

FAMILY LAW

You've Got Mail!

Is It Legal to Read Your Spouse's E-mail? And Is the Evidence Admissible in Court?

PRIVACY LAW

BY MEREDITH BRENNAN

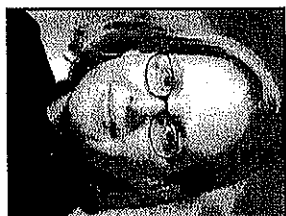
Special to the Legal

It's not farfetched: You become suspicious that your spouse has become involved with someone online. Your spouse spends hours at a time on the computer, and when you walk in to the home office, your spouse immediately minimizes the computer screen.

You decide to investigate one step further, and you access your spouse's e-mail account only to find that he or she has been having an online affair — even sending pictures of your children to the new love interest. Is this evidence admissible in court, and does accessing a spouse's e-mail account violate the Pennsylvania Wiretap Act?

Given the fact that many couples are separating but continuing to live in the same household for economic and strategic reasons — and often sharing a computer during that time — this scenario is becoming increasingly common.

The Wiretap Act does apply to e-mail communications, and Section 5741 of the act specifically applies to stored communications, such as e-mails that have been sent and received. Pennsylvania courts have begun to address the admissibility of e-mail in court,



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although no court has yet addressed the admissibility of e-mail communications accessed by a third party.

However, a recent New Jersey case has addressed exactly this issue. Given that the New Jersey and Pennsylvania Wiretap Acts are virtually identical in language, the New Jersey case may shed some light on the issue.

In *White v. White*, 781 A.2d 85 (N.J. Ch. Div. 2001), the husband and wife were in a hotly contested custody dispute. At issue was whether the wife — by retrieving her husband's stored e-mails from the hard drive of the family computer — unlawfully accessed stored electronic communications, in violation of the New Jersey Wiretap Act, or violated the husband's common law right to privacy.

The court found that the wife's actions did not violate the Wiretap Act or the husband's right to privacy. Although the parties had filed for divorce,

the husband and wife continued to reside together in the family home, and the husband slept in the sun room, where the family computer and entertainment center were located. Upon finding a letter from the husband to his girlfriend, the wife hired a private detective who — without using the husband's password — copied the husband's e-mail files from the computer's hard drive. These files contained e-mails sent between the husband and the girlfriend as well as images that he viewed on the Internet.

The investigator then sent a report to the wife and her attorney.

The wife's expert explained as to how an AOL e-mail account works. Incoming e-mails are received on the AOL e-mail server and are accessible to an AOL user after dialing in and authenticating with the user's screen name and password. A user cannot send an e-mail via AOL until he or she has similarly dialed in.

The wife's expert explained that an AOL user can save e-mails on a computer hard drive through the use of a Personal Filing Cabinet (PFC) feature, which is created automatically on the hard drive during the installation of AOL on the user's computer.

The PFC is named for the user's screen name. All AOL users must voluntarily choose to save the e-mail to his PFC or address book, and this can be done using either the auto-

matic AOL feature or manually. To save automatically to the PFC on the hard drive, the user must select that option in mail preferences and then check Retain All Mail I Send in My Personal Filing Cabinet and/or Retain All Mail I Read in My Personal Filing Cabinet.

Additionally, in the notes section of the help screens, AOL informs the user that he can read mail stored in the PFC when he or she is not signed onto AOL, i.e., the PFC is on the hard drive. Similarly, AOL informs the user that e-mail saved on the PFC will remain on the hard drive until the user deletes it. If no PFC password is created, any computer user may view a PFC and e-mails contained in a PFC by simply opening the AOL software on the hard drive.

The court noted that the husband was saving his e-mails — received and sent — to the PFC of the family computer. It also noted that it was clear he did not realize he was doing so.

The court cited *Fraser v. Nationwide Mutual Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001), to explain how the storage system works for e-mail communications. After a person sends an e-mail message, the system stores the message in temporary or intermediate storage (intermediate storage). The system also stores a copy of the message in a

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SUIT YOURSELF

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separate storage for backup protection, in the event the system crashes before transmission is completed (backup storage). Transmission is completed when the recipient logs on to the system and retrieves the message from intermediate storage. At that point, the recipient may choose to store permanently the message in a third type of storage—post-transmission storage, where it may remain for years.

The court clarified that the e-mail on the White family computer accessed by the wife's investigator was in post-transmission storage. Holding that the Wiretap Act was not meant to extend to e-mail retrieved by the recipient and then stored, the court stated: "It protects only those electronic communications which are in the course of transmission or are backup to that course of transmission."

The court found that this result made logical sense "when one considers that the 'strong expectation of privacy with respect to communication in the course of transmission significantly diminishes once transmission is complete.'"

The court also found that the wife and/or her investigator did not access the husband's e-mail "without authorization." The court noted that "without authorization" means using a computer from which one has been prohibited, or using another's password or code without permission.

Overtime

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ment.

The attorneys did not argue that they were ordered to work overtime, but that it

In the Whites' case, the wife was authorized to use the family computer and did not use the husband's password or code without his authorization. Rather, she accessed the information by "roaming in and out of different directories on the hard drive."

Lastly on the issue of the Wiretap Act, the court noted that the language of the act refers to access rather than disclosure or use. Thus, at least one court has held that a person can disclose or use with impunity the contents of an electronic communication unlawfully obtained from electronic storage. (*Wesley College v. Pitts*, 874 F. Supp. 375, 389 (D. Del. 1997).)

The White court stated, "[B]ecause there is no prohibition regarding the disclosure or use of the information [the wife] obtained from the family computer's hard drive, [the wife] cannot be barred from using it." The court also dismissed the husband's invasion of privacy claim.

Pennsylvania courts have also addressed the issue of accessing e-mail — although not under the circumstances present in the New Jersey case. In *Commonwealth v. Proetta*, 771 A.2d 823 (Pa. Super. 2001), a police officer was arrested for criminal solicitation, dissemination of obscene materials and corruption of minors, stemming from his e-mail communications with a 15-year-old girl over the Internet.

There, the 15-year-old girl printed out the police officer's e-mails and electronic chat-room communications to her and turned them over to the police.

that argument.

"We agree entirely with this statement and comment it," Hodges wrote. "For the purposes of this litigation, however, it is irrelevant."

Former Assistant U.S. Attorney Rory Little, a professor at Hastings College of

The court analogized the situation to one where a party leaves a message on an answering machine.

The court stated: "Any reasonably intelligent person, savvy enough to be using the Internet ... would be aware of the fact that messages are received in a recorded format, by their very nature, and can be downloaded or printed by the party receiving the message. By the very act of sending a communication over the Internet, the party expressly consents to the recording of the message."

Of course, in that case, the e-mail was downloaded and printed by the intended recipient, and thus by definition could not have been intercepted, whereas in the New Jersey case, the husband's e-mail was downloaded and printed by the wife, a third party to the communication.

The court quoted *United States v. Charbonneau*, 979 F. Supp. 1177, 1184 (S.D. Ohio 1997), which stated: "Defendant possessed a limited reasonable expectation of privacy in the e-mail messages he sent and/or received on AOL. ... E-mail is almost equivalent to sending a letter via the mails. When an individual sends or mails letters, messages, or other information on the computer, that ... expectation of privacy diminishes incrementally."

The court concluded that the police officer did not have a reasonable expectation of privacy in the e-mail messages sent to the 15-year-old, because once those messages were received, she could forward them to anyone.

Only a handful of other states have

He also said exceptions will have to be made in the crafting of any settlement.

"You cannot do a trial in a 40-hour work week. Anyone who's done the job knows that," Little said.

Assistant U.S. Attorney William Shockley, past president and current sec-

addressed the issue of the expectation of privacy in Internet communications, and the courts have generally found that no expectation of privacy, or a limited expectation, exists.

Thus, there is no clear answer to the question of whether e-mail communications accessed by third parties are admissible under Pennsylvania law. The Pennsylvania Superior Court has indicated that a person's reasonable expectation of privacy diminishes incrementally when communicating by e-mail.

However, that case was decided in the context of the recipient of the e-mail disseminating the information, not a third party. However, under New Jersey law, if a spouse accesses the other's e-mails from post-transmission stored e-mails, the spouse would not be in violation of New Jersey's Wiretap Act, which is virtually identical to the Pennsylvania Wiretap Act.

Depending upon how the e-mail is accessed, a spouse sharing a computer with an estranged spouse should be extremely wary of the privacy of e-mail communications. If you are living with an estranged or suspicious spouse, you want may to use an e-mail system that requires different e-mail accounts with different passwords, or set up a free e-mail account that would be password-protected.

Alternatively, if you are the suspicious spouse, know that the fruits of your snooping may only be admissible if you access the information from a hard drive, rather than by using the spouse's password or otherwise access the spouse's e-mail account without authorization.

FBI agents, do get paid overtime.

Shockley said 68 percent of assistant U.S. attorneys leave government between their sixth and 15th years of service, just when they're becoming journeyman prosecutors.

"As federal prosecutions get more complicated, we need to have a greater number