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Smartphones, text messages appear in more divorces

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Evidence from text messages and voice mail is increasingly common in divorce cases as is evidence from smartphones in general, lawyers said.

Sometimes a judge will ask a party to a divorce case to produce his or her phone in open court, said one lawyer, Dean S. Dussias.

"Sometimes a judge would say, 'If you have nothing to hide, what are you worried about?'" Dussias said, "especially when they denied they've sent a text message."

But that party's attorney can object, he said.

On occasion, lawyers will use their smartphones in court even to make legal citations from the Internet, Dussias said.

There are limits and drawbacks to telephone evidence that lawyers and clients have to be aware of, attorneys said.

Also interviewed for this story were Meighan A. Harmon of Schiller, DuCanto & Fleck LLP and Joel J. Levin of Levin & Conde.

"The e-mail of 2007 is the text message of 2012," said Harmon, who is president of the Illinois Chapter of the American Academy of Matrimonial Lawyers.

"But text messages vaporize. ... The cellphone company may have data going back only 24 or 48 hours" on the actual content of the message, she said. E-mail, by contrast, "is sort of there forever."

Data to show merely whether a text message was sent and from whom lasts longer than the content, Harmon said.

Thus, if a divorce client wants to cite a text message or messages that she received, "they've got to maintain it in order for it to stay alive or it's mostly gone," she said.

Smartphones can also easily record live telephone calls if you "turn on the memo portion," Levin said.

But "if a husband tries to trap a wife or a wife tries to trap a husband" by secretly recording a phone call, Levin said this can run afoul of eavesdropping laws.

For a recorded conversation to be admissible in court, typically the party doing the recording has to announce that fact and the other party has to agree, Levin said.

In divorce cases, evidence is "less and less paper and more and more electronics,"



Dean S. Dussias

Dussias said.

"I can tell you last week in court ... a father was complaining the mother was blocking his access to a teenage child by blocking his phone number" in the child's cellphone.

The judge "asked him to dial the child's phone number in open court on the speaker so the whole courtroom could hear.

"We all waited on baited breath. Sure enough, it went into voice mail," Dussias said. Lawyers can duel with smartphones too, Dussias said. Recently, he said, an opposing lawyer "started arguing the terms of a statute. I didn't believe him. There's an app on my iPhone called Fastcase."

Dussias said he dialed up the statute and handed his iPhone to the judge. "It worked out well for me."

Dussias is past president of the Illinois Chapter of the American Academy of Matrimonial Lawyers.

Levin said that some phone messages and e-mail messages are privileged, but lawyers may try to use them anyway.

For instance, a therapist for a child in a custody case may leave a phone message for one side or the other or for a third lawyer who represents the child.

Then one party may try to use the therapist's message in the legal dispute. "That would probably be inappropriate,"



Meighan A. Harmon

Levin said. "It might be protected and privileged by the mental health code."

Text messages or e-mails can be grist for petitions for orders of protection in divorce cases, the attorneys said.

"I have seen more than one instance when late night, perhaps alcohol-infused text messages have gone back and forth," Harmon said.

"They get angry enough and get hostile enough. When the court is reading these angry and hostile e-mails in the cold light of day, taken out of context, it could seem pretty horrible."

Smartphones also hold e-mails, the lawyers said. They said trying to get text messages or e-mails from the opposing party's phone, instead of your own client's phone — for instance to show evidence of an extramarital affair — might be difficult.

Subpoenas can be issued for the opposing party's phone data and courts will sometimes support this, the lawyers said.

But one phone company "has said they won't even attempt to recover any content from text messages unless it's related to a criminal case," Harmon said.

But "there is such a huge amount of data out there that trying to put the onus on these companies to maintain the data, it would be impossible," she said.