUSION

For the reasons stated above, Scott Harris respectfully requests, the entry of a protective order: (1) precluding Fish and its counsel from accessing attorney-client communications between Mr. Harris and his counsel; (2) compelling Fish and its counsel to return any and all such communications; and (3) precluding Fish and its counsel from referencing or otherwise using such communications.

Respectfully submitted,

/s/ Paul K. Vickrey
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**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **SCOTT HARRIS' SCOTT HARRIS' MOTION FOR A PROTECTIVE ORDER REGARDING PRIVILEGED E-MAIL** was electronically filed with the Clerk of Court using CM/ECF system, which will send notification by electronic mail to the following:

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on December 18, 2007.

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