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Cyber Spying on Your Spouse During a Divorce: Does It Cross a Legal Line?

For the most part, technology is good—but when couples find themselves in a divorce, the rules about the use of technology change. This article discusses how attorneys should advise clients how to modify their use of technology to protect themselves and their children and be clear about the consequences of "cyber spying" during a divorce.

Dina de Giorgio of Schwartz Sladkus Reich Greenberg Atlas. Courtesy photo

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Facebook and Instagram make it possible to follow and connect with our "friends" any time of day or night, "Air tags" keep track of keys, cell phones and luggage. GPS instantly lets us know the "location" of middle and high school children experimenting with their independence. Doorbell cameras make it easy to avoid unwanted visitors and monitor our homes from anywhere and "Nanny Cams" provide peace of mind for working parents. Shared cell phone plans, e-mail and calendars keep families organized and informed.

For the most part, technology is good, and using it makes our lives better. But when couples find themselves in a contentious divorce, the rules about the use of technology change. The same technology that parents and spouses use to connect with one another often becomes tools for "cyber spying" in a divorce. It is essential, as soon as you are retained, to advise clients how to modify their use of technology to protect themselves and their children and be clear about the consequences of using technology for "cyber spying" during a divorce.

Most people are aware that it is legal to record conversations in New York if you are a participant, even if the other participants are unaware that they are being recorded. However, clients should be told that, while it's legal to make the recording, if they want to use it they will have to explain to a judge how and why the recording was made. More often than not, this strategy backfires, and the value of the "evidence" is undermined by the inevitable damage done by the other side on cross examination.

In other words, the "juice" is probably not worth the "squeeze".

While it may be tempting, and very easy to keep tabs on your spouse, their companions and their conversations, clients should be told not to do it. Placing hidden cameras or microphones in the marital home, downloading spyware on a spouse's cell phone or placing "air tags" on a spouse's vehicle constitute the crime of Stalking in the Fourth Degree, Unlawful Surveillance and Harassment. Stalking and harassment are also considered family offenses under the Family Court Act.

Even if the spouse never finds out about the surveillance, the client should be made aware that any "dirt" they get, no matter how shocking or indecent it is, can't be used in court.

Likewise, placing recording devices in backpacks or spyware on your child's cell phone or tablet to secretly record interactions between your children and the other parent is illegal and, for the most part, inadmissible in a custody case. In very limited circumstances, such as *People v. Badalamenti*, the Court considers the

recordings if it determines that the recording parent gave "vicarious consent on behalf of the child" to the recording.

These cases are rare, and to be able to use the recording the parent must have a good faith belief that the child was in danger and the recording was necessary to protect the child. If the court learns about spying, without any credible evidence of a threat to the child, it may leave an impression on the court, and not in a good way.

Given all of the prohibitions on "spying," how can litigants obtain damaging information about their spouses that is admissible in court? Typically, they convert the good and helpful technology their family relies upon, such as shared computers, phone plans, emails, nanny cams and Ring doorbells into spyware.

Is it legal for one spouse to use existing technology to surveil and track the other spouse, read private email, intercept texts and listen to conversations with impunity, even after a divorce action is started? In general, *yes*, unless the spouse specifically revokes their prior consent to the use of these recording devices and takes steps to prevent the other spouse from accessing private emails from shared computers and intercepting texts from shared devices.

Clients should be counseled to stop sharing tablets, computers, phone plans and email accounts. Passwords on all existing accounts should be changed. If a client suspects that their spouse may have placed eavesdropping devices in their home or vehicle, installed spyware on their phones or believe their devices have been "hacked", a forensic computer expert should be retained to locate and disable the spyware or tracking devices.

If the other spouse has an attorney, it would be wise to request that all existing audio and video technology in the home be disabled and to revoke any prior consent to using these devices. The client should be instructed to obtain any video or audio recordings from the "cloud" or stored in an electronic device so they can be reviewed.

Attorneys should advise clients to stop posting on social media altogether because anything shared on the Internet is fair game in a divorce. Ideally, in your retainer agreements, you should prohibit their use of social media. Clients should be counseled not to discuss the details of their case with their spouse.

In contested custody matters, clients should communicate with the other parent, whenever possible, about their children using a program designed for that purpose, such as Our Family Wizard.

Addressing the use—and misuse—of technology from the beginning of the attorney- client relationship should prevent you or your client from ever having to hear Warner Wolfe's famous catchphrase, "Let's go to the video tape" in your case.

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