

# Spyware is latest tool in divorce wars

## Cyber-snoops often cross legal line, attorneys say

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When a Greeneville, Tenn., man saw that emails he sent were different from what the intended recipient received, he immediately suspected his soon-to-be ex-wife.

His suspicions turned out to be true: She had installed snooping software on his computer, intercepted his emails and altered them, according to federal court records.

His case illustrates a growing aspect of divorce in the digital age. As more and more information is transmitted through email, social media and smartphones, husbands and wives are increasingly snooping on their counterparts' communications and whereabouts — sometimes illegally. It's an evolving aspect of divorce cases in which technology quickly outpaces the law's ability to keep up. The end result is a gray area with little settled law and a lot of lingering questions.

“It has resulted in a lot of evidence, not only of romantic involvement of one spouse with someone else, but it can also result in proof of undisclosed assets or responsibilities, financial misconduct,” said Davidson County Circuit Judge Phillip E. Smith. “But what is the cost of obtaining this information? How does it balance against the need to prove your case? We're going to struggle with that in the future.”

As that information becomes more widely used in divorce proceedings, judges are often required to sort out subtle nuances. For example, how much of a shared computer can litigants access? What if one party knew another's email password before divorce proceedings began? And what are the repercussions for breaking those rules?

In Tennessee, one party can record his conversation with another, even without the second party's consent. But one cannot, for example, drop a voice-activated recorder in someone's car and record conversations he is not a party to.

Such cases are rare but could lead to severe penalties. In Nashville, a man was charged in 2010 with recording his wife's conversations with her mother. He faces from two to four years in prison if convicted on the felony charge.

Far stickier are email and social media communications. So sticky, in fact, that attorneys have had to change the way they advise clients in divorce cases.

“I have a letter I send to every client after their divorce is over saying change all your passwords,” said Helen Rogers, a Nashville attorney. “If you don't change your passwords, you left them the key to the house.”

Rogers said that if a husband knows a wife's password before the divorce proceedings, he may legally be able to read and save her emails during the proceedings. But other methods to intercept emails, as in the Greeneville case, in which snooping software was installed, are more troublesome.

"It includes communications between the spouse and the lawyer. They do that intentionally to see what their spouse and their lawyer are up to," said David Raybin, a Nashville attorney who advises divorce attorneys on wiretapping and privacy laws. "When that happens, one it's a criminal offense, and number two, it can subject you to civil liability."

But even if criminal charges aren't filed, the information obtained from snooping software could ultimately prove useless.

"I've had some cases where the attorneys have objected to the entry of certain documents because they were obtained illegally," said Circuit Judge Royce Taylor, who handles divorce cases in Rutherford and Cannon counties. "We've excluded the evidence."

Social media sites such as Facebook and Twitter are murkier, but attorneys advise clients to avoid any discussion of matters that could become relevant in a divorce proceeding.

"When I create an email and I create a confidential email, that is a violation of law to intercept that because I have an expectation of privacy," Raybin said. "When I put stuff in a publicly accessible zone such as Facebook, I have no expectation. The law doesn't recognize an expectation of privacy in this."

## **Look for spyware**

To protect from snooping during a divorce, all passwords should be changed immediately, lawyers say. There also are companies that can check smartphones and laptops for any suspicious software that could be capturing information.

Jim KempVanEe, with LogicForce Consulting in Nashville, said it's often difficult to remember to take such countermeasures, but it can be critical.

"These folks are so overwhelmed with the emotional aspect of their situation, this kind of becomes a side note," he said. "Go back and review what you do daily."

Attorneys and judges suggest spouses resist the temptation to snoop. Instead, they should consult with their attorneys, who could file motions for that same information through the court.

Raybin said these kinds of debates probably will intensify as more and more communication goes digital. "It is only going to get worse instead of better. As electronic communications become so dominant, people lose sight of the fact that it is very accessible," he said. "They believe that their computers are private little islands and they are extremely accessible and so you should take precautions to keep things private."