



That’s What She Said

What you need to know about tweeting, posting, surfing, emailing, and texting if you are going through a divorce.

BY AUDREY BLAIR

In the world of Twitter, Facebook, texts, and emails, electronic evidence can be a treasure trove of information—particularly in a divorce. Many clients have had little counsel on privacy (or lack thereof) in a divorce, and their tweets, posts, emails, and text messages can easily come back to haunt them.

The information included in this column is for educational and informational purposes only. Please consult an attorney regarding specific legal questions.

Understanding the Technology

Our computers and other forms of technology will store information long after we hit the “delete” button and clear the history of our favorite Internet browser. Computers are continually writing a history of the places we have been on the Internet, the pictures we have downloaded, and the emails we have written. If a client going through a divorce sets up a match.com profile to start dating, for example, and then deletes all of the emails he has received, those emails may still be stored somewhere. Computer forensic expert C.M. “Mike” Adams of Prime Focus Forensics, L.L.C., in Hutto explains this as follows: “If one uses Microsoft Outlook or another email program that resides on a computer, then a certified and trained forensics examiner using forensic software can find them without much trouble. If one is using Gmail or other cloud-based email services, the forensics examiner can usually recover bits and pieces, and sometimes the entire email. Also, if the case warrants a subpoena, then given enough time, the entire email can usually be recovered from the electronic mail service provider.”

As for Internet history, Adams goes on to explain that “without a doubt, Internet browsing history will still be on your computer, whether you cleared the browsing history or not. Most users do not understand that the browser history they can see is just one record that the computer generates when they browse the Internet. There are at least two others that forensic examiners can easily recover. Further, trained forensic examiners can usually recover an image of almost every page a person has visited while browsing.”

Do’s and Don’ts—Spoliation and Illegally Obtained Material

Once clients hear that their electronic communications may surface

during a divorce, many will have the inclination to remove or destroy the data. There are software programs and other methods available for truly clearing a hard drive. It is incumbent upon the attorney to advise the client not to destroy or delete any information. This includes emails, posts, data on Facebook, and all other forms of electronic data. If a court finds that there was a duty to preserve evidence that has since been destroyed, the court can impose severe penalties and sanctions, such as the exclusion of testimony or other evidence at trial. In some cases, lawyers have been sanctioned for deleting information from a client’s social media.

A spouse may be tempted to spy on his spouse electronically, which can be a violation of state and federal law. Adams explained that there is commercially available software for this purpose that is relatively inexpensive. “The victim of this software will never know it is there or what it is doing. For all practical purposes, if a computer is infected by this type of software, then everything that one does on one’s own computer is an open book to whomever is doing the spying. Some software will even include a report that highlights arbitrary keywords. For example, should the spy believe that one’s spouse is having an affair with someone named “David” or “Diane,” those two names can be set up as keywords to monitor on the target computer,” he said. “This technology is also available for certain brands of smartphones. The spy can monitor texts, voicemail, and email received on the phone and can physically locate the owner of the phone. The spy can actually turn your phone into a listening device while you are meeting with your lawyer and remotely listen to everything that is going on.” The Stored Communications Act, the Electronic Communications Privacy Act, and Texas state law all address

various manners of illegally accessing electronic communication. Don’t be tempted to do this, as it will hurt you in your divorce case and possibly subject you to criminal penalties.

Expectation of Privacy in Divorce

In a divorce case, almost everything is relevant. There will be disclosure of credit card statements, bank statements, and other information that shows the property and debt in marital estate. Even in a situation where the parties have been separated for a significant amount of time, the court will still likely force the parties to exchange financial information. A spouse should not have the expectation that transferring money to his brother in the middle of a divorce or spending money at Victoria’s Secret will be kept private. The same can be said about emails or other communication between the wife and her new boyfriend, as well as texts, Facebook messages and posts, tweets, Instagram posts, and the like. In an already emotional process, disclosure of ill-advised comments and pictures can make a divorce even more difficult and contentious. An emotionally charged divorce is almost always an expensive divorce, which is something everyone wants to avoid.

In sum ... think before you tweet (or otherwise communicate electronically). If you are in a divorce proceeding or are even thinking about filing for divorce, pretend that everything you write will be read in front of a judge someday. If that idea makes you uncomfortable, don’t write it. **TBJ**



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