

Electronic Evidence: Who's Really Getting Caught in the Act?

Many clients have questions about whether they can record phone calls, hide a camera to catch a cheating spouse in the act, or access a spouse's emails. Attorneys wonder whether such evidence may be used at trial.

Electronic evidence can be a trap for both client and attorney, exposing them to extensive civil and even criminal liability. A confusing mix of state and federal laws on wiretapping and computer security can have significant effects on divorcing spouses. Further, a spouse can be subject to private suits and common-law tort liability. This article will address the most common types of surreptitious electronic evidence and the pitfalls associated with each.

Wiretap Laws

The federal Wiretap Act, 18 U.S.C. §§ 2510-2522, regulates electronic surveillance of oral communications, whether those conversations are in person, by telephone, or by cell phone. Under the federal act, civil remedies include liquidated damages of \$10,000, punitive damages, and attorney's fees. Criminal penalties can include imprisonment of up to five years.

Texas has both a criminal wiretap law, Tex. Penal Code § 16.02, and a civil cause of action for interception of communication, Tex. Civ. Prac. & Rem. Code, Ch. 123. Unlawful interception of communications is a felony and additional civil remedies can include statutory damages of \$10,000 for each occurrence, punitive damages, and attorney's fees.

The federal and Texas wiretapping laws are "one-party consent" laws, meaning you may record any conversation you are a part of without the consent of the other party. However, planting a bug to record conversations between others would be a violation, as would installing an application on someone else's cell phone to record his or her calls with others. Courts have found a limited "vicarious consent" exception allowing a parent to record his or her child's conversations with others if there is a good faith, reasonable basis that it is necessary for the welfare of the child.

Electronic Data Laws

The federal Stored Communications Act, 18 U.S.C. §§ 2701-2712, regulates access to electronic communications including e-mail, faxes, and voicemail. Despite the use of the term "stored," the Act regulates the access of communications during electronic transmission. Interestingly, this means that accessing emails saved to the hard drive of a shared computer is permitted, but accessing emails through a spouse's webmail account without consent is a violation. Penalties include fines and imprisonment for up to five

years. Under the Texas stored communication law, Tex. Penal Code § 16.04, unauthorized access to electronic communications is a state jail felony. Texas also has a law regarding the breach of computer security, Tex. Penal Code § 33.02, which makes it a crime to access a computer or network without consent.

Using evidence obtained from Facebook, MySpace, blogs, and other online sites is a growing trend in family law. It is a violation to login to a spouse's online account without consent, however, the stored communications laws do not contain the same strict exclusionary rule as the wiretap laws. This means that even illegally-intercepted internet communications may be used at trial.

Torts

Texas recognizes several torts for invasion of privacy. Victims of wiretapping, videotaping, and intercepted emails can sue for (a) intrusion upon seclusion, (b) public disclosure of private facts, (c) appropriation of name or likeness for defendant's advantage, and even (d) intentional infliction of emotional distress, depending on the facts. Liability does not always depend on whether the private matters were ever publicized. Hiding a camera in a master bedroom can give rise to an invasion of privacy claim.

In tort, a plaintiff can recover actual and punitive damages. A divorcing spouse would not have to file a separate lawsuit, because a court can consider tort claims in making a disproportionate division of a marital estate.

Consequences for Attorneys

An attorney's *use* or *disclosure* of intercepted communications violates the wiretap laws, even if the attorney did not direct a client to make the recording. This means that attorneys can face criminal and civil penalties for using evidence that a client obtained in violation of the wiretap laws. If an attorney has reason to believe that recordings were illegally obtained, the attorney should immediately cease reviewing the recordings and should not use or disclose the communications in any way.

Conclusion

Although it is very tempting for clients to try to obtain smoking-gun evidence, attorneys must be aware of the serious consequences that can flow from violating electronic evidence laws. This article is a brief overview of a nuanced legal subject, and the family law practitioner would be well-advised to study these laws in more detail.