

DOMESTIC DISPUTES

BY MEREDITH BRENNAN
Special to the Law Weekly

mbrennan@schneider.com

FAMILY LAW

Snooping on a Spouse

Is key logger software illegal, actionable or admissible?

As "spyware" technology evolves, the divorce minefield becomes even trickier to navigate. A recent federal court decision addressing the issue of key logger software in the context of a divorce action is a cautionary reminder for family lawyers not only to protect their clients, but also themselves.

In *Bailey v. Bailey*, Case No. 2008 U.S. Dist. LEXIS 8565 (E. D. Mich. Feb. 6, 2008), a federal lawsuit involving claims of wiretap violations, invasion of privacy and intentional infliction of emotional distress arose out of a divorce and custody case. The parties were married in 1987 and had three children. Jeffrey Allan Bailey had suspicions about his wife's infidelity based on the amount of time she spent on the Internet. To determine whether his fears were founded, in the fall of 2005, Jeffrey Bailey "clicked" into his wife's e-mail account. The court did not explain how he accessed his wife's e-mail account.

According to the opinion in the case, written by District Judge Sean F. Cox, Jeffrey Bailey discovered messages to his wife from a Web site called "Killer Movies Forum." He read the messages, which were sexual in nature. After his wife, Deborah Jo Bailey, learned that her husband had accessed her e-mail account, she changed her e-mail address. During this period, Jeffrey Bailey downloaded a free trial version of a key logger software program and installed it on both computers in the home. Key logger software is designed to record every keystroke made on the computer and store it in a text file on the computer's hard drive. He used the program to learn his wife's password for her new e-mail account and her private messaging system on the "Killer Movies Forum" Web site. Jeffrey Bailey discovered that Deborah Bailey was continuing her "Internet sexual activities" and filed for divorce.

INFORMING HIS LAWYER

Throughout the divorce proceedings, Jeffrey Bailey provided his attorney, who was named as a co-defendant in Deborah Bailey's subsequent federal lawsuit, with copies of Deborah's e-mails and messages taken from the home computer. Jeffrey continued to access Deborah's e-mails even after he moved out of the marital residence by using the passwords he had obtained using the key logger program before the parties separated or by guessing her new pass-

words, which Jeffrey claimed were all family names.

As part of the divorce proceedings, the parties engaged in contested custody litigation. Jeffrey Bailey alleged that Deborah Bailey was an alcoholic, using this as a basis to argue that he should be awarded custody of the children. At one custody hearing, Deborah Bailey testified that she had not recently used drugs or alcohol. Jeffrey Bailey's attorney impeached her testimony using copies of her own e-mails, which showed that she had gone to a party and consumed drugs and alcohol. Jeffrey Bailey had provided copies of these e-mails to his attorney. At the conclusion of the case, Jeffrey Bailey was awarded custody of the children.

Thereafter, Deborah Bailey filed a civil action against her ex-husband and his attorney. Essentially, she argued that she would not have lost custody of the children if her e-mails and Internet messages had not been disclosed. She also claimed that she had suffered emotional distress as a result of the loss of her children. Jeffrey Bailey and his attorney filed separate motions for summary judgment. The court addressed each claim.

WIRETAPPING?

Deborah Bailey alleged that her ex-husband and his attorney violated the federal Wiretap Act, 18 U.S.C. section 2511 et seq., when they obtained her e-mails and messages using the passwords learned from the key logger software program. The Wiretap Act prohibits a party from intentionally intercepting any wire, oral or electronic communication of another. The court concluded that there was no interception of Deborah's communications because interception requires that the electronic communication be intercepted contemporaneously with its transmission. In this case, the key logger software program only allowed Jeffrey to learn Deborah's passwords, which were then used to access and copy her e-mails and messages. Because Jeffrey did not obtain the e-mails or messages at the time of their transmission, the Wiretap Act did not apply, and the court granted summary judgment on that claim.

Next, the court addressed whether Jeffrey Bailey had violated the federal Stored Communications Act, 18 U.S.C. Section 2701 et seq. The Stored Communications Act prohibits a party from intentionally accessing without authorization a facility through

which is provided, and thereby obtains ... access to a wire or electronic communication while it is in electronic storage. Jeffrey Bailey argued that the Act did not apply because his ex-wife had already opened the e-mails and

messages by the time he accessed them, and thus the e-mails and messages were no longer in electronic storage, but were rather in post-transmission storage. The court rejected this argument.

In a similar decision from the Eastern District of Pennsylvania, *Bansal v. Russ*, 513 F. Supp. 2d 264 (E.D. Pa. 2007), that

federal court found that the Act did not prohibit obtaining opened e-mails, without citation to any authority or other analysis.

The *Bailey* court held that read e-mails and messages are not outside the purview of

the Stored Communications Act. Interestingly, through, the court noted that the Act's protection does not extend to e-mails and messages stored only on a party's personal hard drive, since those e-mails are not accessed through an electronic communication service. Thus, the court did not grant summary judgment on this claim.

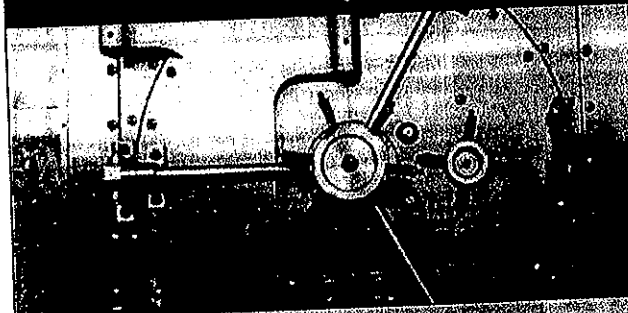
INVASION OF PRIVACY

Deborah Bailey also claimed that her privacy was invaded by her ex-husband and his attorney under two theories based upon Michigan tort law. First, she asserted an intrusion upon seclusion, which requires that a plaintiff prove (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about the subject matter through some method objectionable to a reasonable person. The court held that the cause of action could not be maintained against the ex-husband's attorney because there was no evidence that he participated in the "intrusion." Jeffrey Bailey argued that he had a

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It is critically important to understand exactly how a client has accessed a spouse's e-mail or Internet history before accepting this information from a client.

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Disputes

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right to monitor his wife's computer activities in the interests of himself and the children. Deborah Bailey countered that her ex-husband continued to access her e-mails after the divorce and regarding matters that were no longer his concern. The court held that Deborah Bailey had raised an issue of fact whether her ex-husband's use of the key logger software program to access her private e-mails and messages was objectionable to a reasonable person, thus denying summary judgment on that claim.

Deborah Bailey's second invasion of privacy claim was based upon the theory of public disclosure of private facts, which

requires that a plaintiff prove (1) the disclosure of information, (2) that is highly offensive to a reasonable person, and (3) that is of no legitimate concern to the public. She alleged that her ex-husband and his attorney publicly disclosed the information contained in her e-mails when those e-mails were used to impeach her testimony during a custody hearing. The court rejected the claim, noting that all of the disclosures were in the context of a custody hearing wherein the court was charged with determining the fitness of the parents, which is a legitimate public concern.

EMOTIONAL DISTRESS

Finally, Deborah Bailey alleged a claim of intentional infliction of emotional distress. The court found that Jeffrey Bailey's conduct of using the key logger program was not

extreme or outrageous conduct.

"A husband snooping in his wife's e-mail, after learning that she was engaging in sexual discussions over the Internet while the children may have been present, and using damaging e-mails in divorce and custody proceedings can hardly be considered 'atrocious and utterly intolerable in a civilized society,'" Cox wrote.

LIMITED GUIDANCE

Since there is limited guidance in Pennsylvania on these developing issues involving e-mail interception and access, keystroke software and other "spyware" programs, particularly in the context of family law cases, decisions across the country are instructive. They also serve as a cautionary tale to family lawyers who are confronted with "evidence" from a client that may not

only be inadmissible, but may be illegal and could potentially create civil or criminal liability for the attorney who uses this evidence. It is critically important to understand exactly how a client has accessed a spouse's e-mail or Internet history before accepting this information from a client. For example, as pointed out by the Bailey court, whether an e-mail was accessed in violation of the Stored Communications Act may depend upon whether the e-mail was obtained from a personal computer or the Internet server. While in this case the court dismissed all but two of the wife's claims, the law in this area is by no means settled, and attorneys should tread very cautiously in determining how such information can or should be used. ■

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