

E-Mail Security Key to Maintaining Privilege

By Julia Swain

MAINTAINING E-MAIL SECURITY IS CRITICAL to protect attorney-client privilege, attorney Joel Bernbaum told members of the Family Law Section at an Oct. 6 program on e-mail, the Internet and family law.

Bernbaum explained that e-mail should be treated as any other important paper document intended to be preserved and used for litigation.

During the initial client interview it is important to ask about e-mail accounts, both private and work related, password protections; and, to identify who has access to the client's e-mail accounts or to the storage devices where e-mails are archived, such as the computer's hard drive, a portable flashcard, a backup drive, or even a third party data archiving company. Clients should be advised to change their passwords, or better yet, change their e-mail provider. Setting up a new account with providers such as Yahoo (ymail.com), Google (gmail.com) and Microsoft (hotmail.com) is free, and

a secure method to ensure privacy.

Clients should minimize the number of their e-mail accounts since having too many accounts often means less security. They should be made aware that deleting an e-mail from their computer may not actually delete all copies of the e-mail, particularly if the account has been set up to archive e-mails. E-mails deleted on a computer may be retrieved. The deleted e-mail is not actually erased when one clicks on the delete function, it is just removed from your inbox. E-mail retrieval programs can extract deleted e-mail so long as the e-mail data has not been overwritten. Clients should be aware that electronic data can be retrieved from home computers and portable drives.

E-mails may be stored by the account provider, allowing any family member to access the e-mail account. For attorney-client communication, it is important for your client to acquire a new e-mail account to ensure that one's spouse or a child does not access your account. Passwords can be changed regularly to enhance security. Making these changes

can also be used as evidence to demonstrate an expectation of privacy so as to bar the use of improperly obtained e-mail or to demonstrate that the client did not waive any recognized privilege.

Clients should be advised that intercepting private, protected e-mail is a criminal offense, and that they should not purposely retrieve e-mails transmitted to their spouse's personal account. Keylogging, used to capture and record key strokes by a person using the computer, is illegal. Evidence obtained improperly may be inadmissible, and again, could subject your client to criminal charges. Clients should also be advised that courts will usually find that e-mails transmitted from an employer's account have no privacy protection.

Bernbaum recommended that when communicating with your client or with counsel an attached document should be saved in a format that allows the revised



document to track all of the edits made to the text; or better yet, send in PDF format. He also reminded attorneys to be cautious in using the "cc" or "bcc"

functions because the attorney-client privilege could be waived if the e-mail is also sent to a third party in addition to your client.

Counsel and litigants should be mindful of how easily e-mailed documents can be forwarded, copied, or extracted, and that special precautions must be taken to preserve the integrity of the attorney-client privilege. With law firms and courts heading towards a paperless environment, attorneys should implement procedures to safeguard their electronic data and the data of their clients.

Julia Swain, an associate with Fox Rothschild LLP, is a member of the executive committee of the Family Law Section.

YOUNG LAWYERS DIVISION

YLD Panel Revisits Casino Controversy

By Kathryn C. Harr

FROM ITS INCEPTION, THE PENNSYLVANIA Gaming Board and the casino licenses that followed have engendered tremendous controversy in Philadelphia, as discussed at a panel hosted by the Young Lawyers' Division on Oct. 17.

Moderated by James J. Eisenhower, a partner at Schnader Harrison Segal & Lewis LLP, the panel included Adrian R. King Jr., a partner at Ballard Spahr Andrews and Ingersoll and former deputy chief of staff to Gov. Rendell; Matt Ruben, co-founder of Casino-Free Philadelphia; James Leonard, Chief Deputy City Solicitor to the economic investments unit of the City of Philadelphia Law Department; and Andrew Ross, Chief Deputy City Solicitor for Housing and Code Enforcement.

"If you can get past any initial decision in your mind whether you support

gaming or not," King explained, the Pennsylvania Race Horse Development and Gaming Act, or Act 71, "started with good intentions" to revitalize the state's dying horse racing industry. Gov. Rendell expanded the reach of the idea as part of plan to increase state revenues.

The way in which the Act was created, however, sparked controversy, along with many of its requirements.

"This was a resounding failure of democracy just in the way it was created and passed," Ruben argued, noting that it was passed at 3 a.m. on the morning of July 5 and is comprised of a 145-page amendment to a 33-line bill. Further, there was little to no opportunity for meaningful public input about the legislation or the license applications, according to several members of the panel.

Including a slots-only plan for casinos was more about political strategy, King noted, with the idea that later, the bill

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