June 2013

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ATTORNEYS AT LAW

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E-Mail Privacy

Much like the proverbial diamond, an e-mail is forever. Family photos, intimate conversations, trade secrets, and personal videos can be unearthed from hard drives with a few simple keystrokes and sent to millions of people all over the world in a matter of seconds. E-mail accounts and digital cloud services hold some of our most private information, things that we would never want our friends and family to see, let alone the entire world.

The law hasn't done a very good job of keeping up with the fast pace of technology, but House Bill 2268 is an attempt to change that, much to the dismay of law enforcement.

One of the few bills to emerge from the latest Texas legislative session with bipartisan support, Governor Rick Perry recently signed HB 2268 into law, making Texas the first and currently the only state that requires all state agencies to obtain a search warrant to access e-mails, videos, documents, and other electronic customer data.

Introduced in the 83rd legislative session by State Rep. Jonathan Stickland – HD 92, HB 2268, which was incorporated into Article 18 of the Texas Code of Criminal Procedure, requires state agencies to obtain a probable cause warrant to access "customer data held in electronic storage or the contents of and records and other information related to wire communication or electronic communication held in electronic storage." What does this mean in plain English? It means before accessing any information in your Gmail, Hotmail, Yahoo, or other email accounts, a state agency will need probable cause and a warrant. But this is just the tip of the iceberg of HB 2268.

HB 2268 draws a line between emails older than 180 days. This is likely a reference to the Electronic Communications Act of 1986 ("ECPA"), which governs federal law enforcement's access to personal electronic data. Under the ECPA, federal law enforcement does not need a warrant for emails older than 180 days; all that is needed is a written and somewhat vague statement saying that it "pertains to an investigation." Under HB 2268, law enforcement can access e-mails less than 180 days old by obtaining a warrant. However, if those e-mails are older than 180 days, the Bill requires that if the customer or subscriber *is not* given notice, law enforcement may seek a warrant. But if a customer *is* given notice, all that is needed to access those emails is a subpoena authorized by statute, a grand jury subpoena, a court order, or permission under federal law (i.e., the ECPA). This portion of the Bill leaves a few unanswered questions, particularly what constitutes notice? And, more importantly, *who* gives the customer notice?

The Bill also addresses law enforcement's access to "remote computing services." While "remote computing services" is defined under 18 U.S.C. § 2711(2) as "the provision to the public of computer or processing services by means of an electronic communications system," the Bill itself doesn't define "remote computer services." One could interpret the phrase to encompass remote access services, such as LogMeIn and TeamViewer. Again, this portion of the Bill contains the same notice or lack thereof requirement for law enforcement's access to e-mails.

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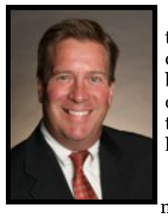
INSIDE

In The Spotlight:

Winding-Up And Dissolving A Business



Most entrepreneurs recognize the importance of careful planning and consideration in choosing the form of entity that best suits the business that they will conduct and the source of capital. However, planning and consideration should also apply to the end of the entity's life.

After an entity ceases to carry on its business, it can commence the process of "winding-up" and dissolving. Generally, unless the governing documents of the entity state otherwise, at least a majority of the owners of the entity will need to approve the dissolution. Chapter 11 of the Texas Business Organizations Code ("TBOC") applies to all Texas entities in connection with their termination, supplemented by entity-specific provisions contained in the corresponding chapters applicable to the types of entities. Together, they provide the guidebook to dissolving an entity in Texas.

While ceasing to file the requisite annual franchise tax return and Public Information Report ("PIR") with the Texas Comptroller will eventually result in the termination of an entity, this path does not provide much certainty for when the entity (and possibly its governing persons) are in the clear. An entity continues to have limited existence for three years after its termination, either by voluntary filing or tax forfeiture, for purposes of liquidating assets and other matters relating to the final conclusion of the entity's existence. Consequently, a voluntary filing establishes a date certain from which an entity's governing persons can start the clock ticking toward the finality of the entity's termination. Provided that the statutory steps are followed, claims against the entity will be extinguished if they are not asserted within this three-year term of limited existence.

If an entity ceases doing business leaving no unpaid debts, it is a simple process of obtaining the requisite consents to the dissolution from its governing persons and owners, filing a final franchise tax report with the Texas Comptroller, and then filing a Certificate of Termination with the Texas Secretary of State. The filing of the Certificate of Termination will set the three-year time frame for final termination of the entity's existence.

However, if the entity has liabilities, whether liquidated or contingent, it must apply or distribute its assets to discharge the debts and obligations or "make adequate provision for" the discharge of such debts and obligations. Only after this has occurred are distributions to be made to the owners. Unfortunately, "adequately providing for" unknown or contingent liabilities is a speculative exercise at best. Moreover, if the governing persons authorizing the distributions are accused of failing to make such "adequate provision", they are exposed to personal liability. What "adequate provisions" are necessary will ultimately depend on the circumstances and should be spelled out in an appropriate plan and agreement of dissolution that reflects that thought and planning have gone into winding-up and dissolving the entity.

Finally, there are extraordinary examples of how conducting the formal dissolution of an entity is more advisable than allowing it to terminate through the normal course of events. There have been instances where a delinquent entity has been reinstated by third parties who then engage in conduct that results in liabilities for the entity. Because the original principals are still associated with the entity through its original filings, they could find themselves entangled in a legal dispute that they have nothing to do with, but have to incur unanticipated expense in extricating themselves.

Consequently, following the sale of your business or property or even following the death of a deal after an entity is formed, take the extra time to consider how to deal with the inactive entity.

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E-Mail Privacy (continued from Page 1)

The Bill allows a warrant to be issued on any service provider doing business in Texas under the terms of a service agreement or contract with a Texas resident. The warrant issuance provision also allows a warrant to be issued for access to electronic data, even if the data is not stored in Texas. This means, for example, that a warrant may be issued for electronic data stored by Google servers, a few of which are located in Oregon, Virginia, North Carolina, and South Carolina.

Thus, be aware, as I frequently tell my clients, "The 'e' in e-mail stands for evidence!"

Sincerely,

Larry Friedman

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"Oversharing"

A Modern Parable: The Dangers of Oversharing in the Age of Electronic Evidence

"Oversharing" now refers to those who share too much on social media. Without oversharing, things in Steubenville, Ohio, might have gone very differently. You probably remember the story: last August, a young woman, who had been out partying with members of the Big Reds, a high-school football team, woke up alone and, reportedly, with little memory of the night before. It took a couple of days to piece it all together; gossip had to fill in the gaps. What emerged was shocking: rumor had it that she'd been repeatedly sexually assaulted at several parties, publicly dragged from house to house, unconscious, as a "joke." Her parents went to the police.

In another time, it might have ended there. Rape cases are difficult to prove. Steubenville is a small town; the Big Reds are very popular; the alleged perpetrators, the witnesses, and the victim all seem to know each other well. No one wanted to talk. And the days that elapsed between the victim's blackout and the police report meant physical evidence was largely unavailable. But gossip is no longer passed around in whispers and paper notes; it's fixed, in digital form, on someone's Facebook wall or Twitter account. The parents of the alleged victim showed up at the police station with a flash drive full of social-media postings that suggested the young woman had indeed been assaulted. Police seized the cell phones of the accused and found more digital traces that corroborated her story. Digital "chatter" led the police to sources of admissible evidence. One particularly damning artifact that surfaced is a photograph of an unconscious girl, possibly the victim, being carried like a calf. Its caption: "sloppy."

There are others who might have been charged, based in part, upon electronic evidence. A young man reportedly testified that he photographed the assault in progress, saying that he intended to preserve it as proof of the acts but that he later deleted it.

And then there are the young men who were "just" on social media, doing the digital equivalent of hooting and hollering. In a twelve-minute video, a young man tells excruciating jokes about the assault he seems to believe is ongoing. He was impressed enough with his own wit to preserve it in tweets, which he sent out the same evening.

It was, after all, these young men themselves who were so intent on making their acts public. Whatever else they did or didn't do that night last August, these young men in Steubenville were performing for each other. Everything they did, they did together, in a group. It is no accident that they photographed it, and they tweeted it. It was their choice to make it public. Their "Oversharing" did them in.

The power of electronic evidence is demonstrated in many forms in this story. In virtually every case we litigate, emails are now the best evidence. We all send hundreds every day that reveal a virtual minute by minute timeline of our day. These emails often reveal your location when you sent it, what you were doing when you sent it, and your instantaneous reaction to events – often in exaggerated language meant to amuse your colleagues – that can be taken out of context to paint an inaccurate picture of your thoughts. Take a moment and look at your 'sent' folder. Opposing counsel can recreate your entire day from a review of that folder.

If there is a workplace incident that you believe might lead to litigation, and this is often hard to predict in the early stages, STOP discussing it in writing and require your employees to stop discussing it. Gossipy tweets from employees – even those who are not part of the decision group or group of actors – may lead to the discovery of valuable evidence, just as it did in Steubenville. The good old fashioned meeting or phone call is always preferable.

Use email for scheduling and routine communications, not for expressions of remorse or confessionals. If you want to bare your soul, talk to your priest, therapist, or spouse: these communications are all privileged under Texas law. If in doubt, call Friedman & Feiger: a lawyer's investigative file is privileged.

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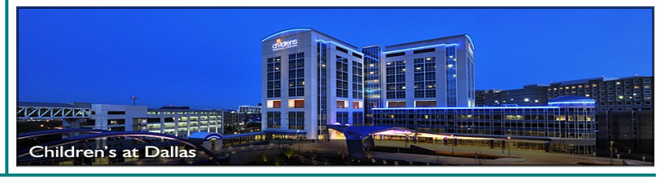
Janelle and Larry Friedman to Co-Chair Children's Medical Center's 100 Year Anniversary With The "Celebration Of Our Century," Saturday, November 2, 2013

Janelle and Larry Friedman will Co-Chair the "Celebration Of Our Century" on Saturday, November 2, 2013 at the Omni Dallas Hotel.

The evening begins with en elegant VIP reception followed by a special tribute to celebrate the past 100 years and the future of Children's Medical Center in Dallas.

Grammy and Academy Award Winning Jennifer Hudson, The Pointer Sisters and New York City's Starlight Orchestra will provide action-packed entertainment at the unforgettable black-tie evening. For more information and sponsorship opportunities, please contact Janelle Friedman at: jfriedman@fflawoffice.com



Upcoming Events

Friedman & Feiger Calendar

June 13, 2013	Carlos Morales speaks on "Bond Claims & Dispute Resolution" at the D/FW International Airport. For more information: cmorales@fflawoffice.com
June 14, 2013	Sponsored by the Dallas Bar Association, Carlos Morales speaks on "Litigation Practice Tips" at The Belo Mansion, 2101 Ross Avenue. For more information: cmorales@fflawoffice.com
July 5, 2013	Friedman & Feiger sponsors "Thunder Over Cedar Creek Lake" Pilots Party.
July 6, 2013	Friedman & Feiger sponsors Cedar Creek Veteran's Foundation Gala.
September 24, 2013	Friedman & Feiger sponsors The Kidney Texas Fashion Show at Brookhollow Country Club.

Contact for Info: jfriedman@fflawoffice.com