



A Legal Affair

TRUTH vs. PROOF:
WHAT MATTERS IN COURT WHEN DEALING WITH INFIDELITY
Sex, Laws and Videotape

(Vienna, VA)—In Virginia, as in many states, adultery is the one of the few causes on which you can file for divorce without having to live separate and apart for at least a year. While it may be true that your spouse is having an affair, proving it in court is difficult. “There’s a big difference between truth and proof,” explains [Kyung \(Kathryn\) Dickerson](#), a partner at [SmolenPlevy](#) in Vienna, Virginia. “You have to produce admissible evidence to prove it in court.”

Dickerson says clients often come to her because they’ve discovered emails, pictures or have telephone records showing their spouse is making calls at all hours of the night. To the client, this clearly indicates an affair – to the client, this is enough to “prove” adultery. But that’s not enough for a court. “These documents are not evidence of adultery,” says Dickerson. “The documents are evidence of emails, pictures or calls.” Clients are often surprised to hear that the documents that they discovered are not enough to prove adultery in court. For example, with emails, no matter how explicit the emails are, the client still must prove in court that who wrote the emails, to whom the emails were addressed and then must have the writer testify as to the truth of the acts described in the emails.

Even if one party admits to an affair, the courts want more. Virginia law requires independent corroborating evidence that a spouse has engaged in sexual intercourse with another person. Otherwise, Dickerson explains, a spouse could simply admit to an affair in order to get out of waiting for the expiration of the year-long separation to file for a divorce. “A spouse may want to get divorced quickly because they expect the business that they own to become profitable, and don’t want to share it, or because they want to marry someone else,” she says. “Couples may even collude and fake grounds for a divorce, because they don’t want to wait. People have tried to commit fraud on the court. That’s why a level of reliable corroborated proof is needed.”

Dickerson says as corroboration has to come from an independent third party, usually the witness is a private investigator. A private investigator has no motive to create fraudulent evidence as they do not have an interest in the case. They can follow the adulterous spouse and their paramour, leave markers, record video and take pictures, and then file a report and testify as to what they observed in court.

Proving adultery in court is not only difficult, it can be costly. But it can have an effect on negotiations and strategy. Dickerson says adultery can possibly give the aggrieved party an advantage in court when it comes to the distribution of the marital estate. “If a cheating spouse is flying a paramour all over, lavishing their lover with gifts and spending the married couple’s assets

to pursue this affair, the court can certainly consider the issue when deciding how to divide the estate between the parties,” she says. Similarly, in Virginia, adultery is a bar to spousal support, short of manifest injustice, so the innocent spouse can argue that the cheating spouse should not receive any spousal support.

Dickerson advises against confronting a spouse about their possible adultery – which is a common gut-jerk reaction, because it is not advantageous to the innocent spouse. There is no guaranty that if confronted, the erring spouse will tell the truth. Further if the person’s spouse is having an affair, they’ll just go further underground. She says the first thing is to decide how much you want to know, and then consult an attorney.

Kyung (Kathryn) Dickerson is available to speak on this and other issues family law issues. She can be reached by contacting Marc Silverstein at marc@onthemarcmedia.com, or at 410 963-2345.