

Who's Watching? Electronic Media and Divorce

Written by Kaine Fisher

Q&A with [Kaine Fisher](#), Director of Rose Law Group [Family Law Department](#)

“My gut tells me my spouse is cheating on me and I want to prove it. I want to do some investigating but I’m worried I might get into trouble. What can I do and not do to find out?”



In 1984, Michael Jackson was featured in the Rockwell hit, debut single “Somebody’s Watching Me.” The song climbed to #2 on the *Billboard Hot 100* and reached the top of the *Billboard R&B* singles chart. The song had a distinct, paranoid tone and the music video portrayed a Halloween-like, haunted house inspired theme (very apropos this time of year). More recently, this song appeared in a Geico commercial featuring a pair of disturbingly large jiggly eyes perched atop of a tall stack of \$5 bills. In instances of divorce, it’s usually not the IRS, the mailman or your neighbors who are keeping an eye on you and what you’ve been doing.

Of paramount importance in my divorce cases is protecting and preserving client confidentiality. This consideration is my first priority and is a crucial element of successful representation and achieving a favorable outcome. The importance of a free flow of communication between lawyer and client simply cannot be understated. This is exactly the reason my first bit of advice is for clients to change their passwords for electronic methods of communication, such as e-mail accounts and social networking sites (Facebook, Twitter, LinkedIn, etc.). For those clients who intend on filing for divorce, this should be done once the decision to file has been made, but absolutely no later than before your spouse is served with divorce papers. Even better yet, you might consider opening up a new e-mail account altogether to communicate with your lawyer to further minimize the likelihood your spouse will be able to intercept such communications. Create a password that is unique and does not include a child’s name, a pet’s name, or your favorite number. And never – I mean never – set your password to the word “password.” I know that seems like common sense but you’d be surprised. If your e-mail comes through to your home computer through cox.net or some similar program, you might consider using an internet based e-mail such as g-mail, yahoo or hotmail, etc. And always remember any e-mail downloaded to your computer may still remain on your computer long after the e-mail is deleted. Make sure to password protect your phone, computer and other electronic devices you might use.

We have come a long way in terms of technological advances. Spyware is easy to find and is relatively cheap. It can be installed on your cell phone, tablet, or notebook in a matter of minutes while you’re taking a shower or taking a quick trip to the grocery store. Keyboard logging, duplicating e-mails to another mailbox, periodically capturing screenshots, GPS devices on a cell phone and vehicle are just some of the many spyware/tracking technologies used by spouses to obtain potentially incriminating information about their spouse. Some of the technology is so sophisticated it may take a forensic expert to determine if something has been installed on a particular device. You can also purchase anti-spyware software. It would be wise to periodically review your computer and other devices during and even after your divorce to ensure privacy. If you suspect this is happening to you, consult with your divorce lawyer to discuss hiring a qualified forensic computer analyst to scour through your electronic devices.

Now, as far as social networks sites go, I cannot even begin to tell you how frequently I come across stacks of Facebook posts which contain incriminating, if not at least the very least, embarrassing content. Why is this important in family law cases? Well, oftentimes this type of evidence can be introduced to support a waste claim or establish unfitness of a parent as it relates to the issue of parenting time. Remember Arizona is a “no fault” divorce state. In order words, no fault has to be established to obtain a divorce; therefore, proving infidelity in and of itself is not particularly persuasive to a judge. That said, however, proving that a spouse used community funds to purchase a plane ticket to Venezuela for a significant other (which might be easily confirmed by a Facebook picture of that spouse and his or her significant other at the base of Angel Falls) could on the other hand be very relevant to support a waste claim. Further, postings which show a spouse bragging about purchasing marijuana, owning a handgun or going out when he or she is supposed to be watching the children is also compelling. My advice is for clients to keep social media postings to a minimum, remove mutual “friends” from your social network page and for goodness sake be careful about what you post. You can almost guarantee your spouse will be watching.

I certainly don’t want to ignore the question posed at the onset of this article so let’s go back to it. What if you are the spouse wanting to do the snooping? I must caution you to be careful and it would be irresponsible for me to give any sort of advice without knowing the particular facts of the situation. The state law on this issue varies between jurisdictions and there are even federal law implications. There are distinctions in the law which revolves around whether the communication has already been stored (e-mails) or whether the communication is intercepted in transmission (recording a phone conversation for instance). The contemporaneousness of the transmission is important. With regard to computers, e-mails and social media sites, the location of the device on which the information is stored or transmitted is most certainly relevant and whether the computer, cell phone or Facebook page is password protected will also have an impact on whether you have violated your spouse’s privacy. Be sure to consult with your divorce lawyer before even thinking about taking steps to subversively obtain information about your spouse or you could otherwise be subject to a lawsuit (invasion of privacy, trespass to chattels, theft, conversion, etc.) or worse yet, criminal liability.

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