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

ILLINOIS COMPUTER RESEARCH, LLC., Plaintiff and Counterclaim Defendant v. FISH & RICHARDSON P.C., Defendant, Counterclaimant and Third-Party Plaintiff, v. SCOTT C. HARRIS, Third-Party Defendant. And Counterclaimant FISH & RICHARDSON P.C., Defendant, Counterclaimant, Third-Party Plaintiff and Counterclaim Defendant.	)	Case No. 07 C 5081 Judge Rebecca R. Pallmeyer Mag. Judge Maria Valdez

SCOTT HARRIS'S REPLY IN SUPPORT OF HIS
MOTION FOR A PROTECTIVE ORDER REGARDING PRIVILEGED E-MAIL

The issue here in a nutshell is this: Can a law firm that knows one of its employees has sought legal advice to license and enforce his property access his private, password-protected emails that contain confidential attorney-client communications? The answer under California law (and for that matter, under the Seventh Circuit case cited by Fish) is clearly, "No." The Muick case does not apply to privileged communications. In other words, a company policy of the type Fish relies upon ***does not***, standing alone, allow access to confidential attorney-client communications:

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> All of these cases [e.g., Muick], however, arise in the context of an employee asserting a right to privacy claim, either under the *Fourth Amendment* or common law. While these cases may be analogous, they are not controlling as they do not address the confidentiality of employee's e-mails and personal computer files with regard to the attorney-client privilege or attorney work product immunity.

Curto v. Medical World Communications, Inc., et al., 2006 U.S. Dist. LEXIS 29387, *16 (E.D.N.Y. 2006).

More importantly, California law controls here, since the improper access to Mr. Harris's emails took place in California. Under California law, attorney-client communications are strictly protected even in the face of policies that, on their face, would suggest the employer has a right to gain access to such communications. 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"). The controlling case in California is People v. Jiang, 31 Cal. Rptr. 227, 2005 Cal. Appl. LEXIS 1095 (6th Dist. 2005) (attached to opening brief as Exhibit D). There, an employee was subject to a published policy that allowed access to password-protected email. But, as that Court properly found, that policy did not override the attorney-client privilege. Jiang has been cited repeatedly on the exact issue before this Court:

> Once an employer realizes she is poking into an employee's private communications, the law dictates she should immediately cease. This is true even if the employer issued a policy stating that company equipment may be monitored at any time and that the employee should have no expectation of privacy.

Baroni, Michael, "Feature: Employee Privacy in the High-Tech World,“ 48 Orange County Lawyer 18, *22 (May 2006). See also, Gergacz, John, "Employees' Use of Employer Computers to Communicate with Their Own Attorneys And The Attorney-Client Privilege," 10 Comp. L. Rev. & Tech. J. 269, Southern Methodist University:

> Jiang's analysis properly distinguished between the employee's work relationship with an employer and the employee-client's privilege relationship with counsel, thus, keeping the attorney-client privilege from being inadvertently smothered by workplace practices or regulations. Separating the two also permitted a clear focus on the attorney-client privilege's elements (e.g., communication confidentiality), which although possibly affected by workplace events, are nonetheless independent of them.

Id. at *285.

Here, Scott Harris was an employee of Fish who obtained patents in his own name, on his own time, using his own resources. Fish knew what Mr. Harris was doing: indeed, the wife of the managing partner was a co-inventor on one of his patents. To suggest, in the face of such knowledge, that Fish had the right to knowingly access his confidential attorney-client communications that were password protected and clearly contained confidential information is simply not supported by any case cited by Fish.

By way of example, some improperly accessed emails reflect the confidential communications between Mr. Harris and Grant Kinsel, a lawyer at Foley & Lardner, where Mr. Harris was seeking a legal evaluation of his potential claims for infringement against Google and Amazon on the very patent involved in this case (FR Docs. 0067-74). There can be no doubt these are privileged communications. And Fish knew it.

Further, Fish's email policy itself acknowledges that firm computers will be used by employees for personal matters. And it is unrebutted that Fish has not previously

used a private password of an employee to gain access to personal emails, as was done here. This was a first.

In short, a privileged communication under California law does not lose its status because it is communicated by email using an employer's computer. Hence, this is not a question of whether Scott Harris knew or did not know of some policy. Nor is it a question of whether there was an expectation of privacy; rather, the sole question is whether the law permits an employer to circumvent the attorney-client privilege by establishing a policy that it has the right to access all email when, in fact, the law says such a policy cannot circumvent the privilege.

Fish, of course, is not an employer unfamiliar with the law. It is a national law firm of attorneys, all of whom in the San Diego office (where Mr. Harris worked) are admitted to the California Bar. These lawyers surely know about the attorney-client privilege and know, as well, that it cannot be circumvented because the privileged communications are on the firm's email.

Finally, these are not communications between friends or relatives. They are not social communications. Rather, they are communications between attorneys and their client, Mr. Harris. They deserve and require protection under the law. Mr. Harris's motion for a protective order should be granted.

Respectfully submitted,

/s/ Raymond P. Niro

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **SCOTT HARRIS'S REPLY IN SUPPORT OF HIS 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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