



HERRING LAW GROUP

Certified Specialist, Family Law, The California Board
of Legal Specialization of the State Bar of California

Fellow of the American Academy of Matrimonial Lawyers
Fellow of the International Academy of Family Lawyers

Writer's direct email: gherring@theherringlawgroup.com

Personal Information, Privacy, and Related Concerns

by Gregory W. Herring

I am encountering more and more personal information and privacy concerns in my practice. This has largely developed with the rise of email and the emergence of social media. Here's a glimpse into how I discuss privacy with clients:

Advice to Family Law Clients about Personal Information and Privacy

An attorney's ability to represent a client requires the attorney to gather from the client complete and truthful information. We rely upon the full and complete truthfulness of the information you provide to us in formulating strategy, giving you advice and calculating the best positions to be taken.

During our representation, we will need to collect sensitive data including your personal financial information. But the sensitive information that is required to be disclosed to the other party in litigation, or filed with the court, may then be used by anyone who comes into its possession. Please be very clear that the content of all court filings are most probably going to be available for examination by the public as court files are very rarely sealed.

Remember that, generally speaking, eavesdropping and recording private communications by another person is illegal. Additionally, such evidence would be inadmissible under the Family Code. I believe that these principles could reasonably be extended to the reading of private email messages and copying of electronic data.

Keep in mind that serious problems can also arise with other forms of surveillance, such as hidden cameras, automobile tracking, etc. Do not undertake surveillance without clearing it with me.

Email Communications

As we know, there are substantial timing benefits to communication by email. Please, however, be very clear about the following:



1. Email communication is not a secure method of communication.
2. Any email that is sent to you or by you may be copied and held by the various computers it passes through as it goes from me to you or vice-versa.
3. Emails that reside in computers are subject to being accessed or copied by persons innocently or with a hostile agenda.
4. Emails may be inadvertently accessed by, or delivered to, persons not intended to participate, nor authorized to being a part of, our communication. Our email communications may be intercepted by persons improperly accessing your computer or my computer or even some computer unconnected to either of us through which the email passes. By inadvertence someone may reply to an email and mistakenly include an unauthorized person, even opposing counsel or the opposing party, because of using the “reply to all” feature.

As a result, I expressly offer the option of not using emails and restricting our method of communication to either the US Postal Service, overnight delivery services or direct messengers.

For one client in a particularly high-profile case, I set up an encrypted communications system, called “CryptoExpress.” It allowed instant messaging, emails and voice over internet services. A cost was involved, but, under the circumstances, the client was happy to incur it.

Certainly not everyone is aware that emails to and from an employer’s computer are considered non-confidential. Thus, I ask clients to please only use their own private email, especially in order to protect the attorney-client privilege. Because it is hard to keep track of all clients’ various email addresses, I tell them ahead of time that I assume they are using their private email address, and not an employer-provided email address.

Documents that are sent by email often contain “metadata” (i.e., information describing or tracking the history, authors or management of electronic data) that clients and attorneys may not want someone else to know. As we cannot be responsible for removing metadata from the documents that clients may sending us or others (as opposed to the documents that we send from this office), please be aware of this concern. Even converting a document to a .pdf through computer software may not do the job. The safest way to “scrub” metadata from a document is to convert it to .pdf format by scanning it by hand.

It is unpleasant for a lawyer to be presented with a copy of an email at a hearing that might contradict the client’s position or otherwise put him or her in an unfavorable light. Thus, please take a deep breath before emailing, texting or otherwise communicating something that could come back to haunt you.

Danger of social networking sites

“Facebook” and other social networking services are more popular than ever. Please be careful, however, if you already have or might in the future upload any information or documentation on them. For instance, I have had more than one client embarrassed when “confessions” made to friends on Facebook came back to haunt them when used against them as evidence. Please



consider everything you might put “out there” available to those who would potentially use it against you.

On the other hand, please do keep your eyes out for such communications that may have been made by your spouse. Unless you expressly instruct me to do this, I will not pursue such potential evidence because most clients do not want to pay for me to scan the other party’s sites.

Electronically Stored Information

Recent changes in the law require that you now protect from change and destruction all electronically stored information (ESI) during your case. This means that until your case is over and you are told otherwise by me, you must not delete or modify any email, text messages, voicemails or even social networking postings (a lawyer in another state was recently disbarred for encouraging this). If you are using QuickBooks, Microsoft Money or other accounting software at home, you cannot delete their files. Frankly, if in doubt, keep it.