List

Fast Facts:

- Once an e-mail has been read by the subscriber, it is no longer a protected communication that is afforded an expectation of privacy.
- Eavesdropping on another's conversations can be a civil, or even criminal, violation of the law.
- If the individual recording the conversation is a participant and all participants are in Michigan, the conversation was not intercepted and is not illegal.

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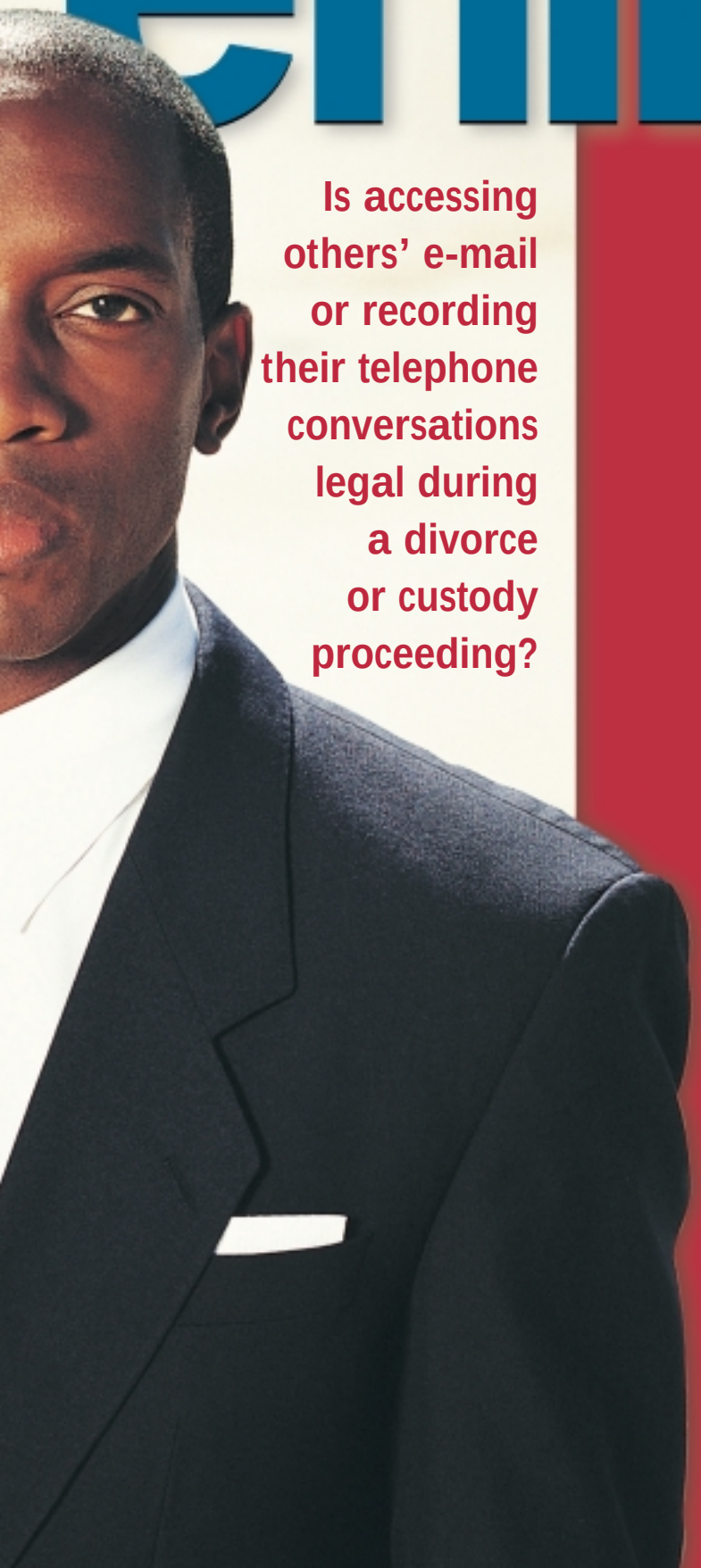

Is accessing others' e-mail or recording their telephone conversations legal during a divorce or custody proceeding?

By Henry S. Gornbein and Jorin G. Rubin

E-mail can be a hot issue during a divorce. In one case, our client believed that his wife was having an affair and that there might be some incriminating e-mail. We issued a subpoena to the e-mail server and were able to get the e-mail, despite the fact that the other side was claiming privilege. Other cases have involved situations where people were using e-mail to communicate back and forth during an affair, to track financial information, to gamble on the Internet, or even to watch pornography. Is there a privacy right to such e-mail communications and if so, is it privileged?

Another situation involved a divorce where the husband and wife worked for the same corporation. The wife believed that her husband was involved in an affair and accessed his corporate e-mail. She obtained his e-mail because she knew the password. She obtained proof of an affair along with proof of some possible corporate misdeeds on his part. Did she have the right to go into his corporate e-mail? In a child custody case, a mother tape-recorded her daughter's conversations with her father from an extension phone. She wanted

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to know why her daughter did not want to visit with her father any more. Was the law violated in these situations? If so, what is the potential civil or criminal liability that can stem from such conduct?

Statutes Governing the Interception of Electronic and Oral Communications

Generally, there are three claims related to these issues: federal and state wiretapping statutes, the Electronic Communications Privacy Act (ECPA), and tort claims in privacy. The Federal Wiretapping Act in Title III1 and the Michigan eavesdropping statute2 prohibit the unauthorized interception, disclosure, or use of communications, as well as eavesdropping on third-party conversations. Violations of either statute brings criminal sanctions, and the federal statute also can expose an individual to a wide range of civil remedies.[3]

The Electronic Communications Privacy Act[4] amended the Federal Wiretap Act in 1986 to encompass the technology of computer communication. The ECPA prohibits the disclosure of the contents of electronic communications to any person. In *Jessup-Morgan v America Online*,[5] the court clarified the term "contents" as set forth in the statute. The sixth circuit held that AOL did not violate the ECPA when it revealed the name of one of its subscribers, pursuant to a civil subpoena. The court held that this disclosure did not reveal the "contents" of the e-mail. Similarly, in *Hill v MCI World Communications*,[6] an Iowa court held that revealing the phone number and duration of phone calls to one of its subscribers was not a violation of the ECPA. Therefore, although the ECPA prevents the communications companies from revealing the contents of e-mails under subpoena, these companies will be able to reveal information related to the subscriber without revealing the actual e-mail contents.

There are several torts that stem from one's expectation of privacy, such as intrusion upon seclusion, false light, and public disclosure of private facts. Civil damages related to such claims can flow from these. Courts look at an individual's objective and subjective expectation of privacy in their analysis of liability for these torts.[7] Further, without a violation of the wiretapping or ECPA statutes, one's objective claim to privacy is diminished.

E-Mail

Generally speaking, retrieving a spouse's e-mail from a home or work computer is not prohibited because the e-mail is stored. Certainly, if a spouse knows the computer's password, the other spouse has authorized access to his or her computer. An understanding of how e-mail is transmitted is necessary to grasp the basis of the courts' rulings related to e-mail retrieval.

Sent e-mail is temporarily stored on the service provider's server until the recipient retrieves it. E-mail is retrieved from the server after the subscriber enters a password, accesses the e-mail, and opens it. Once the e-mail is opened, it is stored on the computer's hard drive. In the case of AOL, the e-mail is automatically stored on the computer's hard drive in the AOL Personal File Cabinet or PFC. E-mail will remain on the PFC until manually deleted. There is usually no automatic password protection provided for the PFC. The result is that anyone can open the service provider's software on a computer's hard drive and read the PFC e-mails stored there.

Courts have consistently held that retrieving and accessing of e-mail stored on a computer is not a violation of ECPA or the wiretapping statutes because the "transmission" of the e-mail is complete, and reading stored e-mail is not an intercepted transmission. In *White v White*,[8] White exchanged e-mails with his girlfriend that were stored on the family computer. Mrs. White hired an investigative service to obtain her husband's e-mails from their computer. The court held that retrieving such stored e-mail did not violate the law because it was in its "post-transmission" storage.

Similarly, in *Fraser v Nationwide Mutual Ins Co*,[9] the court held that a wife's reading of her husband's e-mail stored on his computer at work did not violate the ECPA or the state and federal wiretapping laws. The court held that an individual's expectation of privacy with respect to such e-mail communications diminishes significantly after transmission is complete. Further, the *Fraser* court compared stored e-mail to saved voice mail and held that retrieval of such a communication does not violate the law because the transmission is complete at the point of retrieval and therefore no interception of the communication occurred.

Accordingly, once an e-mail has been read by the subscriber, it is no longer a protected communication that is afforded an expectation of privacy. Just as reading a letter left on a desk is permissible conduct, so is reading an opened e-mail.

Telephone Conversations

Eavesdropping on another's conversations, unlike opening another's e-mail, can be a civil, or even criminal, violation of the law. The Michigan and federal wiretapping statutes prohibit such

conduct. However, under both statutes, if the individual recording the conversation is a participant in the conversation and all participants are in Michigan, there is no violation of the wiretapping statutes because such conversations were not "intercepted."[10] One exception to this rule focuses on the purpose of taping the conversations.[11] If the taped conversation is used to commit a crime (such as blackmail), even if the person making the tape is a participant in the conversation, the recording is illegal.[12] Regarding the publicized recorded tapes of Judge Ferrara of Wayne County Circuit Court, the court held that although the judge's husband (a participant in the taped conversation) had a right to record his conversations with her, he was liable for damages because he sought to use the tapes to blackmail her.[13]

Spouses have attempted to escape the liability of the wiretapping statutes by invoking interspousal immunity to the wiretapping statutes. Most states, however, do not recognize interspousal immunity regarding the state and federal wiretapping statutes. Federal courts[14] and Michigan courts[15] have consistently held that the federal wiretapping statute in Title III does not recognize an interspousal exception. In *Young v Young,* the Michigan Court of Appeals held that when a husband placed a tape recorder under the bed to record his wife's telephone conversations he was not entitled to immunity, despite the recordings having been made within the marital home.[16]

There are other exceptions to the wiretapping statutes. One exception to eavesdropping on the conversation of third parties without consequence, is if consent is obtained from one of the participants in the conversation. In the context of an extramarital affair, it should be impossible to obtain such consent. However, if a parent records the conversations on behalf of a child, the courts have recognized the exception. In *Williams v Williams,*[17] the court held that a five-year-old son gave his father vicarious consent to record his conversations with his mother. In *Pollack v Pollack,*[18] Mrs. Pollack taped conversations between her daughter and her ex-husband. The sixth circuit held that Mrs. Pollack had an objective basis for believing that taping the conversations was in the best interest of her child and therefore, her conduct fell into the exception and did not violate the Federal Wiretapping Act.

Others who have recorded their spouse's conversations have attempted to invoke other exceptions to the Federal Wiretapping Act, such as the business exception.[19] There are two elements to this exception: that there is recording equipment used on the phone line and that the tape recording is done in the ordinary course of business. In *United States v Murdock,*[20] Mr. Murdock was being prosecuted for tax evasion. He attempted to suppress the use of his taped conversations because the tapes were made by his wife without authorization. The government argued that Mrs. Murdock's conduct fell within the business exception because she recorded conversations from an extension phone related to the family business. The court ruled, however, that the wife's tape recording was not done in the ordinary course of her business and that she was wrong to do so. Despite the court's ruling that the taped conversations were recorded illegally, it permitted the government to admit those tapes into evidence in its prosecution of Mr. Murdock, under the clean hands exception.

There is a fine line between love and hate. Many divorces and custody proceedings sadly turn sour. If someone wants to escalate either, it appears that e-mail is fair game. Reading or obtaining e-mail is accessible to anyone and everyone who has access to a computer where the e-mail is stored. Any expectation of privacy to opened e-mail is misplaced and unrealistic.

On the other hand, taping conversations of others is very dangerous. Any attempt to do this could render the nonparticipant eavesdropper exposed to significant civil and even possible criminal liability. Clients should be very careful in this area—it can backfire. ✦

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Henry S. Gornbein, of Bloomfield Hills, is a former chair of the State Bar Family Law Section, a fellow of the American Academy of Matrimonial Lawyers, and a past president of its Michigan chapter. He is frequently appointed to mediate and arbitrate domestic relations matters. Gornbein is also a founder and legal editor of the website "Divorce Online" (www.divorceonline.com) and the creator and host of the cable TV show "Practical Law."

Jorin G. Rubin is with the firm of Resnick & Moss, P.C. in Bloomfield Hills. Her practice focuses on family law, commercial litigation, and asset forfeiture defense. For ten years before joining the private sector, she was an Assistant United States Attorney in the Detroit and Brooklyn Offices. Rubin received her BS and MS from the University of Michigan and her JD from St. John's School of Law.

FOOTNOTES

1. 18 USC 2510 et seq.
2. MCL 750.539c.
3. 18 USC 2520.
4. 18 USC 2701 et seq.
5. 20 F Supp 2d 1105, 1108 (CA 6, 1998).
6. 120 F Supp 2d 1194, 1196 (D Iowa 2000).
7. *Dorris v Absher, et al.*, 179 F3d 420 (CA 6, 1999).
8. 334 NJ Super 211, 781 AD 85 (2001).
9. 115 F Supp 2d 623 (ED Pa 2001).
10. *Sullivan v Gray,* 117 Mich App 476, 324 NW2d 58 (1982).
11. 189 USC 2511(2)(d).
12. *Stocker v Garrett,* 893 F2d 856 (CA 6, 1990).
13. *Ferrara v Detroit Free Press, et al.*, 1998 US Dist Lexis 8635.
14. *United States v Murdock,* 63 F3d 1391 (CA 6, 1995); *United States v Jones,* 542 F2d 661 (CA 6, 1976).
15. *Young v Young,* 211 Mich App 446, 452, 536, NW2d 254, 257 (1995).
16. Id.
17. 237 Mich App 426, 603 NW2d 114 (1999).
18. 154 F3d 601 (CA 6, 1998).
19. 18 USC 2510(5)(a)(I).
20. *United States v Murdock,* 63 F3d 1391 (CA 6, 1995).