

# PRESIDENT'S PERSPECTIVE

ALLEN A. ETISH

## Big Brother and the Attorney-Client Privilege



**G**rowing up in the 1960s, I recall 'technology' being something used by TV superheroes like Adam West on *Batman* and secret agents like Maxwell Smart in *Get Smart*. Both had portable

phones—one in the Bat Mobile and the other in his shoe—and both employed massive, elaborate computers with cool flashing lights. At the time, I could never have imagined that palm-sized cell phones and laptop computers would someday be an integral part of our everyday lives.

Today, most of us would be hard pressed to make it through a single day without our high-tech gadgets, from the cell phone and BlackBerry® to the laptop computer. But while there is no denying that technology has made certain aspects of legal practice far more convenient in recent years, including online legal research, electronic filings, email and texting, we should not lose sight of the serious concerns that continue to arise surrounding the vast amount of electronic information being produced, and the confidentiality issues that surround it.

There could be no better time for *New Jersey Lawyer Magazine* to deal with the topic of Big Brother. As this issue of the magazine goes to press, a significant case is on motion for leave to appeal to the New Jersey Supreme Court. The final ruling in *Stengart v. Loving Care Agency, Inc.*, will help define the attorney-client privilege in the 21st century. Because of its potential impact on the way every one of us practices law today, this case stands as one of several matters the New Jersey State Bar Association is reviewing, and may ultimately seek *amicus* status in.

The case at hand involves the question of whether emails between an employee and her attorney, sent from an employer's laptop computer but using the employee's password-protected, web-based email account, remain protected under

the attorney-client privilege. Involved in a sexual harassment/hostile workplace suit against her employer, the employee and her attorney only learned of the breach of confidentiality when opposing counsel cited one of the emails at trial. The employer discovered the emails when a forensic process uncovered temporary Internet files containing the contents of the emails.

**[W]hile there is no denying that technology has made certain aspects of legal practice far more convenient in recent years...we should not lose sight of the serious concerns that continue to arise surrounding the vast amount of electronic information being produced, and the confidentiality issues that surround it.**

While the Appellate Division found the electronic correspondence was protected, the Supreme Court has granted the defendant's leave to appeal, and will hear the case in the current term. The Court may agree with the Appellate Division, or may set new guidelines for ensuring protected communications in the future. Whatever the outcome, we can be certain this will not be the last case where new and innovative technology challenges our longstanding notions of privacy and confidentiality.

In a world of transparency, those notions are still at the heart of lawyers' relationships with their clients, and it is increasingly incumbent on us to shield them from Big Brother's watchful eyes. ☪