

Cheating in the 21st Century – How Adultery Has Changed in the Digital Age and How to Prove It

By

“Life is Short. Have an Affair” is the catchphrase on the website which calls itself “the most famous name in infidelity...” Ashley Madison claims that it “is the most successful website for finding an affair and cheating partners” and touts that it has “over 41,980,000 anonymous members.” That anonymity, of course, was destroyed by the ingenuity of a group of hackers which broke through the website’s network cybersecurity and acquired the contact information of its members. With the continued proliferation of Facebook (also known in divorce circles as “F---book”), Twitter, Instagram and other websites, as well as the use of other digital tools and devices, how does someone without access to a hacker find out if their spouse has strayed and secure that information without going to jail? After all, long gone are the days when a suspicious spouse could rummage through their beloved’s wallet while they were in the shower. Most of that information is now located in smartphones, tablets, laptops, watches and the soon to come to market – digital eyewear. All this information hidden behind a myriad of encryption, passwords and laws designed to protect consumer privacy. And, encryption and passwords have also been used by wayward spouses to try to get away with cheating.

So, without the NSA at your disposal, what can a jilted spouse do? As easy as it sounds, you have to hire someone who truly understand this stuff, knows how to get it and then use it. After all, adultery is still grounds for divorce in Maryland and one of only three grounds where you do not have to wait a year to secure an absolute divorce, the other two involving some element of domestic violence or abuse. Adultery also falls under the “facts and circumstances that lead to the parties’ estrangement” factor that must be considered when deciding alimony and a monetary award under Maryland law. Further, pursuant to a recent Maryland Attorney General Opinion, adultery, which was first defined in the common law as sexual intercourse between a man and woman, now extends to same-sex individuals.

Fortunately, in Maryland you do not have to secure the proverbial pornographic videotape of the *corpus delicti*. How about a confession? Well, the cheating spouse may refuse to answer due to the fact that the answer could incriminate him or her. What!? That sounds like a refusal to answer based on the Fifth Amendment’s privilege against self-incrimination. Yep, that’s right; in Maryland adultery is a crime punishable by a fine of ten dollars. Not enough to buy the philanderer and their paramour two coffees at Starbucks, but enough to keep the innocent spouse from the truth.

So, what do you have to present by way of evidence to secure a divorce on the basis of adultery? You simply have to show circumstantial evidence of a disposition (e.g., kissing) and opportunity (e.g., staying the night or several hours). Given that our personal digital devices generally contain an enormous amount of electronically stored information, such as photographs, videos, e-mail, text, as well as corresponding metadata, they contain a potential treasure trove of evidence against a cheating spouse including location services, which shows dates, times and locations of the smartphone, just like GPS.

So, going back to hiring someone to secure the information, it should be an attorney who has a track record of understanding the law and the technology and how each of these intersect to achieve the client’s goals – one is useless without the other. For example, I represented an individual whose wife, with the help of a private investigator hired by her counsel, had surreptitiously installed spyware onto my client’s computer so that she was able to receive hundreds of e-mails sent to him, many of which would have been devastating to his case. Because the technology used actually intercepted his email as prohibited by the Maryland Wiretapping and Surveillance Act and a similar Federal act, I was able to implement a section of the statute precluding the use of the damaging evidence that had been illegally acquired.

So, in an effort to hire the right person, ask:

- How many cases has the attorney handled involving the use of digital forensic evidence?

- How many of those were actually presented at trial?
- How was this digital forensic evidence managed?
- What experts have they worked with and/or challenged in court?
- What were the outcomes of those cases?

Nothing but specific detailed answers should suffice. After all, you are placing your life in their hands. By way of analogy, would you rather have a physician who has the training, knowledge and experience to treat you with all the most modern diagnostic equipment possible or just stick with guy who would place his ear to your chest? The same applies to your choice of counsel.