E-Mail Purloined by Opposing Party

By Jeffrey P. Lewis

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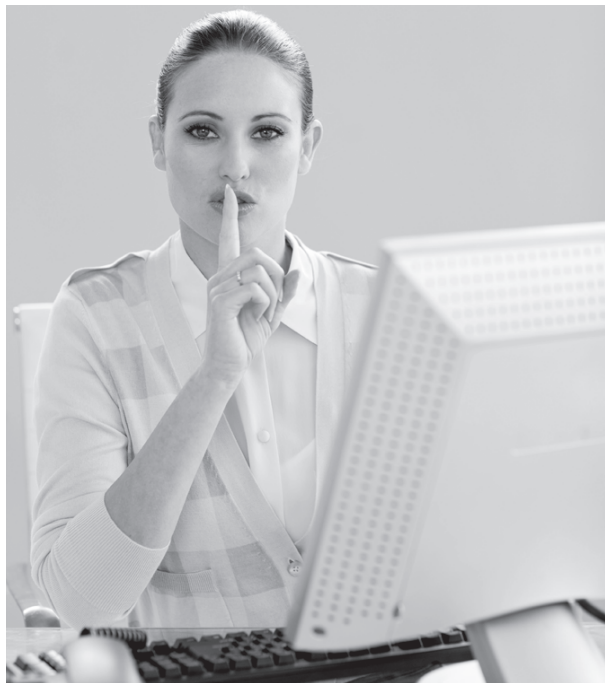
The March 21 issue of the *Pennsylvania Bar News* ran a front page article on the Pennsylvania Supreme Court's recent holding in *Gillard v. AIG Insurance Company*, A.3d, 2011 WL 650552 (Pa.), which revisited the issue of the appropriate breadth of the attorney-client privilege under Pennsylvania law. That decision addresses, in particular, whether the attorney-client privilege applies to communications from attorney to client that do not reveal the substance of confidential communications made from client to attorney. As previously noted, prior case law was conflicting. Way back in 1900, the Pennsylvania Supreme Court had spoken on this issue in *National Bank of West Grove v. Earle*, 46 A. 268 (1900), holding that the attorney-client privilege runs both directions so long as the communication involved seeking or receiving legal advice or services. With respect to confidential communication from attorney to client, it drew no distinction as to whether the communication revealed the contents of any client-to-attorney confidential communication. But then, in a line of Pennsylvania Superior Court cases such as *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259 (Pa.Super. 2007), that court seemingly ignored *National Bank* and held that the privilege as to attorney-to-client communication only applies where it involves inclusion of confidential communication previously made by the client to counsel. The Supreme Court considered *Fleming* on appeal, but before only four justices. As a result, in *Nationwide Mutual Insurance Co. v. Fleming*, 992 A.2d 65 (Pa. 2010), the sitting justices evenly split, not because of a difference in the view of privilege law but over whether a waiver of the privilege had occurred.

Gillard has certainly cleaned up this jurisprudential mess. But the court acknowledged the possibility that this broader application of the privilege may prompt abuses that can occur when parties to an action assert the privilege in excess of its intended scope. For example, it cites the "ruse abuse ... in which ordinary business matters are disguised as related to legal advice." A recent New York case, however, provides an example of how an abuse can occur when the scope of the privilege is limited, as it had been previously by the Superior Court in *Fleming*.

In *Parnes v. Parnes*, 915 N.Y.S.2d 345 (Sup. Ct. App. Div. 2011), an intermediate appellate court decision, the court considered the suppression of e-mails, both from and to a lawyer and his client, the husband in a domestic dispute, "discussing a strategy for defendant to gain advantage in future matrimonial and custody litigation." While the parties were still living together, "wife apparently discovered a page of one of the e-mails on [husband's] desk and, while searching for the remainder of the letter, discovered the user name and password for [husband's] e-mail account." Using the password, she gained access to her husband's account, printed out the e-mails between her husband and his counsel and handed them over to her own counsel. "The context of the e-mails shows that [husband's counsel] was giving legal advice, sent from his law firm e-mail address, and billed [husband] for his time." Moreover, a retainer agreement was drafted, but husband never signed it.

Disturbingly, wife's counsel did not reveal to opposing counsel that he had the e-mails until he confronted husband with them at his deposition. Moreover, with the information learned from the e-mails, wife amended her complaint to allege a conspiracy between husband and his counsel to cause her anguish. Her counsel also subpoenaed husband's counsel for a deposition, which also included a request to produce documents.



Husband and his counsel both moved to strike the subpoena, and husband also moved to, in effect, suppress the use of the e-mails as trial evidence, strike any portion of the amended complaint using any information contained in these privileged communications and disqualify wife's counsel. The trial judge granted all of the relief requested by husband, finding that all such communications were privileged and not subject to waiver. Moreover it decided that wife was prohibited from using the information gleaned from any of the e-mails. The trial court found that husband "had met his burden of demonstrating that he and [his counsel] had communicated as an attorney and client and 'that the information sought to be protected from disclosure was a "confidential communication" made to the attorney for the purpose of obtaining legal advice or services.' "

On appeal, the Superior Court affirmed, with the exception of the disqualification of counsel and the suppression of the single printed page of an e-mail between husband and his counsel that wife had found on his desk. With respect to the disqualification, the court found that the remedy was too drastic under the circumstances and an unnecessary deprivation of wife's right to be represented by counsel of her choosing and therefore an abuse of discretion. With respect to the trial court's refusal to find waiver, the court reversed with respect to the single printed page, observing that "[r]egardless of whether the parties had separate desks, by leaving a hard copy of part of the document on the desk in a room used by multiple people, [husband] failed to prove that he took reasonable steps to maintain the confidentiality of that page." But with respect to the e-mails that husband maintained on a new password-protected e-mail account and which he only checked from his workplace computer, the court agreed with the trial judge that husband had not waived the privilege. It reasoned that "leaving a note containing his user name and password on the desk in the parties' common office in the shared home was careless, but it did not constitute a waiver of the privilege. [Husband] still maintained a reasonable

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expectation that no one would find the note and enter the information into the computer in a deliberate attempt to open, read and print his password-protected documents."

The court also rejected wife's argument that the crime-fraud exception applies to overcome the privilege. Husband, a doctor, had sent a letter to wife's doctor, with a copy to her, expressing his personal opinion that wife should not take human growth hormones and that he would refuse to make continued payments for this treatment. Although this exception can apply in instances where fraud is not involved, such as in the instance of "other wrongful conduct," the court found that "such conduct must usually be of a criminal or dubious nature, not merely mean or dishonorable." The court was especially impressed with the fact that wife's own insurance company refused to cover that treatment, which granted legitimacy to husband's motivation.

Before the Supreme Court's holding in *Gillard* and if Pennsylvania law had applied in *Parnes,* e-mails comprising communication from husband's counsel to his client would not have been subject to suppression based upon privilege. Moreover, notwithstanding their lack of privilege, they still would not otherwise be subject to discovery because discovery is limited in divorce actions.

What does *Parnes* teach the practitioner? Always advise one's client to ensure absolutely that all confidential attorney-client communications are secure. After all, even though the e-mails were suppressed in *Parnes*, that did not suppress the knowledge gained from those e-mails by wife and her counsel and, therefore, available for their use, even in a limited manner, notwithstanding the trial court's order that wife and her counsel could not use this knowledge. There is no remedy to undo that.