

FAMILY LAW

Caveat, Cheater!

Spyware Software and the Admissibility Of Intercepted Computer Communications

BY MEREDITH BRENNAN

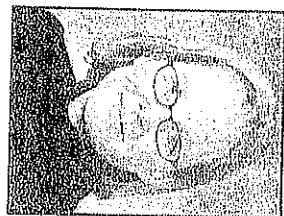
Special to the Legal

Is your spouse cheating on you? And if so, can you prove it? Increasingly, people are turning to Internet monitoring software — also known as spyware — to find the smoking gun.

For under \$100, you can purchase spyware such as Spector Pro, which promises to monitor and record "every detail of PC and Internet activity." Spector Pro allows you to record e-mails, instant messages, chats, Web sites visited, keystrokes typed and programs launched. Spector Pro describes its software as the "equivalent of a digital surveillance tape so that you can see the exact sequence of everything your family members ... are doing on the computer." Spyware like Spector Pro secretly saves all of the recordings to a "hidden location only you know about" on the computer's hard drive.

Once you learn that your spouse is, in fact, having an online affair, can you use this evidence in court as part of your divorce case? Under Pennsylvania law, a court may not consider marital misconduct as a factor in making a property distribution award. However, marital misconduct is one the 17 enumerated factors a court must consider in making an alimony award.

Additionally, while Pennsylvania is a "no fault" jurisdiction, meaning that a spouse no longer has to allege that the other spouse is "at fault" to establish grounds for a divorce,



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Pennsylvania has retained its fault grounds, and a spouse may choose to proceed on fault grounds. One such fault ground is adultery.

A recent Florida case addressed the admissibility of evidence of a spouse's online affair obtained through the use of spyware. In that case, O'Brien v. O'Brien, the wife secretly installed spyware onto the husband's computer. (It is not clear from the opinion whether the parties were still living under one roof and sharing a computer.)

The husband engaged in online chats with another woman, who happened to be his Yahoo Dominos partner. The spyware software took snapshots of what appeared on the computer screen, capturing and recording all chat conversations, instant messenger e-mails sent and received by the husband, and all the Web sites visited by the husband.

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The husband eventually discovered that the wife had installed the spyware. He filed a motion for an injunction, which was granted. He also filed a motion to preclude the introduction of all such communications into evidence in the divorce proceeding, which request was also granted by the trial court.

On appeal, the wife argued that the electronic communications did not fall under the protection of Florida's wiretap act because the communications were retrieved from storage, and thus were not "intercepted communications." The husband argued that the spyware program intercepted his communications real-time as they were in transmission

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(i.e., in real time) and therefore were illegally obtained under the wiretap act. The central issue on appeal was whether the husband's communications were "intercepted" by the spyware.

The federal courts have consistently held that in order to be intercepted, electronic communications must be acquired contemporaneously with transmission. Electronic communications that are retrieved from storage are not intercepted within the meaning of the federal Wiretap Act, as seen in the 3rd U.S. Circuit Court of Appeals' case Fraser v. Nationwide Mut. Ins. Co.

In the O'Brien case, the wife's spyware system intercepted and copied the husband's communications as they were transmitted. The appellate court held that this constituted an interception under Florida's wiretap act. It also distinguished the wife's spyware program, which copied communications as they were being transmitted and routed a copy to a hidden storage file, from monitoring software that retrieves information already stored on a hard drive.

In this case, the wife argued that the communications were stored before acquisition, because once the text image was visible on the screen, the communication was no longer in transit, and thus not subject to interception. The court rejected the wife's argument finding that this "evanescent" time period was not sufficient to transform acquisition of the communications from a contemporaneous interception to a retrieval from electronic storage.

After concluding that the wife's interception of the husband's communications was a violation of Florida's wiretap act, the court next turned to the issue of whether evidence of such communications should be excluded from the divorce litigation. Oddly, the federal Wiretap Act specifically precludes the use of unlawfully obtained wire or oral communications, but does not preclude the use of unlawfully obtained electronic communications.

The federal courts have interpreted this

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omission to mean that Congress intended that such communications not be excluded under the federal Wiretap Act. Florida's wiretap act similarly omits electronic communications from its non-disclosure provision. Therefore, the *O'Brien* court held that the husband's electronic communications were not excludable under Florida's wiretap act.

However, the court found that this did not end the inquiry. The court noted that although such communications are not specifically excludable from evidence, the interception of the communications was illegal and punishable as a crime under the act. In this case, the trial court correctly found that the electronic communications were illegally intercepted in violation of the wiretap act. Because the evidence was illegally obtained, the appellate court concluded that the trial court did not abuse its discretion in refusing to admit the evidence.

So what does this mean for spying spouses in Pennsylvania? Unlike the federal Wiretap

Act and Florida's version of the wiretap act, Pennsylvania's wiretap act does specifically prohibit the disclosure of any wire, oral or electronic communication intercepted in violation of the wiretap act. Therefore, if one spouse violates Pennsylvania's wiretap act by intercepting the other spouse's e-mail or other instant messages, that communication should be inadmissible.

However, for a snooping spouse, all hope is not lost. As noted in the *O'Brien* case, there is a fine distinction between the interception of electronic communications and the retrieval of such stored communications. Both the federal Wiretap Act and Pennsylvania's wiretap act prohibit the disclosure of intercepted communications, but no such prohibition exists with respect to the disclosure of stored communications. Thus, if a spyware program breaks into a computer and retrieves information already stored on a hard drive, no interception occurs, and it is arguably that the communication, while illegally obtained, is still admissible.

For example, in *White v. White*, the wife retrieved her husband's stored e-mails from the hard drive of the family computer. The

husband had been saving his e-mails to the hard drive through the use of a personal filing cabinet (PFC) without realizing that he was doing so. The wife hired a private detective, who was able to retrieve the e-mails from the hard drive without using the husband's password. Because the e-mails retrieved were in post-transmission storage (and not temporary storage), the court held that these communications were not protected under the wiretap act.

With the advent of spyware technology, issues of a spouse's e-mail and online communications will be increasingly frequent. *The National Law Journal* recently reported on a Connecticut case where the court actually ordered the wife to stop using her laptop and turn it over to the court clerk's office, so that the husband could have an expert examine her e-mail records.

Cheating spouses and their attorneys should be aware of how these communications can be used against the cheating spouse, as well as the potential arguments for and against the admissibility of such communications, depending upon whether they were intercepted or retrieved from post-transmission storage. •

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## Immigration

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immigration benefits for up to three years if

occupation in the employer's geographic area.

This ensures that employers aren't depressing wages by hiring foreign employees willing to work for less. One new aspect of the proposed regulations is that prevailing wages be

the H-2B program. Since not every H-2B

petition would be scrutinized for complying with the requirement to pay the prevailing wage, it is almost certain that there will be unscrupulous (or even simply mistaken)