



FAMILY LAW PRACTICE

ALERT

ELECTRONIC COMMUNICATIONS AND THE ILLUSION OF PRIVACY

By Jennifer Weisberg Millner, Esq.

Most of us are using cell phones and e-mail more than ever to communicate with friends and family. We're using these electronic formats to communicate about the small — and big — things in our lives. While these innovations have undoubtedly enhanced our lives, the technology has its drawbacks, and privacy is chief among them. Can we ensure that what we intend as a "confidential" cell phone call, text message, or instant message is indeed private? When can a spouse or significant other obtain information legitimately for use in litigation? And whose information is it, anyway? Unfortunately, the issue of privacy in communications has particular relevance — and carries particular risks — in the area of family law.

The most pressing issues at stake are those regarding the ownership of the computer, phone, account, etc., and who has legitimate, legal access to the related records. In one reported divorce case in New Jersey, a wife hired a technology firm to retrieve the husband's files from the hard drive of the family computer, which was located in a sun room of the marital home. These files included e-mails from the husband's America Online (AOL) account that were relevant to the issue of child custody. The husband, however, had not realized that the e-mails were stored on the computer's hard drive. The court found that the New Jersey Wiretap Act protects only those electronic communications that are in the course of transmission or are backed up to that course of transmission, but did not apply to

communications that were received and stored, as on the hard drive. The court also discussed the husband's expectation of privacy related to his e-mails and, likening the family computer to a storage room to which others had a key, found that he could not reasonably have expected privacy.

In a Pennsylvania matter, a court had the opportunity to rule on cell phone text messages, in the case of a high school student who possessed a cell phone in sight, contrary to school policy. A teacher had confiscated the phone and then accessed text messages as well as records of calls to numbers on the phone's contact list. The court found that, by accessing the text messages, the teacher did not violate the Pennsylvania Wiretap Act, but that, based upon the particular facts, the student might have a cause of action for invasion of privacy. Most of us do not assume that the text messages or other electronic communications stored on our cell phones could legally be made public, but clearly it would be wise to do so.

Because they are integral to our day-to-day lives, cell phones and computers now serve as a fertile source of information in domestic relations cases. Cell phone records are frequently used by litigants to prove cases against spouses. In one particular case, a husband utilized cell phone bills — indicating the location from which a call is made — to pursue an action for adultery against his wife. In another case, a husband and wife had a "family plan" for their cell phones, of which the husband was the account

holder. The wife had not password-protected her number, and the husband was legally able to obtain records of her text messages, including statements that she had made to third parties — including her attorney in matters directly related to custody issues and domestic violence allegations.

Certainly, each case turns on its own particular facts. However, the desire for communication that will remain entirely private and confidential inherently must also remain outside the realm of electronic communications. We cannot assume that the law protects privacy of the contents of a computer or cell phone. Furthermore, any form of

electronic communication may — unbeknownst to us — leave an electronic record that can be readily obtained by members of the household and/or third parties alike. In potentially contentious or divisive situations involving family members, this is especially important to keep in mind as we go about our busy daily lives. The bottom line? If you'd rather not see an exchange appear in court someday, avoid using your cell phone or e-mail; instead use a good old-fashioned landline or — even better — meet for coffee. Your future could depend on it.

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