

ARTICLE:

PRACTITIONER NOTE

E-MAILS CAUSE PRACTICAL PROBLEMS FOR CLIENT CONFIDENTIALITY

By **Iain G. Mitchell, QC**

In Scotland, as elsewhere, communications between lawyers and clients are privileged and attract the highest degree of protection. However, a recent personal experience reveals that problems can easily arise in practice, especially when insecure means of communication, such as e-mail, is used.

The writer was recently instructed to act for one of several co-accused in a high profile case involving the return of a stolen artwork. Each of the co-accused was separately represented. The client in question had been charged with several alleged criminal offences and had been released on bail, but he had not yet been indicted. In consequence, he was still under police surveillance. In particular, unknown to him, the police were intercepting and reading his e-mails.

He had already consulted the writer, and he sent to certain of his friends an e-mail mentioning the writer by name (in flatteringly approbatory terms). However, this e-mail was intercepted by the police, and, in due course appeared in the bundle of Crown productions prepared for the trial.

This might be thought not to be an issue. As it happened, the e-mail did not say anything about any advice which might have been given and would pose no issues for the client, even if it were found to be admissible.

However, when co-accused get to falling out with one

another, they tend to fight like ferrets in a sack, and the counsel acting for one of the other accused saw a golden opportunity to wreck the client's defence: he would cite the writer to appear as a witness. If called, the writer's position would be protected by professional privilege and there would be no evidence which he might usefully be able to give; but that was not the point: if he was a witness in the case, he could not also act as Counsel; and, as an additional twist, the threat was a threat which did not need to be acted upon until a few days prior to the trial, at the last date for citing witnesses.

In practical terms, the client could not be subjected to the uncertainty of working with his Counsel of choice to prepare the case, only to run the risk of the Counsel being forced to withdraw on the eve of the trial. The writer had no choice but to withdraw as soon as the threat had been made.

For the record, all the accused went on to be acquitted on a 'not proven' verdict, and the writer has been instructed in connection with the consequent civil action for payment of the reward money for the return of the painting!

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Iain G. Mitchell, QC is a member of the editorial board