

## **Electronic Evidence Meets Right to Privacy in Texas Divorce Cases**

There is a false sense of security that takes place when we log on to the internet, our smart phones, or some other form of electronic communication. Many of us seem to think that our true selves are separated from these pieces of technology and that our words and actions are anonymous and floating somewhere through the netherworld of cell phone towers and Wi-Fi hotspots. The undeniable truth is that we are capable of being tracked better now than ever before. Even when we believe we have deleted every file from our computer, every web site visited from our browser, and every text from our phones, forensic specialists still can retrieve the electronic information. And believe it or not, this evidence is becoming increasingly a standard component of divorce trials in the state of Texas and across the country. In a survey completed three years ago, eighty-eight percent of members of the American Academy of Matrimonial Lawyers stated the number of cases introducing electronic data had increased greatly over the past five years.<sup>1</sup> Undoubtedly, the presence of electronic evidence has risen since then.

There are the obvious pieces of electronic evidence that can be used against a spouse during divorce proceedings, such as a Facebook update that says, “John Doe is meeting his girlfriend for dinner even though his wife thinks he is working late” or an online statement for a joint checking account that shows unexplained investments or gifts. But, separating spouses should also consider employee benefit files, online financial management programs, emails, recorded conversations, and GPS tracking devices (just to name a few) as possible sources of evidence in court.<sup>2</sup> All such records must be carefully reviewed, though, before submitting them to a judge. Otherwise, you may find yourself in violation of state and/or federal privacy rights and facing both actual and punitive damages.

When determining whether or not certain electronic evidence is admissible in court, there are important statutes to consider at both the federal and state level. The Federal Electronic Communications Privacy Act and Stored Wire and Electronic Communications Act, passed with its original content in 1986, prohibit the interception of “certain electronic communication” and lay out the ability for the victim of the invasion of privacy to pursue both criminal penalties and civil damages.<sup>3</sup> The combined statutes also regulate the access to communication that is transmitted electronically, including emails, faxes, voice mails, and text messages. Under the

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<sup>1</sup> “Nation’s Top Divorce Lawyers Note Dramatic Rise in Electronic Evidence,” American Academy of Matrimonial Lawyers, <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/nations-top-divorce-lawyers-note-dramatic-rise-el>, February 6, 2008.

<sup>2</sup> “Discovery and Admissibility of Electronic Evidence,” National Legal Research Group, Inc, <http://www.divorcesource.com/research/dl/discovery/01sep157.shtml>, 2001.

<sup>3</sup> “Electronic Communications Privacy Act of 1986,” Computer Professionals for Social Responsibility, <http://cpsr.org/issues/privacy/ecpa86/>, February 11, 2005.

law, only communication attained through a shared source, such as the family's hard drive, is permissible. On the other hand, accessing a spouse's individual email account or cell phone records may not be allowed. This is when the issue of consent comes into play, and what type of information concerning email passwords and other confidential information was shared between spouses in the past.<sup>4</sup> The courts are still navigating the language of the law in our electronic age, and every legal decision seems to create new precedent for how divorce lawyers will handle the overwhelming evidence that technology has the ability to provide.

At the state level, Texas has both a criminal wiretap law, Tex. Penal Code § 16.02, and a civil cause of action for interception of communication, Tex. Civ. Prac. & Rem. Code, Ch. 123.<sup>5</sup> Concerning the first law, you may not place a recording device in a phone to record your spouse's conversations with others. However, Texas is a "one-party consent" state, meaning that you can record conversations in which you are a party without the other participants knowing.<sup>6</sup> Concerning the interception of communication, Texas largely reflects what is in place at the federal level, with much deference given to the person whose personal exchanges were captured.

With the fluidity of the law and the struggle of both legislation and the courts to keep up with ever-changing technology, you can be certain that Texas divorce attorneys will aggressively fight any electronic evidence that may be damaging to their clients and often will meet with success in this effort. Doubts will be raised concerning the authenticity of the sender of an email or text message, the Fourth Amendment and the implied right to privacy that is protected in both federal and state laws will be argued, and the attorney will try to raise suspicions concerning the time that any tracking device was installed and whether or not it was unfairly directed at catching one person.

The bottom line is this—electronic evidence can be a powerful and determining tool in divorce settlements, as shown by its overwhelming use in courtrooms today, but privacy laws will take precedence over such findings. You need an experienced divorce attorney by your side to discuss the evidence you collected or that you believe is out there to be found so that your efforts are not later used against you. Texas has several torts on the books concerning the invasion of privacy and a court can consider these claims when dissolving and apportioning the marital estate. Do not let evidence that you collected to protect and benefit you become the reason that you pay a large fine or even end up in jail. Gather all of the resources you can when you enter

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<sup>4</sup> "Electronic Communications Privacy Act," Rosen Law Firm North Carolina Divorce, <http://www.rosen.com/divorce/divorcearticles/electronic-communications-privacy-act/>, 2011.

<sup>5</sup> Miskel, Emily, "Electronic Evidence: Who's Really Getting Caught in the Act?" *The Big "D,"* <http://blog.emilymiskel.com/2010/04/electronic-evidence-who%E2%80%99s-really-getting-caught-in-the-act/>, April 19, 2010.

<sup>6</sup> "Texas Recording Law," Citizen Media Law Project, <http://www.citmedialaw.org/legal-guide/texas/texas-recording-law>, April 18, 2008.

the courtroom to dissolve your marriage, but proceed with caution by working closely with your divorce lawyer.