

# Rudolph Friedmann LLP

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Real Estate; Civil Litigation; Bankruptcy & Insolvency; Corporate & Partnership; Commercial Matters; Personal Injury; Construction; Business & Estate Planning; Divorce; Hotel & Restaurants; Patent & Intellectual Property

## **Six Rudolph Friedmann Lawyers Named “Massachusetts Super Lawyers” by *Boston Magazine***

We are pleased to report that six of our attorneys have been selected by an independent blue-ribbon committee of their peers as “Massachusetts Super Lawyers.” The six lawyers selected for 2004 are Jim Rudolph, Bob Shaer, Jon Friedmann, Jim Singer, Mike Tracy, and Bob Shea. (See insert which appeared in the November issue of *Boston Magazine*.)

## **E-Mail Privacy in the Workplace**

Richard was an independent insurance agent who sold policies for a major insurer on an exclusive basis. After a period in which there was some dissatisfaction and acrimony on both sides of the relationship, the company terminated its agreement with Richard. In subsequent litigation brought by Richard, the parties disagreed as to the reason for the termination. The company’s position was that it had fired Richard for disloyalty. How the company came by its evidence of disloyalty led to a separate element of the ensuing lawsuit.

When other events raised suspicions about Richard, an attorney for the company and a systems expert searched the company’s main file server for any e-mail to or from Richard that caught their attention because of the e-mail headers. There, they claimed to find two messages from Richard to a competing insurance company that essentially asked if the competitor might be

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## **Simple Steps to Success in Small Claims Court**

The Small Claims Court is an inexpensive and informal forum used by 1000’s of businesses and consumers on a yearly basis to resolve disputes of \$2,000 or less without the need for an attorney.

As the Small Claims Court is an informal forum, one of the keys to success is to keep it simple. There is no need for formal briefs; there are no complex rules of court to adhere to, and definitely no need to learn legalese. Your claim should be outlined in layman’s terms.

## **Select the Right Court**

Small claims courts are found in every Massachusetts District Court in every county in the Commonwealth, and also in the Boston Municipal Court, the Hampden County Housing Court, the Worcester Housing Court, and the Boston

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# Oscar Wilde and Copyright Law

Nineteenth-century writer Oscar Wilde had not yet produced the works for which he is best known when he came to the United States in 1882 for a lecture tour to promote a touring opera. He clearly was a celebrity in the making, however, and that is what brought him to the attention of Napoleon Sarony. Sarony was making a name for himself, and lots of money, in the still emerging field of photography. He took photographs of the rich and famous, to whom he paid large sums in return for the exclusive right to distribute the photographs.

Wilde posed for 27 pictures taken by Sarony. When the most famous of these was used in an advertisement without Sarony's permission, he sued. The defendant was a lithographer who was said to have reproduced many thousands of copies of the image. Sarony alleged a violation of his copyright in the photograph. The defense was that Congress had the power to protect authors' writings, but not authors' photographs, which were described as mere reproductions of nature created by the operator of a machine.

The case went all the way to the United States Supreme Court (which itself was later the subject of a formal photographic portrait by Sarony). In a decision that has been valuable to photographers and copyright seekers ever since, the Court ruled that Sarony's photograph did indeed have copyright protection. The photograph was deemed a work of art and the product of the photographer's "intellectual invention," no different in nature from a novel. Rebutting the argument that taking a photograph has nothing to do with imagination, the Court described Sarony, as an art critic might have done, as having set up his subject "so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."

The essential holding in Sarony's case is no less valid today, but more than a century later there are added layers of legal analysis to consider in our copyright jurisprudence. For example, in a recent case, a photographer took pictures of a blue vodka bottle for use in the vodka producer's marketing. The company then had other photographers take similar photos of the bottle and ended up using them in its advertising campaign. The

first photographer sued for copyright infringement in his photographs. He reached back into the 19th century to cite the *Sarony* case, but lost.

The problem was not that the photographs were unworthy of copyright protection. Everyone agreed they were. However, under a doctrine that is now well established in copyright law, courts will not protect a copyrighted work if the idea underlying it can be expressed only in one way, such that the idea and the expression of it "merge." The basic question in the case was, "How many ways are there to create a 'product shot' of a blue vodka bottle?" The court's answer was "not very many."

## E-Mail Privacy in the Workplace

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interested in acquiring some clients who supposedly were unhappy with Richard's company.

Richard argued to no avail that his former company violated his rights under the federal Electronic Communications Privacy Act (ECPA). First, he asserted that there was a violation of that part of the law that prohibits "intercepts" of electronic communications such as e-mails. However, courts, including the one hearing his case, have reasoned that an intercept can only occur contemporaneously with the electronic transmission. The company did not access Richard's e-mails *as he was sending them*, but read them later, so it did not "intercept" them.

The second claim was brought under a different part of the ECPA, which creates liability for intentionally accessing without authorization a facility through which an electronic communication service is provided, and thereby obtaining access to a communication while it is in electronic storage. "Storage" in this context means temporary, intermediate storage, or backup storage. A related part of the law makes an exception from liability for the person or entity providing the communications service. Since Richard's e-mails were stored on a system controlled and administered by his company, the company could not be liable for accessing the e-mails.