



## Alerts

### NY Appellate Court Manages Litigation Issues Stemming From Pilfered E-Mails

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*Lawyers for the Profession® Alert*

*Parnes v. Parnes*, \_\_\_ N.Y.S.2d \_\_\_, 2011 WL 102664 (N.Y. App. Div. 3d Dept. Jan. 13, 2011)

#### Brief Summary

In a divorce proceeding, the wife's counsel sought to depose the husband's lawyer based on e-mails between the husband and his attorney that the wife had obtained, mostly improperly. The husband's lawyer successfully moved to quash the deposition, suppress use of the e-mails, and to disqualify the wife's counsel for using privileged information. The New York Appellate Division affirmed the trial court's decision quashing the deposition and prohibiting use of the e-mails but reversed the disqualification of the wife's attorney.

#### Complete Summary

A husband contacted an attorney friend about marital troubles that he was having. The husband and his lawyer exchanged e-mails discussing litigation strategy, after which the wife initiated divorce proceedings. The wife subsequently found a printout of one page of an e-mail between the husband and his attorney. She then searched and found the husband's e-mail account username and password, accessed the account, and printed out other e-mails between the husband and his attorney. At the husband's deposition, the wife's counsel questioned him about those e-mails. The wife then amended her complaint to allege claims against both the husband and his lawyer and issued a subpoena to the husband's attorney—now a defendant—to produce more documents and to be deposed. The husband's lawyer moved to quash the subpoena, and the husband cross-moved to quash the subpoena, prohibit the wife from using any of the e-mails between him and his attorney, strike the newly amended claims, and disqualify the wife's counsel.

The trial court found that all of the e-mails were privileged, prohibited the wife's counsel from using the documents or any information in them, struck the newly amended claims, quashed the deposition subpoena, and disqualified the wife's lawyer. The wife appealed.

The Appellate Division concluded that the e-mails all were privileged. However, the court found that the husband had waived his privilege as to the initial printed

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page of the e-mail that the wife found, which had been left out in a room used by multiple people. The husband never waived privilege to the other remaining e-mails, having taken reasonable steps to maintain the confidentiality of the e-mail account, which he only checked from his workplace computer. Accordingly, the court quashed the husband's attorney's deposition because any testimony that the lawyer could provide was privileged. The court also prohibited any use of the e-mails other than the one printed page.

In spite of the wife's counsel's improper use of privileged documents as well as the questions at the husband's deposition, the appellate court held that the trial court had abused its discretion by ordering disqualification. While not condoning the wife's attorney's actions in failing to promptly notify the husband's counsel that the wife had obtained the e-mails, the court reasoned that the wife's lawyer had an arguable right to ask the questions because the privilege had been waived as to at least the one printed e-mail. The better sanction, opined the court, was suppression of the e-mails. To disqualify the wife's counsel on an arguable opinion of law would have unduly outweighed the important right of the client to choose her own counsel.

### **Significance of Opinion**

This matter provides a good case example of disputes that now arise more frequently, when lawyers are confronted with purloined access to otherwise confidential electronic information of an opposing party or witness. This appellate court's prohibition on use but reticence to enforce disqualification in this instance should not mask the importance of lawful and ethical handling of another party's privileged information in discovery and otherwise as well as the serious sanctions that can result from failure to do so.

For further information, please contact your regular [Hinshaw attorney](#).

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