To Read or Not to Read

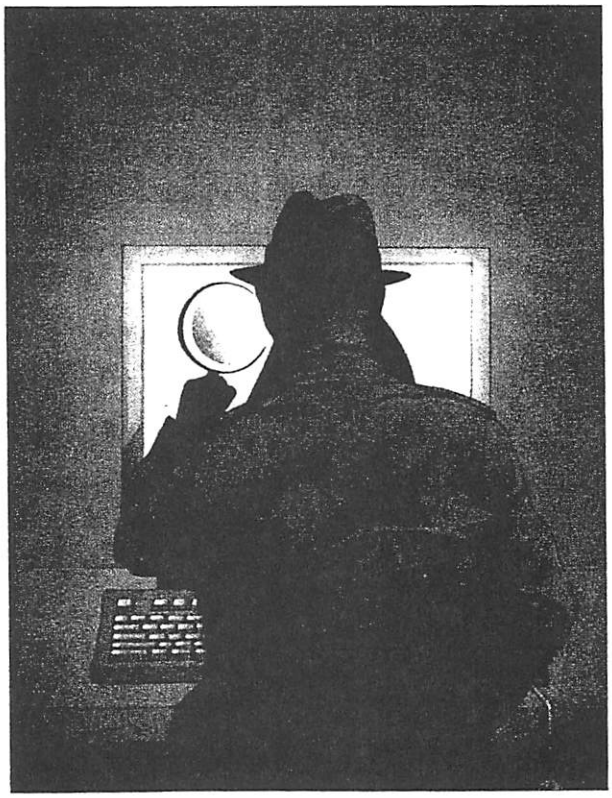
Are E-mails Between An Opponent And Opposing Counsel Privileged?

You're involved in a hotly contested divorce case. Your client calls to tell you he has just obtained evidence that will obliterate your opponent's case: The client has accessed his wife's e-mail and found messages between his wife and her lawyer that contain devastating admissions. Have you just been handed the smoking gun that will win your case, or are you now facing the possibility of disciplinary proceedings for reviewing privileged communications? Or worse yet, might you be exposing yourself to potential civil or criminal liability for the unauthorized access of an electronic communication? This scenario is not uncommon, particularly in the family law context, where spouses frequently attempt to access each other's e-mails by both legal and illegal means.

The Philadelphia Bar Association recently issued a major ethics opinion addressing exactly this situation. In Opinion 2008-2, published in March 2008, the Professional Responsibility Committee determined that a lawyer confronted with similar facts cannot rule out the possibility that he or she has an affirmative duty to use the e-mails without at least reviewing their contents. Thus, a lawyer should not simply refuse to read the e-mails based on the assumption that they are privileged communication.

The facts before the committee were as follows: A client was involved in litigation with his ex-wife. The client accessed his ex-wife's e-mail through the computer in his home, which the ex-wife had used while they were married. The ex-wife had not changed her password until recently. The client told his lawyer that he had obtained e-mails between his ex-wife and her attorney that would be extremely harmful to the ex-wife (and extremely beneficial to him) in their pending case. The client sought to introduce the e-mails into evidence in their court proceedings. Are the e-mails privileged? If not, is the attorney able to review the e-mails and use them in the litigation?

The committee noted that Rule 4.4 of the Rules of Professional Conduct prohibits a lawyer from using methods of obtaining evidence that violate a person's legal rights. The committee had insufficient information about how the client had gained access to his ex-wife's e-mails, and thus it was unclear whether the e-mails had been obtained illegally. Under Pennsylvania law, the unauthorized access of another's computer records can constitute a third-degree felony. In addition, the federal and state Wiretap Acts (which prohibit a party from intentionally intercepting any wire, oral or electronic communication of another) and the federal Stored Communications Act (which prohibits a party from intentionally accessing a wire or electronic communication while it is in electronic storage without authorization) also provide for civil and criminal liability. In its opinion, the committee placed the onus on the lawyer to familiarize himself or herself with any applicable criminal and civil laws, and then determine exactly how the client gained access to the e-mails before deciding whether or how to proceed. If criminal or civil liability is a real possibility and the client insists on going forward with using the e-mails, the committee recommends that the lawyer seriously consider withdrawing from the representation pursuant to Rule 1.16 of the Rules of Professional Conduct, which allows a lawyer to withdraw if the client persists in a course of action that the lawyer reasonably believes to be criminal or that the lawyer considers repugnant. The withdrawal, however, cannot violate the lawyer's duty of confidentiality to the client.



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If the lawyer determines that there is no risk of criminal or civil liability, the lawyer should not assume that the e-mails are privileged communications and elect not to use them in the litigation. The committee noted that the mere fact that the e-mails were between the ex-wife and her attorney did not render them privileged per se. The privilege between attorney-client communications extends only to communication that is "for the purpose of securing primarily either an opinion of law or legal services." Thus, the lawyer has to review the e-mails in order to determine whether they are privileged. Although not addressed in the opinion, the question remains as to who should conduct the review. For caution's sake, the attorney might consider asking another attorney in the firm, such as the firm's loss prevention partner or ethics expert, to review the materials.

If the client obtained the e-mails legally and the communications are not privileged, does the lawyer still have a duty to notify opposing counsel that the e-mails have inadvertently come into the client's possession? Pursuant to Rule 4.4(b) of the Rules of Professional Conduct, the lawyer's duty is limited to notifying the sender. The rule is silent as to whether the lawyer

must return the inadvertently disclosed documents and/or whether the lawyer can use the information in litigation.

The committee concluded that because a lawyer has a duty to abide by the client's decisions concerning the representation, and because in this case the client sought to use the e-mails in the litigation, the lawyer may have an affirmative duty to use the e-mails in the litigation if they would significantly advance the client's interests, assuming the e-mails were legally obtained and not privileged. Although the opinion is advisory only, it certainly should give us pause about our obligations to understand the civil and criminal ramifications of accessing e-mail, as well as the basics about computer technology, since determining whether a client has any civil or criminal liability depends upon exactly how a client accessed the other party's e-mail.

For example, a New Jersey court held in *White v. White* that where a wife obtained a husband's e-mails by hiring a private detective to retrieve e-mails saved on the computer's hard drive without using his password, the e-mails were not obtained illegally. However, a Florida court held in *O'Brien v. O'Brien* that where a wife installed spyware on her husband's computer and intercepted the communications as they were transmitted, the e-mails, chats and instant messages were obtained illegally. This area of law is just evolving, and it is no small task for lawyers to familiarize themselves with both the technological and legal issues involved.

Even more sobering is that a lawyer who uses such e-mails obtained by a client could herself be subject to criminal or civil liability. A recent case from the Eastern District of Michigan highlights that exposure. In *Bailey v. Bailey*, a federal lawsuit involving claims of wiretap violations, invasion of privacy and intentional infliction of emotional distress arose out of a divorce and custody case. The husband accessed the wife's e-mail account by installing keylogger software on the computer's hard drive to learn her password. The husband provided his attorney — who was named as a co-defendant in the wife's subsequent lawsuit — with copies of the wife's e-mails and messages taken from the home computer. The e-mails were later used as evidence in the parties' custody trial to impeach the wife's testimony that she had not recently used drugs or alcohol. The husband was ultimately awarded custody of the children.

The wife then filed a civil action against her husband and his attorney. While dismissing many of the wife's claims, the court did not grant summary judgment with respect to her claim that the husband had violated the Stored Communications Act by accessing her e-mails. (For reasons that are unclear, the wife included both her husband and his lawyer for violation of the Wiretap Act, a count dismissed by the court because her e-mails were not intercepted, but included only her husband in the count for violation of the Stored Communications Act.) The court also refused to dismiss one of her invasion of privacy claims with respect to the husband, although it did dismiss it with regard to his lawyer because there was no evidence that he participated in the intrusion. Although the counts against the husband's lawyer were dismissed in this case, it certainly highlights the possibility that to the extent a lawyer is complicit, or possibly even just cognizant, of the client's activities in accessing another's e-mails, the lawyer could be subject to liability as well.

Although a lawyer's first instinct may be to have a "hands off" policy with regard to e-mails or other communication between an opponent and opposing counsel, the Philadelphia Bar Association's recent ethics opinion demonstrates this is not a clear-cut issue.

Although fraught with landmines, a lawyer confronting this situation has a responsibility to wade through the technological issues of how the client accessed the opposing party's e-mail, then examine the various federal and state laws to determine whether the client risks any criminal or civil liability. This is no small feat. The lawyer then should determine whether the communication is privileged in any event, as well as seek an ethics opinion, and only then can the lawyer determine how to proceed.

This issue is also a good reminder for lawyers to be extremely careful in their communication with their own clients, and to ensure that the client's e-mail is not accessible to the opposing party, whether it be a spouse, employer or other third party. No lawyer wants to see his or her own e-mail with a client used as "Exhibit A." ■

Meredith Brennan is an associate in the family law practice at the law firm of Schnader Harrison Segal & Lewis LLP and co-Chair of the Divorce and Equitable Distribution Committee of the Association's Family Law Section. Her e-mail address is mbrennan@schnader.com.