

Don't sneak around in "my space"

How accessing another's electronic account could land your client in jail

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Specific Computer Crimes

- Tampering with Computer Data
- Tampering with Computer Equipment
- Tampering with Computer Users

Overview

- Become familiar with the criminal code as it relates to computers and the Internet
- Learn how the behavior of your clients can put them at risk for criminal liability
- Discuss hypothetical situations where the criminal statutes might apply to civil cases
- Discuss ethical obligations for the attorney

556.063 Definitions

- Computer: Equipment, Hardware, network, program, software, system
- Computer-related documentation
- Access
- Damage
- Data
- Digital Camera
- Property
- Services

Applicable Statutes

- 445.010 RSMo. Definitions
- 445.085 RSMo. Violation of Order of Protection
- 556.063 RSMo. Definitions
- 565.090 RSMo. Harassment
- 565.225 RSMo. Stalking
- 565.250 RSMo. Definitions
- 565.252 RSMo. Invasion of Privacy 1st
- 565.253 RSMo. Invasion of Privacy 2nd
- 569.095 RSMo. Tampering with Computer Data
- 569.097 RSMo. Tampering with Computer Equipment
- 569.099 RSMo. Tampering with Computer Users

The Cloud.....

- What is "The Cloud"?
- What is the difference between a computer and a cellphone?
- Where is the Internet?
- Where are internet accounts located?

Internet Accounts DO exist on a physical object: the Server

- A computer or cellphone only act as a portal to help you get on the web and travel to a server that hosts the actual account.
 - Google is located in Mountain View, CA
 - Facebook is located in Menlo Park, CA
- Although the computer and cellphone have software installed to help you travel the internet, those accounts aren't actually located on the device memory.
 - Some remnants may be left in the cache, but the whole account is not.

St. v. Brushwood 171 S.W.3d 143 (2005)

- Married, legally separated with pending dissolution proceedings
- During the marriage, wife purchased a vehicle for her stepson (husband's son) with title in her name and made payments from her individual checking account. Stepson reimbursed her for the payments, obtained insurance and drove the vehicle.
- Stepson could no longer afford to payments, so wife obtained insurance herself for the vehicle and it sat unused in her driveway for several months.
- After divorce proceedings started, another son of the couple needed to drive the car. It broke down and the mechanic found that water had been added to the gas tank.
- Husband admitted to putting the water in the tank.
- Husband charged with property damage

Does marriage equal automatic authorization?

- *St. v. Winkelmann 761 S.W.2d 702 (1988)*
 - Married going through divorce proceedings
 - Wife's vehicle owned before marriage and titled in her name only
 - Dispute as to how often he used the vehicle
 - He took her keys during an argument and left
 - Took the vehicle during the night, deliberately crashed it into a brick wall, and walked away.
 - Guilty of stealing and property damage

Brushwood cont.

- Husband claimed that he cannot be charged with damaging marital property because the facts did not show he damaged the property of "another" as required in the statute.

Winkelmann cont.

- **The common law principle is not controlling in certain unique situations (1) where a dissolution of marriage is pending, (2) the property stolen was owned by the spouse prior to the marriage, (3) title to the property during the marriage remained the property solely in the victim-spouse's name, and (4) the property was not generally used or available to both spouses.**

Brushwood cont.

- When a husband and wife own property together, they are often deemed to have a joint tenancy in the property. 'Joint tenancy is a tenancy of two or more persons whose interests are equal in every respect.' Each concurrently owns all of the undivided whole and has a nonexclusive right to possess that undivided whole. Thus, when a husband destroys property that he owns jointly with his wife, not only does he destroy his property, which he may have a right to destroy, but he simultaneously destroys his wife's undivided one hundred percent interest in the property, which he does not have a right to destroy. Therefore, when a husband destroys *marital property*, he destroys the property of another and violates this element of criminal mischief statutes.

Quoting *People v. Khevfets*, 174 Misc.2d 516, 665 N.Y.S.2d 802, 805 (Sup.1997)

Brushwood cont. on the definition of “property of another”

- Under the express terms of this definition, for purposes of second-degree property damage, in violation of § 569.120, if a natural person, other than the actor, “has a possessory or proprietary interest” in the alleged damaged property, that property is considered “property of another.” While this definition clearly requires that someone other than the actor have an interest in the property, it does not require that that person have the only interest, and conversely, it does not require that the actor have no interest, as the appellant contends. Thus, in order for the State to show that the Blazer was “property of another,” it only had to show that someone other than the appellant had a possessory or proprietary interest in it. The appellant concedes that Rowena had such an interest.

455.010 RSMo. Protective Orders

- Relevant definitions
 - Assault
 - Coercion
 - Harassment
 - Stalking
 - Alarm
 - Course of Conduct
 - Repeated

“Knowingly and without authorization”

Sections 569.095, .097, .099

- Authorization affected by?
 - Marriage
 - Separation
 - Filing a Petition
- What is the scope of authorization?
 - Shared accounts: GeorgeandLydia@yahoo.com
 - Infrequent use by other party, but knowledge of passwords
 - Frequent use by either party
 - No use by other at all, but knowledge of passwords
 - Use by other party of a shared phone or computer

Stalking and Harassment

- Keep up to date with revisions
- Includes activity that uses phones, GPS monitoring, social networking, email accounts and other Internet sites.
- Can be misdemeanor or felony depending on the circumstances
- Don't be a witness or a co-defendant

455.085 Violation of Protective Order

- Class A misdemeanor for a first offense
- Class D felony if a second offense within 5 years
- A criminal act occurs when there is a violation as to the conditions regarding abuse, stalking, child custody, communication initiated by respondent or entrance upon the premises of the petitioner's dwelling unit or place of employment or school or being within a certain distance of the petitioner or a child of the petitioner

Invasion of Privacy

Section 565.252

- No exception made for a party to a dissolution, private investigator, or attorney
- No requirement that conduct be for the purpose of sexual gratification
- What does “knowledge and consent” mean in the context of a marriage or intimate relationship?
 - Can it be implied?
- Is the marital home a place where one has a reasonable expectation of privacy from one's spouse?

Should I file a criminal complaint?

- What are you trying to accomplish?
- Do you plan to stick with it?
- Who is in the chain of custody?
- Can the evidence be independently verified and reproduced?
- The burden is NOT on the defendant in a criminal case.
- Who will really be on trial?

Rule 4-3.3 a) a lawyer shall not knowingly

- 3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The Criminal Case

- The evidence must be collected as it would be in any criminal case
- Danger of losing the protection of attorney/client privilege
- No one but the prosecuting attorney has the right or power to negotiate the disposition of a criminal case with the defense attorney
- Beware of Witness or Victim Tampering

Rule 4-3.3 b)

- A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal

Missouri Supreme Court Rule 4 Preamble

- A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.....

Rule 4-3.4 Fairness to Opposing Party and Counsel: A lawyer shall not:

- a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Rule 4-3.4 Fairness to Opposing Party and Counsel: A lawyer shall not:

- c) Knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
 - d) In pretrial procedures, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- etc...

Back to law school...

Is it permissible to use information if:

- Lydia or George copied from the other's electronic account *before* they split up?
- After they split, information was found on a shared computer (not the internet)?

George and Lydia Wickham

- Lydia Bennet and George Wickham meet and fall madly in love. They immediately "Friend" one-another on Facebook. As George previously had a thing for Lydia's sister, Elizabeth, trust issues exist. The couple agrees that they will trade passwords on their many computer accounts, and give one another verbal permission to access these accounts.

Is it permissible to use information if:

- After George and Lydia split, information was found by accessing internet accounts?
- After they split, information was found on a family/shared computer by installing software to discover deleted files?

George and Lydia Wickham cont.

- George and Lydia move in together and share a couple of computers.
- Eventually, they marry (much to Lydia's family's relief) but it does not last long.
- George and Lydia separate, and each takes one computer.
- Finally, George and Lydia are divorced, in the state of Missouri.

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