

## ELECTRONIC EVIDENCE: IS IT LEGAL?

By Nancy M. Perry

In this time of text messaging, email, voicemail, instant messaging, and the like, it seems you should be able to easily catch your spouse cheating, or at least find out what he's doing. While unauthorized access of this information is clearly an invasion of the non-consenting person's privacy, whether or not you can legally obtain this information can be very complicated. **The best practice is to run it by your attorney first since the laws for each state can vary.**

Federal law regulates obtaining electronic evidence under the Stored Communication Act. This act prohibits intentional accessing or obtaining of email or voicemail without authorization while it is in electronic storage. So is it okay to obtain emails from the family computer you both use? The legal answer to this is it depends. If you shared the computer, yet had separate, password-protected email addresses, then it could be deemed that you intended for your email accounts to be private and thus not openly accessible to the other spouse. It could violate federal law for you to access it. However, some courts have held that access to emails stored on the hard drive on the family computer did not violate federal law. Again, you'll need to consult your attorney because the law is not clearly set on this and much of it depends on the laws of your state and the facts of your particular case.

Are keystroke loggers and screen capture programs and other "snoopware" legal? The first thing your attorney will ask you is whether or not this snoopware had a legitimate, legal purpose. An example of a legitimate use is snoopware placed on employee's computer by the employer to monitor the employee's activity on a company provided computer. Most likely, a spouse installing snoopware on the other spouse's computer is not considered a legitimate, legal purpose. This is because the law assumes we have an expectation of privacy when we use our computers in our own homes. Trying to use this information in court could result in it being excluded altogether, you being criminally responsible, and you having to pay damages and attorney's fees to the other spouse.

Can you record your spouse's conversations? This falls under the federal wiretapping laws or the Omnibus Crime and Control Act (also known as The Wiretap Act). Most states have their own laws governing this that are similar to the federal law. In some states, it's legal to record a conversation when one party consents to the recording and is also a party to the conversation. In other words, you can record a conversation between you and another party, but you can't record conversations between two parties when you are not a party to the conversation. Once again, you'll need to consult an attorney and check the laws in your state.

What about planting a tape recorder or video camera in the bedroom? This clearly violates the Wiretap Act. However, some states have determined that video surveillance that does NOT have sound with it may not be a violation of the Wiretap Act because no audio is recorded.

Can you use a GPS device to track your spouse's location? Again, you have to be very careful with that as it could backfire on you with you being convicted of stalking. Some states even make it illegal to install a GPS device on another person's car.

Bottom line is, even if your actions are legal, you and your attorney need to assess whether or not this information will actually help your case or harm it.