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FEATURE STORY

Your cheatin' heart will tell on you; adulterous spouses leave electronic trails

By Nora Lockwood Tooher

A suspicious husband hired a private detective in Maryland to plant a device on his wife's car so he could track her when she went to meet her lover.

The wife had a feeling her husband was onto her. She asked a private detective to check her car and remove a GPS tracker if he found one. Unfortunately, it was same private detective who had installed the device. (He declined her request.)

In 21st Century divorce wars, electronic data is a key source of evidence, whether its instant messages, web browsing histories or text messages via a cell phone. Angry spouses and savvy lawyers are scouring electronic gadgets to uncover unfaithfulness and find hidden assets.

"Everybody is going every which direction to spy on each other," said Sharon Nelson, a lawyer and president of Sensei Enterprises, a computer forensics firm in Fairfax, Va.

Family law cases account for 25 percent of the firm's business, with the number of requests to extract cell phone data up 200 percent in the last year.

"People feel their cell phones are private," Nelson explained. "They keep them on them or near them. They will text things. There's a lot of texting going on with love affairs."

Other electronic evidence in divorce cases includes:

- GPS histories of a vehicle's locations and the amount of time spent at each one.
- EZ pass records showing toll booth locations en route to rendezvous.
- Deleted e-mails.
- Internet histories detailing which web pages a person has visited (such as gambling or dating sites).
- Blackberry and cell phone records.

In a recent survey by the American Academy of Matrimonial Lawyers, 88 percent of 600 attorneys who responded reported an increase in the number of cases using electronic data as evidence during the past five years.

E-mail is the most common form of electronic evidence in divorce cases, with text/instant messaging and Internet browsing history tied for second, according to the survey. Data taken from GPS systems ranked third.

Electronic data is a "major source of information for spouses and also for the lawyers who are advising their clients to gather that information," said Marlene Moses, a family law attorney and founding partner of Moses & Townsend in Nashville, Tenn. "We've always had the ability to have a private investigator follow your spouse and record them via videotape," agreed James Gross, a family law attorney and managing partner of Thyden, Gross & Callahan in Chevy Chase, Md. "Now we've got a few more tools at our disposal, and people are leaving more trails of their misdeeds."

Cyber eyes are watching you

While electronic data is producing a wealth of evidence in family law cases, it is also raising concerns about privacy, ethics and admissibility.

"Lawyers are using a lot of these issues as bargaining chips to try to get some sort of settlement, but there is a lot of concern about it," said Michael Hutter, a professor of law at Albany Law School of Union University in Albany, N.Y. "And once you do get into court, there are very few guidelines [about admissibility]."

Laws regulating electronic evidence vary "tremendously" from state to state, Nelson said.

For example, it is illegal in Virginia to put a GPS device on any motor vehicle in which you do not have an ownership interest. So, if a wife puts a GPS tracker on a car in the husband's name or which he leases, she is violating the law.

James Hennenhoefler, president of the American Academy of Matrimonial Lawyers and a principal in a family law firm in Vista, Calif., said electronic data is no different than a box of documents sitting in the attic.

"Since there aren't a lot of rules, I advise my clients that if you can seize it, seize it, and if there's a dispute, let the judge decide," he said.

Hennenhoefler said he uses electronic evidence mainly to uncover hidden financial assets.

"I'm not a big fan of hiring someone to prove infidelity because most states are no-fault and truly it doesn't matter," Hennenhoefler said. "But what I am interested in are hidden assets, hidden bank accounts."

Even office computers are fair game in divorce e-discovery. Most often, a search of a work computer is aimed at uncovering hidden financial assets.

"A lot of people keep personal financial statements on their computer at work," said Caren Nichol, a family law attorney and shareholder at Evans & Petree in Memphis, Tenn. "They may have assets listed on that personal financial statement they have not disclosed to their spouse or a value they have not disclosed."

One client's husband, for example, repeatedly undervalued the worth of his closely held company. Nichol obtained a court order to examine the computer in his office; a computer forensics expert found evidence that the company was worth far more than the husband had claimed.

Such investigations can be costly, with computer forensic searches averaging \$4,000 to \$10,000. Also, an employer may require a computer expert to sign a protective order agreeing not to disseminate company information before examining a workplace computer.

E-traces of love

The bottom line, computer forensics experts agree, is that anything on a computer can be recovered.

One client of Moses learned that the hard way when her husband read her online gripes about her marriage.

The husband got a bill from a tarot card reader's chat line. When he refused to pay, the site sent him the entire record of his wife's online conversations.

"We settled the case, but it was information she didn't realize was subject to being recollected or gathered over the Internet," Moses said.

Other electronic devices, such as cell phones and PDAs, can also leave damaging evidence.

"They're booking airline tickets on the Internet, making hotel reservations," Moses said. "That's the way people function these days. They communicate electronically, they do business electronically, there's just all kind of data left behind."

But veteran divorce lawyers say that, as much as electronic data has changed discovery in divorce cases, it's still the same old story.

"Cheating spouses have always tried to hide what they're doing, and discovering spouses have always found ways to find out what they're doing," Gross said.