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FAMILY LAW

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Beware the Smoking E-mail

Don't let your divorce client test the reach of New Jersey's computer crimes laws

The emotional volatility attendant to the breakup of a marriage may lead a client to search out and collect evidence of the other spouse's wrong-doing. Family law practitioners should be aware that domestic disputes may intersect with criminal law, and should be cautious when advising a client that the law permits a spouse to collect electronic evidence from a household computer.

A few years ago, the New Jersey Legislature revised computer crime laws in an attempt to bring them into harmony with recent technological advances. Today's technology may easily enable one spouse to spy on the other to collect evidence for a divorce or child-support hearing. Under New Jersey's computer theft law, "a person is guilty of computer criminal activity if the person purposely or knowingly and without authorization, or in excess of authorization, accesses any data, data base, computer storage medium, computer program, computer software, computer equipment, computer, computer system or computer network." N.J.S.A. 2C:20-25a. Notably, the revised law also states that "[a]n actor has authorization if a reasonable person would believe that the act was autho-

riized." N.J.S.A. 2C:20-23q. A violation of the unauthorized access portion of the statute is a third-degree offense, exposing the offender to up to five years in prison.

An interesting and common fact scenario arises. Suppose your client believes that her husband is cheating and wants to install a device on the home computer to confirm her suspicions, or wants to know if it is permissible for her to rummage through her husband's e-mail account. Before advising your client to become Big Brother at home, be aware that you might be putting your client in hot water, not just with her spouse, but also with the law. A prosecutor, and even a court, may conclude that your client illegally accessed the electronic communications. Courts will likely consider the following: Was the spouse authorized to use the computer? Was the computer or the e-mail account accessed password-protected, and, if so, who knew the password? Was the computer located in a common area, such as the family room, or in a more secure location, such as the spouse's office? Who owned the computer? Did the spouse invade what a reasonable person would believe was the spouse's legitimate expectation of privacy? A

statutory defense does not provide much of a safe harbor in this situation:

It is no defense that...computer criminal activity was from or committed against the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is...computer criminal activity only if it occurs after the parties have ceased living together. N.J.S.A. 2C:20-2k.

The same issue seems to present itself in both the statute defining the offense and in the defense — was the accessed information normally accessible to both spouses? If so, seemingly there would be no offense because the accessed information was not "without authorization, or in excess of authorization." In this context, the defense does not seem to afford any additional protection to an accused spouse.

As if the prospect of your client committing a third-degree offense is not alarming enough, the unauthorized access of electronically-stored data also exposes the unwary to a civil action in which a prevailing party is entitled to compensatory and punitive damages, costs and attorney's fees. See N.J.S.A. 2A:38A-1, et seq. Your client's divorce complaint could result in a nasty counterclaim, one that you may unwittingly help prove if, in the divorce action, you present the surreptitiously obtained electronic information as evidence of her spouse's infidelity.

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A reported opinion from the Chancery Division, Family Part, sheds some light on how courts are likely to interpret the potential criminal liability of someone charged with the unauthorized access of a spouse's computer. In *White v. White*, 344 N.J. Super. 211 (Ch. Div. 2001), the court, in a custody dispute, addressed the admissibility of evidence that the wife obtained after a computer expert she retained extracted copies of e-mails sent to and from the husband from the family's computer. Note that the *White* case was not a criminal prosecution, and was decided under a different statute — New Jersey's Wiretap Act, N.J.S.A. 2A:156A-1 to 34. The *White* court ultimately concluded that the Wiretap Act, enacted to protect against the eavesdropping of in-progress communications, did not apply to the accessing of past e-mail communications electronically stored on a computer's hard drive. Nonetheless, the court in

White offered some cogent observations about how to analyze whether a spouse is authorized to access electronic information stored on a family computer, observations that would seem to be equally applicable in the analysis of whether conduct violates N.J.S.A. 2C:20-25a.

The court noted that "without authorization" refers to using a private computer, or using another's password or code without permission. Defendant did not use the family computer, but was not prohibited from doing so. She did not use the husband's password to access the information, but searched different directories on the hard drive.

The computer was located in a room of the house where the husband resided. But the wife and children regularly entered the room. The husband, therefore, had no reasonable expectation of privacy.

The wife was searching for evidence of her husband's affair,

which the court said was "not an uncommon occurrence in the realm of human experience." The court said searching through files in a computer hard drive is tantamount to "rummaging through files in an unlocked file cabinet."

Our courts have yet to apply our newly revised, computer criminal statutes in a family law context, so be wary about advising your client that it is acceptable to sift through the spouse's e-mail messages or other electronically stored data. The more secure and private a computer is, the less likely it is that others will be considered authorized to access it — even among spouses. Would the same fact pattern in *White* presented in a criminal court constitute proof that the wife committed a crime? Probably not. But your client probably does not want to be the test case about the reach of New Jersey's computer crimes laws. ■