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Passing on Passwords

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A recent article in the NJ Law Journal (May 14, 2012, p. 3) piqued the Monitor's interest as a harbinger of things to come. According to the article, as Morris County prosecutors were preparing to try a criminal defendant facing narcotics charges, they realized that law enforcement officers had seized several cell phones and a Blackberry at the time of the arrest. Interested in learning what information might be contained on these phones, prosecutors applied for and were granted a search warrant authorizing them to inspect the information contained in the phones. However, prosecutors and their investigatory staff apparently ran into trouble when they could not crack a password-protected Blackberry to review the information on it. Therefore, they sought an order compelling the defendant to provide them with the appropriate passcodes to enable them to access the information stored in the Blackberry.

Criminal defense attorney John Dell'Italia filed opposition papers, arguing that such an order would violate the defendant's right to remain silent and compel him to become a witness against himself, a no-no in a criminal case. Although the trial judge denied the State's motion, no written opinion was filed. Kudos to Mr. Dell'Italia for vigorously asserting his client's constitutional right to remain silent.

The personal smartphone, whether it be a Blackberry, iPhone or some other electronic device, is the new medium of choice in which we store important information. Consequently, it is also understandably the focus of law enforcement when the smartphone belonging to a suspect comes into their possession. In a recent case, a federal law enforcement officer told me that at the time he arrested a narcotics trafficking suspect, he seized a Blackberry, and while he was looking at the Blackberry in his hand, he saw the phone being erased of its data through some remote operation. Although there is very scant New Jersey law on the subject, Mr. Dell'Italia nailed the argument on its head—while an accused has no privilege to alter or destroy evidence in an investigation, compelling an accused to disclose a password is testimonial in nature. It provides direct evidence that the accused had ownership, custody and control of the data contained in the smartphone. Providing a password authenticates the information contained in the smart phone and provides a powerful inference that the person providing the password had knowledge of the contents of the smartphone. Consequently, providing a password to protected data on a smartphone is not the same as providing a fingerprint or a voice exemplar, which courts have universally found to be non-testimonial in nature. Look for this issue to surface again.

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