Electronic Spying and Tracking Spouses in Divorce Cases: What's Legal in the Digital World?

Navigating Admissibility and Privacy Issues With Spyware, GPS Trackers, Cell Phone Forensics, Wiretaps, Social Media and More

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Electronic Spying and Tracking Spouses in Divorce Cases

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August 20, 2014

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TYPES OF INTERCEPTION AND COMPROMISE
SOCIAL MEDIA & THE INTERNET
THE DO’S and DONT’s

SOCIAL NETWORKING SITES HAVE A SUBSTANTIAL IMPACT DIVORCE IN MY FAMILY LAW PRACTICE

- It has become a larger issue in more divorce and custody cases
- Social media sites are not only a source of information but a cause for concern
DO NOT...

- Post messages on Facebook. The whole world can see them, especially if these are compromising or show a lack of discretion.
- Post photos of your boyfriend or girlfriend on the internet.
  → We have handled divorces where one of the parties has posted Facebook pictures of boyfriends or girlfriends, even in the middle of a divorce!
- Say anything through e-mail or text messaging.
  → Text messages brought down the mayor of Detroit!
- Compromising videos. Videos that are shot during a marriage can come back to haunt you in the event of a divorce.
- Gambling online. A form of addiction.
  → We have had cases where people have lost substantial sums of money that have had impact on a divorce. If you have a gambling problem... Seek help!
E-trading. Be careful!

Shopping online. People buy, and spend a lot of money online.

Pornography
  • We have had many cases where computers are filled with pornography images, including child pornography.

Online Mingling
  • We have had many cases where people have met online and been involved in extra-marital affairs.

People use credit cards for charges on adult sites especially when meeting people
  • Such transactions brought down an Article III Federal judge in Colorado!

Remember even when you press the **DELETE** button, the images remain on your hard drive and can be retrieved

E-mail can be a treasure trove of information in a divorce
Federal Statutory Prohibitions

- **Computer Fraud and Abuse Act of 1986**
  - Provides both civil and criminal penalties for violation
- **Electronic Communications and Privacy Act of 1986**
  - Provides both civil and criminal penalties for violation
  - Title I: Wiretap Act
  - Title II: Stored Communications Act
  - Title III: pen register and trap and trace devices
- Many states have counterpart statutes, some of which contain more specific language and are less antiquated.
Computer Fraud and Abuse Act
18 USCS § 1030

• Directed at criminal computer hacking, but applies to ordinary unauthorized access
• Prohibits intentionally accessing a computer without authorization or exceeding authorized access
• Private right of action when loss or damages exceed $5,000, including the cost of hiring a forensic examiner
• Criminal charges may be brought for any violation under this act.
  — Felony charge if the damages exceed $5,000 or a violation is committed in connection with a tortious act.
• House Judiciary Committee considering augmenting the Act — all offenses would be felonies
Title I of ECPA (a.k.a. the Wiretap Act)  
18 USCS §§ 2510 et seq.

- Prohibits *interception* of wire, oral, and electronic communications.
  - Interception implies that the information is obtained while it is transmitting
  - Examples: a wiretap, recording someone’s conversation, or placing spyware on a computer to intercept incoming and outgoing emails
  - Civil penalties up to $10,000 per violation
  - Criminal charges up to 5 years imprisonment

- Video surveillance does not fall under this Act, unless the video includes audio

- Exception: Under federal law, if one of the parties to the communication or transmission consents, you do not need the consent of all parties
  - This is not the case everywhere. Several states require all parties to consent or you may be liable under a state statute
Title II of ECPA (a.k.a. Stored Communications Act)
18 USCS §§ 2711 et seq.

- Protects emails that are temporarily stored electronically or stored for the purpose of backup protection
  - Emails stored to the physical computer, instead of online or with the cloud, are not covered under this statute
  - Includes unread emails and several circuits have held it also includes opened emails. See Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004); Fraser v. Nationwide Mutual Insurance Co., 352 F.3d 108 (3d Cir. 2003) (suggesting copies made of emails after they are viewed are in backup storage for the purpose of the Stored Communications Act)

- Up to 1 year imprisonment for the first offense and up to 5 years for a second offense
- Up to $1,000 per violation in civil damages
State Law - Invasion of Privacy

• “Nothing in…common law suggests that the right of privacy is limited to unmarried individuals.” *Clayton v. Richards*, 47 S.W.3d 149, 155 (Tex. Ct. App. 2001) (cited favorably by *State v. Perez*, 779 N.W.2d 105 (Minn. Ct. App. 2010)).

• Reading private, password protected emails can implicate a civil claim for invasion of privacy in some states (examples: Massachusetts, New Jersey, New York)

• Video taping in the home, especially the bedroom, without the other spouse’s knowledge can create civil liability.
  
  • Example: *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008).
State Law – Unauthorized Access

• Examples
  – Maryland’s Unauthorized Computer Access Laws
    • Up to 3 years imprisonment and a $1,000 fine
  – Hawaii’s Unauthorized Computer Access Laws
    • Unauthorized computer access is a class C felony
    • Unauthorized computer access in which information is obtained is a class B felony
    • Unauthorized computer access for certain purposes, such as committing a crime, is a class A felony
  – Most states have laws that prohibit unauthorized computer access.
Ethics

• Codes of Conduct describes the expected behavior of members of an association or practitioners of a profession, and generally seek to protect the organization or profession from the consequences of bad behavior of its members. ABA Model Rules 1.2, 5.3, 8.4(c)
After filing for divorce, Catherine Zang discovered her husband, Joseph Zang, had placed hidden cameras and microphones around the home, as well as installing software on her computer to copy her emails and instant messages:

• The surveillance not only covered communications between Catherine and Joseph Zang, but communications with Catherine and other individuals

• No criminal actions were brought, but Catherine brought a law suit for hundreds of thousands of dollars for wiretapping and invasion of privacy. The surveillance evidence was not allowed to be used in the divorce proceeding because the judge found that it was “illegally” obtained.
Questions Raised In Regards To The Joseph Zang Case:

1. Can you use audio and video surveillance in your home for the sole purpose of spying on your wife outside your presence?

2. In Ohio, recording conversations is legal if one party consents. Once the consenting party leaves the room, is a conversation between other individuals illegal?

3. Do you have a right to place spyware on a joint computer to see what the other user is doing?

These are all important issues that we face with the rise of social media and the Internet, especially as it impacts upon divorce!
TELEPHONE ISSUES
One Party Consent States v. Multi Party Consent States

• Federal law and many states allow a person to record a phone conversation if they are one of the parties to the phone conversation, or if their child is party to the phone conversation.

• However, some states require all parties to consent to the recording for it to be legal.
**SMART PHONES**

→ The impact on texting is critical. Not only in divorce and custody cases, but even in domestic assault cases.

**SPYWARE**

→ On a computer is illegal. We have seen a tremendous amount of impact with regard to not only divorce but also custody cases.

**GPS TRACKING**

→ A recent law in Michigan explains that individuals cannot put a GPS Tracking devise on another person’s car, but a private investigator or police official can.
FACEBOOK AS EVIDENCE

- In 2010 and 2011, Westlaw revealed 689 published cases involving social media.
- Facebook is now the “marriage killer” as it is responsible for at least one out of every 5 divorces in the country.
- In any divorce or other legal proceeding the key is that Facebook entries, YouTube videos, e-mail exchanges, tweets, texts, and picture posts, that a client may have considered private, are discoverable and can be useful in a legal proceeding.
Six Issues of Facebook

#1
Proper authentication due to the possibility of alteration, or that the communication was counterfeit

#2
Relevance

#3
If you are trying to offer it into evidence, you must show that the posting, photo, or other information was done by the particular person or entity who you claim it was posted by.
#4
Has the person or entity shared the password with any other person or entity?

#5
Show whether the person or entity profile contains identifiable personal information, including birthdates, photographs, and other unique or known information about that person or entity.

#6
Discovery interrogatories should be sent to determine what sites, if any a party uses, the I.P. address, the user names, and the passwords.
Example case Disallowing Admittance of Evidence: In the Interest of A.D.W., 821 N.W.2d 788 (Iowa Ct. App. 2012)

♦ The court upheld termination of a mother’s parental rights, however, it also held that the trial court should not have entered into evidence a picture from the mother’s Facebook depicting a marijuana-growing operation.

♦ Admittance of the picture was inappropriate because the state did not properly authenticate it. There was no personal knowledge about what operation it was, who posted it on Facebook, or whether the mother was even aware that the photo appeared on her profile.
Example case Allowing Admittance of Evidence:

♦ The court affirmed termination of a mother’s parental rights after allowing evidence offered of the mother soliciting prostitution on a website.

♦ The evidence was allowed in because of testimony in which the witness confirmed that it was in fact the mother on the website by responding directly with her on the website. The evidence was relevant because it was highly probative of her fitness as a parent.
Privacy Settings on Facebook to Protect your Client

Control each time you post
Whenever you post content
(like a status update, photo or check-in), you can select a specific audience, or even customize your audience.

- Choose the “custom” button to keep the audience of your postings as limited as possible.
- Clean out your “Activity Log.” This tracks everything you do on and can be an asset to your opposing party.
- Facebook indicates whether you post from a mobile device or the web. Turn off this setting. Also turn off the setting that indicates the location from which you are posting for your and your children’s safety.
- Defriend “frenemies” – those who may be monitoring your profile to give information to your opposing party.
Another discovery method can be to have the opposing parties sign an authorization to provide access to that party’s social media profile. Facebook has recently added a feature allowing users to download each and every activity from account opening to the file status update to a zip file.

There are cases going in different directions regarding whether passwords should be turned over so that a party can make sure they are obtaining all of the requested content. It is currently against Facebook’s Terms of Service to share your password or let anyone else access your account.
Best Interests of the Child

- Suspicion of abuse, compromising photos, inappropriate activity that shows up on Facebook, are all fair game.

- Example Case * Elissan v. Lanb, Op. 51339(U), NY Family Court Monroe County (April 7, 2011).
  
  The mother used Facebook and blogs to rant about her ex-husband. These inappropriate photos clearly were evidence and had bearing on the court’s decision that the mother was a less fit parent than her ex-husband.

- Another issue = a lawyer should not use assumption or trickery, such as friending a person under false pretenses to gain access to private information.


THE USE OF SOCIAL MEDIA AS EVIDENCE IS A GROWING FIELD WITH TECHNOLOGY FAR OUTPACING THE LAW AT THIS POINT!
Twitter -vs- the First Amendment

• NBA Player Steve Nash and his ex-wife had a joint custody agreement including a **nondisparage clause** – their communications had to be respectful. However, the ex-wife made inappropriate Tweets about Nash. The court thus barred all disparaging comments on social media.

• The ex-wife argued that this violated her freedom of speech, but the appellate court upheld the order. As a well-known athlete, Nash’s Twitter was highly visible and such comments could be harmful if seen by their children.
Similarly, the court focuses on the *availability* of postings on Facebook for the child’s possible observation, rather than whether or not the child actually saw them.


At issue were sexually explicit Facebook posts made between a mother and her boyfriend. She argued that the postings were deleted and there was no evidence that the children saw them. However, the posts were still allowed into evidence because of the possibility that the children could see them.
The Newest Phenomenon: Revenge Porn

- Sexual photos sent to ex-spouses or ex-lovers are now being posted on “revenge porn” websites including the victim’s real name, city, occupation, and link to Facebook profiles.

- There is currently conflict in how to deal with these websites. Some victims may be able to get the photo taken down by claiming copyrights. But the website operators counter with Freedom of Speech and Communications Decency Act protections.
Guidance to Clients in this Situation...

- Tell your client to search for his or herself on Google to see if any pictures appear.
- If your client personally took the photo, they may be able to claim copyright protection.
- If the posting of the picture can be traced back to an ex-spouse in a custody case, this may be indicative of the ex-spouse’s behavior and ability to parent.
iPhone Apps for Divorce Lawyers and Their Clients

- Divorce Log
  - Stores important texts and emails
  - Helps track divorce-related expenses
  - Stores payment information
  - Logs important dates and information by category
iPhone Apps for Divorce Lawyers and Their Clients

• Voice Memo
  – Turns your phone into an audio recording device
  – Can be used while operating other applications on your phone
  – WARNING: Exercise extreme caution when secretly recording conversations. Some states require both parties to consent or there could be criminal and civil penalties.
iPhone Apps for Divorce Lawyers and Their Clients

• Text Transcript
  – Several different Apps let you turn text messages into text that can be used to create a transcript, rather than having to screenshot each discussion.
  – Examples: SMS to Text and Text Message Transcript
iPhone Apps for Divorce Lawyers and Their Clients

• Find My Friends
  – Allows you to share your location or view other people’s location
  – Requires the person to accept an invitation to join the Find My Friends app
  – You can hide from your friends on the app at any time with the “Hide my Location” feature
  – If you want to keep only one person from knowing your location, tap the “Me” button at the bottom, select the follower you wish to remove, and tap “Remove from Followers”
iPhone Apps for Divorce Lawyers and Their Clients

• Find My iPhone
  – Allows remote location-tracking of iPhones, iPads, and Mac computers
  – To access the information, the login for your Apple ID or iTunes account is required
  – Any person with this information can view your location from any computer, cell phone, or other web-based device
  – To make sure that you aren’t being tracked, either change your login information regularly or turn off Find My iPhone
iPhone Apps for Divorce Lawyers and Their Clients

• AVG PrivacyFix
  – Allows you to check how much privacy you have online through cookies, social media sites, and search engines
  – Can use it on your phone, computer, or tablet
  – Helps you change the settings on your social networking sites in one application to control who sees your information
HONESTY ON THE INTERNET

YOU'RE A MODEL? COOL! I'M A CHIPPENDALE'S DANCER. I ALSO RACE SPEED BOATS. WHAT'S YOUR SIGN?
Appendix – Some Cases of Interest

• State Law Cases/Regulations
  – Hazard v. Hazard, 833 S.W.2d 911, 914 (Tenn.App. 1991) (Husband's e-mail to attorney found by wife not privileged, because it was voluntarily placed on computer to which wife had access).
  – Byrne v. Byrne, 650 N.Y.S.2d 499, 499-500 (N.Y.Sup. 1996). Husband's work laptop, owned by Citibank, was taken by wife and given to her attorney. Judge ruled that, because husband allowed his children to use it for homework, it was not exclusively corporate property, and wife had access to it as a "family computer."
  – In re Trudeau, 705 N.W.2d 409 (Minn. 2005) (attorney discipline conditional admission based, in part, on respondent's unauthorized computer access by installing and using an email spyware program).
  – Tex.Penal Code Ann. § 33.02 ("A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner").
  – Tex.Penal Code Ann. § 33.01(12) ("'Effective consent' includes consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception, as defined by Section 31.01, or induced by coercion . . . (E) used for a purpose other than that for which the consent was given").
Appendix – Cases (cont.)

- **State Law Cases/Regulations Cont’d**
  - Tex.Penal Code Ann. § 16.02(c)(4)(B). (It is an affirmative defense to prosecution a person not acting under color of law intercepts a wire, oral, or electronic communication and is one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act).
  - *Tave v. Alanis*, 109 S.W.3d 890 (Tex.App., Dallas, 2003) (School district employee's termination affirmed, where employee accessed and subsequently disseminated confidential information (inadvertently left on a computer assigned to him for classroom use) violated the District's policy and constituted conduct could cause the public, students, or employees to lose confidence in the administration and integrity of the District).
  - *Moore v. Moore*, (NYLJ, August 14, 2008, at 26, col 1 [Sup Ct, New York County]): Wife took a laptop computer from husband’s car just before she petitioned for marital dissolution, and discovered salacious instant messages which the husband exchanged with a woman in Texas. The Court determined that the computer was a family computer and not a work computer as alleged by the husband. The Court also found that the taking of the computer was appropriate since it was done before the commencement of the dissolution case and was taken from the family car.
  - *O'Brien v. O'Brien*, 899 So.2d 1133 (Fla.App. 5 Dist. 2005): Florida appeals court ruled that wife “illegally obtained” records of husband’s Internet conversations with another woman as the two played Yahoo! Dominoes online. “It is illegal and punishable as a crime under (state law) to intercept electronic communications . . .because the spyware installed by the wife intercepted the electronic communication contemporaneously with transmission, copied it and routed the copy to a file in the computer's hard drive, the electronic communications were intercepted in violation of the Florida Act.”
Appendix – Cases (cont.)

• State Law Cases/Regulations Cont’d
  – *Gurevich v Gurevich* (2009 NY Slip Op 29191) The parties had been married for 16 years prior to separation, during which husband had provided wife with the password to his email account, and during which both parties had access to each others email accounts. After separation, wife changed her email password, but the husband neither changed his, nor told or gave notice to the wife that she was not permitted to access his account. Court held “there is no statute that would recognize an ‘implied revocation upon service of a divorce action’ and bar the use of the email ‘stored.’”

  – *White v. White*, 781 A.2d 85, 87 (N.J.Super.Ch. 2001) Wife hired a private investigative firm, and unbeknownst to the husband and without using the husband’s password, the PI firm copied the husband’s files from the computer’s hard drive. The court faulted husband for taking neither steps to delete downloaded e-mail messages nor any steps to protect them with a password. The New Jersey act, identical to the federal act, prohibited “access” to electronic information in “temporary, immediate storage,” in backup protection, or in transmission. The court found that e-mail in the hard-drive of the computer was in “post-transmission storage,” and that the act was not meant to extend to e-mail retrieved by the recipient and then stored. Likewise rejected the husband’s argument that the wife’s access was “without authorization,” since other courts had held that “without authorization” meant using a computer from which one has been prohibited, or using another’s password or code use the family computer, the court stated that nonetheless she had the authority to do so.

Appendix – Cases (cont.)

• Invasion of Privacy Cases
  – Vaughn v. Drennon, 202 S.W.3d 308, 320 (Tex.App., 2006) (tort case, noting that the intrusion-upon-seclusion type of invasion of privacy is "generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying")
  – Signorelli v. State, 2008-TX-V0117.004 (In a criminal context, "Generally, when a third party has equal control over the thing to be searched, the third party may properly consent to the search.")
  – Lasater v. State, 2007-TX-V0829.002 (discussing reasonable expectation of privacy and scope of consent, where defendant granted victim limited consent to enter his home, and victim searched for and found evidence she provided to law enforcement)
  – Mahoney v. Denuzzo, 2014 U.S. Dist. LEXIS 10931 (D. Mass. 2014) (Motion to Dismiss a claim under the Computer Fraud and Abuse Act was denied after an ex-girlfriend obtained access of the former boyfriend’s email and Facebook account, altered information in those accounts, and sent racist messages on multiple occasions)
  – United States v. Kernell, 667 F.3d 746 (6th Cir. 2012) (a college student found guilty under the CFAA for hacking into former Governor Palin’s Yahoo! email account).
Appendix – Cases (cont.)

• Computer Fraud and Abuse Act Cases
  – *Mahoney v. Denuzzio*, 2014 U.S. Dist. LEXIS 10931 (D. Mass. 2014) (Motion to Dismiss a claim under the Computer Fraud and Abuse Act was denied after an ex-girlfriend obtained access of the former boyfriend’s email and Facebook account, altered information in those accounts, and sent racist messages on multiple occasions)
  – United States v. Kernell, 667 F.3d 746 (6th Cir. 2012) (a college student found guilty under the CFAA for hacking into former Governor Palin’s Yahoo! email account).
Appendix – Cases (cont.)

• **Electronic Communications Privacy Act Cases**
  – *Bailey v. Bailey*, 2008 WL 324156 (E.D. Mich)). Husband became suspicious of wife’s activities and installed keystroke logging software on both home computers, with which he obtained wife’s e-mail and instant-messaging passwords, which passwords he used to access wife's e-mail and learned of her extra-marital activities.
    - **Wiretap Act**: No “interception” as defined in the Wiretap Act, because the key logging software only allowed husband to learn his wife’s passwords, which he then used to access her e-mail. Since the husband did not obtain the e-mails and messages contemporaneously with the transmission, the Wiretap Act was inapplicable. Further, § 2512 of the Act does not provide for a private right of action.
    - **Stored Communications Act**: the messages on the ISP’s server were stored for purposes of backup protection (since the wife had already accessed those messages) but that does not take it out of the provisions of the Stored Communications Act and therefore the husband’s motion for summary judgment on this count was denied.
  – *Evans v. Evans*, 610 S.E.2d 264, 269 (N.C.App. 2005)(interception under ECPA must occur contemporaneously with transmission. E-mails between wife and paramour recovered by husband were stored on the hard-drive of the family computer and, therefore, not intercepted.
  – "For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse's employ. The end result is the same - the privacy of the unconsenting parties to the intercepted conversation has been invaded." *United States v. Jones*, 542 F.2d 661, 670 (6th Cir. 1976)
Appendix – Cases (cont.)

• Electronic Communications Privacy Act Cases
  – *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11th Cir. 2003) (*en banc*) (the Wiretapping Act makes no distinction between married and unmarried persons or between spouses and strangers. There is no implied exception to Title III liability for interspousal wiretapping) (collecting cases). *Contra Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir., 1974). N.B., *Simpson* has been repudiated by several state and federal circuit courts.
  – *Jennings v. Jennings*, 697 S.E.2d 671 (S.C.App. 2010) (stranger to a divorce case logged onto husband's Yahoo! e-mail account and read and retrieved messages, which wife proffered as evidence. Held that the third party violated the SCA).
  – *Cardinal Health 414, Inc. v. Adams*, 582 F.Supp.2d 967, 976 (M.D.Tenn. 2008) ("[W]here the facts indisputably present a case of an individual logging onto another's e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate"); *Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 55 (S.D.N.Y. 2008) (e-mail stored on an electronic communication service provider's systems after it has been delivered is a stored communication subject to the SCA); *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F.Supp.2d 914, 924-26 (W.D.Wis. 2002) (same).
  – *Miller v. Meyers*, 766 F.Supp.2d 919 (W.D.Ark. 2011) (Husband's use of keystroke logger to obtain credentials to later access wife's password-protected e-mail accounts was a violation of SCA and Arkansas' computer trespass statute).