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# Dealing with Illegally Obtained Evidence

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## CHAPTER \_\_

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At common law, illegally obtained evidence is admissible in Texas civil lawsuits. *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1995, writ den'd). This common law rule is mirrored in our rules of civil evidence. Rule 402 of the Texas Rules of Civil Evidence provides that “(a)ll relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority.”

A party who objects to the admissibility of evidence on the ground that it was illegally obtained must show that the federal or state constitutions or federal or state statutes require it to be excluded. Otherwise, the evidence must be admitted. *Sims v. Cosden Oil & Chemical Co.*, 663 S.W.2d 70 (Tex. App. - Eastland 1984, writ ref'd n.r.e).

This article addresses the evidentiary implications of information obtained by wiretapping, by interception of spousal electronic communications, and by surveillance. The subject is particularly significant in the context of family law disputes where the urge to find, and to use, secretly obtained information is accentuated both by the level of distrust and acrimony commonly seen in matters likely to be litigated and by the emotional overlay of the litigating spouses.

### **1. Wiretapping**

Recording a telephone conversation by a participant to the conversation is not illegal. In contrast, if no party to a conversation is aware that the conversation is being recorded, wiretapping is taking place. Because both state and federal law prohibit and provide sanctions for wiretapping, the question of admissibility of information acquired from such sources is perhaps secondary to the jeopardy one faces in obtaining the information.

#### **A. Criminal and Civil Statutes**

##### **1. Federal Wiretap Statute:**

The federal wiretap statute prohibits the interception and use of illegally intercepted communications. 18 U.S.C. §§2510 et seq. The statute prohibits interception of oral or wire communications by use of any electronic, mechanical or other device. 18 U.S.C. §2511. The penalty for violation of the statute is fine or imprisonment for up to 5 years, or both. With some exceptions set out in the statute, the criminal sanctions apply to any person who:

(a) intentionally *intercepts, endeavors to intercept, or procures any other person to intercept* or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally *uses, endeavors to use, or procures any other person to use* or endeavor to use any electronic, mechanical, or other device to intercept any oral communication (when the device is used in wire communication, radio communication, is sent through the mail or transported in interstate or foreign commerce, or involves a business affecting interstate or foreign commerce);

(c) intentionally *discloses, or endeavors to disclose, to any other person the contents* of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through interception in violation of the statute;

(d) intentionally *uses, or endeavors to use, the contents* of any wire, oral, or electronic communication with knowledge it was obtained in violation of the statute; or

(e) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by the criminal investigation provisions of the statute.

The federal Wiretap Statute also prohibits the use of information obtained in violation of the law:

“Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.”

18 U.S.C. §2515.

## ***2. Electronic Communications Privacy Act amendments:***

The Electronic Communications Privacy Act (ECPA) amendments to the federal wiretap law extends to “electronic communications” the same protections against

unauthorized interceptions that the wiretap law provide for “oral” and “wire” communications via common carrier transmissions. *See* 18 USC §§ 2701-2711 (1994); *Brown v. Waddell*, (4<sup>th</sup> Cir. 1995), 50 F.3d 285. Pertinent provisions of the ECPA are set out below in the section pertaining to electronic mail.

### **3. State Statutes:**

Texas also has enacted civil and criminal statutes addressing wiretapping. §§123.001 - 123.004 of the Texas Civil Practice and Remedies Code create a civil cause of action for a person whose communication is intercepted in violation of the statute. The statute permits damages and injunctive relief prohibiting divulgence or use of information obtained by an interception of this nature. This statute applies only to interception of communications by “aural” acquisition of the contents of a communication. It does not include purely verbal communications that are not transmitted by wire or cable, and additionally does not apply to electronic mail. Section 123.002 of this wiretap statute grants a cause of action against any person who “divulges information” that was obtained by an illegal wiretap.

Additionally, §16.02 of the Texas Penal Code makes unauthorized interception or use or disclosure of the contents of the interception a felony.

### **B. Evidentiary Implications**

The federal wiretap statute prohibits use or disclosure of communications obtained in violation of the statute unless use is otherwise provided by statute. The federal statute also bars the use of any wrongfully intercepted communication in any proceeding in state or federal court. 18 U.S.C. §2515. *Gelbard v. U.S.*, 408 U.S. 41, 51-52 (1972) [witness could not be forced to disclose testimony from illegal wiretap to grand jury].

The legislative history of the federal wiretap statute indicates that Congress anticipated it would restrict the use of wiretap evidence in divorce cases. Senator Long, chair of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, highlighted the need for the statute by explaining that the “three major areas in which private electronic surveillance was widespread were (1) industrial, (2) divorce cases, and (3) politics.” *Kempf v. Kempf*, 868 F.2d 970, 973 (8<sup>th</sup> Cir. 1979). Senator Hruska, a co-sponsor of the bill, commenting on the scope of the statute, noted that “[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.” S. Rep No. 1097, 90<sup>th</sup> Cong. 2d Sess.; *Kempf*, at 973.

The “broad prohibition” referenced in the federal wiretapping statute’s legislative history may no longer have the enforcement strength Congress intended. The United States Supreme Court recently overturned §2511(1) of the federal wiretapping statute, the provision which provides criminal sanctions for anyone who willfully intercepts, uses or discloses illegal oral or wiretap communications. *Bartnicki v. Vopper*, 2001 WL 530714 (U.S. 2001). *Bartnicki* involved the use of an illegally intercepted cellular telephone

conversation between two members of a union representing teachers in a contentious collective bargaining situation in a Pennsylvania high school. The interception was made by an unknown person who disclosed the contents of the interception to a radio commentator, who then played the tape on his public affairs talk show. The contents were also broadcast by another radio station and published by some local newspapers. The Court found that the disclosures to the media and the subsequent disclosures by the media to the public violated both the state and federal statutes, but held these statutes unconstitutional on First Amendment grounds. In doing so, the Court identified the provision of the federal statute, 18 U.S.C. 2511(1)(c), and its Pennsylvania counterpart as “content-neutral” laws of “general applicability” because the statutes single out the communications by virtue of the illegal nature of their interception. The statutes do not distinguish based on the contents of the communication. The Court also focused on the fact that *the parties to be punished in this case were not those that illegally intercepted the communication in the first place*; it saw little purpose in punishing someone other than the person whom the law was designed to punish. *Id.* at 10. Significantly, however, the Court focused on the public policy nature of the communications involved. The Court was concerned with the fact that this statute imposed “sanctions on the publication of truthful information of public concern,” and that this interest outweighed that of privacy of communication. *Id.* at 12. An unknown party’s illegal activities were not enough to justify removing the protection of the First Amendment in a dispute so clearly involving public concern.

In addition to the proposition that *Bartnicki* dilutes the strength of the wiretapping statutes as a tool to prevent admissibility of wiretapped evidence, several exceptions to the general prohibition against use of intercepted oral and wire communications exist. Section 2511(2)(d) of the federal statute provides that it is not unlawful for a person to intercept an oral or wire communication where this person is one of the parties to the communication or where one of the parties has given prior consent to such an interception. The court in *Pollock v. Pollock* extended the consent exception in holding that a parent may vicariously consent on behalf of a minor child to the interception of a communication as long as the parent can demonstrate “a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child.” *Pollock v. Pollock*, 154 F.3d 601, 610 (6<sup>th</sup> Cir. 1998). Also, several courts have interpreted the ordinary business exception set out in 18 USC §2510 (5)(a)(i) as intending to cover tape recorders attached to extension telephones in personal residences. *Scheib v. Grant*, 22 F.3d 149 (7<sup>th</sup> Cir. 1994); *Newcomb v. Ingel*, 944 F.2d 1534 (10<sup>th</sup> Cir. 1991); *Janecka v. Franklin*, 843 F.2d 110 (2d Cir. 1988).

Another exception to the general federal prohibition concerns the admissibility of illegal interceptions in a family law context. For example, marital conversations have been found admissible in order to show that one party had been blackmailed or coerced into a court-approved agreement. *In re: Marriage of Lopp*, 378 N.E.2d 414, 419 (1986). In that case, the wife was alleging that such communications had been used to coerce her into signing a custody agreement.

And, other conversations obtained in violation of the federal wiretapping statute have been held admissible for impeachment purposes. *Jacks v. State*, 394 N.E.2d 166 (1979). The 4th Circuit even held admissible an illegally obtained taped conversation offered to impeach a denial of adultery set out in an affidavit. *Culbertson v. Culbertson*, 143 F.3d 825, 827 (4<sup>th</sup> Cir. 1998).

Two federal Circuits have held that the criminal sanctions set out in the federal wiretap statute do not apply to spousal communications. In *Simpson v. Simpson*, the 5th Circuit held that the federal statute did not apply to a husband's wiretapping of his wife's conversations while they were still married and living together. *Simpson v. Simpson*, 490 F.2d 803, 809 (5<sup>th</sup> Cir.), *cert. denied*, 419 U.S. 897 (1974). In *Simpson*, the Court held that the statute was not sufficiently definite and specific to create a federal cause of action in favor of one spouse against the other spouse for the interception of communications prohibited by the federal statute. The court based its reasoning on the tradition federal courts have typically followed of leaving family matters to state courts; the court stated that it did not believe Congress had intended to act counter to this tradition. The 2<sup>nd</sup> Circuit likewise found that interspousal wiretaps were a matter of marital disputes, an area typically left to the discretion of the states. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977). In *Anonymous*, a father tape-recorded his 8 year old son's conversations with the child's mother. The Court analogized this activity to listening to the conversation on an extension telephone, which is not prohibited by the federal statute. The court further found that the actions by the father did not rise to the level of criminal conduct intended to be punished by the federal statute.

A majority of courts, however, have found no exception for intercepted wire or oral family communications. The most frequently cited case for the majority position, *United States v. Jones*, was a criminal case finding that the federal wiretap statute intended "to reach private electronic surveillance and that Congress was aware that a major area of use for surveillance techniques was the preparation of domestic relations cases. *United States v. Jones*, 542 F.2d 661, 668 (6th Cir. 1976). This case involved a husband who was criminally charged with intercepting phone conversations of his estranged wife and using these contents to obtain a divorce (in violation of the federal statute). *Id.* at 663. In addition to the 6th circuit, the 4th, 8th and 10th Circuits have found no Congressional intent to except such willful, intercepted spousal communications. *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989); *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991); *Platt v. Platt*, 951 F.2d 159 (8<sup>th</sup> Cir. 1989).

In applying the federal statute, state courts have also refused to recognize a spousal exception. Alabama courts have found no exception for spousal wiretapping, even for impeachment purposes, when the intercepting person was not a party to the communication or did not have the consent of either participating party. *Ex parte O'Daniel*, 515 So.2d 1250, 1252 (Ala. 1987); *Hudson v. Hudson*, 534 So.2d 617 (Ala. Civ. App. 1988). A Missouri court held that the federal statute was clear and unambiguous in its blanket application to all wiretaps not authorized specifically by the statute, so any communications or evidence obtained in violation of this blanket

prohibition, even those from spousal communications, are not admissible. *Stamme v. Stamme*, 589 S.W.2d 50, 53 (Mo.App. E.D. 1979).

Similar to the federal statute, §16.02 of the Texas Penal Code makes unauthorized interception or use or disclosure of the contents of the interception a felony. Also, Article 18.20 §2 of the Texas Code of Criminal Procedure prohibits use of the contents of an intercepted communication, and any evidence derived from an intercepted communication in any trial except civil trials, arising out of a violation of the Penal Code, code of Criminal Procedure, Controlled Substances Act, or Dangerous Drug Act. The state penal code and criminal procedure provision appear to prohibit interception of the same communications addressed by the federal statute. It is not a violation of the state or federal statutes if a party to the communication consents to the interception or if the person intercepting the communication is also a party to the communication.

Texas courts have generally declined the opportunity to follow the *Simpson* and *Anonymous* cases to attach a spousal immunity exception to the applicable federal or state wiretap statutes and except marital cases from the prohibition against use of illegal wiretaps. See *Kent v. State*, 809 S.W.2d 664 (Tex. App. - Amarillo 1991, writ ref'd); *Turner v. PV Int'l Corp.*, 765 S.W.2d 455 (Tex. App. - Dallas 1988, writ den'd per curium 778 S.W.2d 865); *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1995, writ denied).

The courts in *Turner* and *Collins* held that tape recordings and transcripts of those recordings made in violation of the state or federal wiretap statutes are inadmissible. The *Collins* court noted that §§123.001 - 123.004 of the Texas Civil Practice & Remedies Code did not expressly provide for the exclusion of illegally intercepted communications from evidence in civil cases. *Collins, id.* at 796. The court found that the statutory provision for recovery of damages and injunctive relief were sufficient to overcome the presumption of admissibility under Rule 402 of the Texas Rules of Civil Evidence. *Id.* At 799 [“to permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe.”] Also, the *Collins* Court found nothing in either the Texas Constitution or common law to suggest “that the right of privacy is limited only to unmarried individuals,” and found that spouses have the same rights of privacy under both statutes. *Collins* at 797.

The El Paso court interpreted the Texas statute, *V.T.C.A., Penal Code § 16.02(b)(1)*, as applying to spouses, thereby rendering any intercepted wiretaps unlawful. *Duffy v. State*, 22 S.W.3d 17, 24 (Tex. App. - El Paso, 2000). The *Duffy* Court declined to follow *Simpson*, and agreed with *Collins* holding that the common law and constitutional right of privacy recognized by Texas courts is not limited to unmarried individuals. The court concluded that “a spouse has a right of privacy under Section 16.02.” *Id.* at 24.

Nonetheless, the Texas courts recognize the general exception to the blanket prohibition of spousal wiretaps when the intercepting party is a party to or has consented

to the interception. *Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex. App. - Corpus Christi, 1986). In *Kotrla v. Kotrla*, the husband taped an in-person conversation with his wife in which she admitted to having used cocaine and marijuana. *Id.* at 855 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.) While the wife's argument on appeal centered around the theory that this tape should not have been admissible because she had not consented to being taped, the court disagreed, holding that the state interception of communications statute does not prohibit this type of interception so long as one party consents to the taping. In the *Kotrla* case, the husband doing the taping was the party who consented, so the recording was admissible. *Id.* at 855.

Arguably, illegally-taped telephone conversations may be used for impeachment purposes, provided the recording satisfies a seven-point test for admissibility. *Cummings v. Jess Edwards*, 445 S.W.2d 767, 773 (Tex. Civ. App. – Corpus Christi 1969, writ ref'd n.r.e.). This seven-point test requires that the offering party demonstrate:

- 1) that the recording device was capable of taking testimony;
- 2) that the operator of the device was competent;
- 3) the authenticity and correctness of the recording;
- 4) that changes, additions, or deletions have not been made;
- 5) the manner of the preservation of the recording,
- 6) the identity of the speakers; and
- 7) that the testimony elicited was voluntarily made without any kind of inducement.

*Id.*

Finally, a court may look to all the surrounding circumstances to determine whether information obtained from wiretapping was wrongfully considered in a civil case. The Austin Court ruled that information obtained from wiretapping would be admitted if the information could have been gathered through means other than that of wiretapping. *Fabian v. Fabian*, 765 S.W.2d 516 (Tex. App. - Austin 1989, no writ). In *Fabian*, the husband admitted at trial he had attached a recording device to the family telephone. While the tapes were not admitted, the wife objected to introduction of evidence regarding an affair she was having, claiming the only way the husband knew about the affair was through telephone conversations taped in violation of the Texas Penal Code §16.02. The court allowed the evidence to be admitted because there were other means of discovering this information. The husband had a private investigator check motel records, the husband followed the wife, and the husband also questioned her friends and co-workers. *Id.* at 519.

## 2. Electronic Mail

It is a federal crime to intercept electronic mail while it is stored, in route, or after receipt. The Electronic Communications Privacy Act (ECPA) amendments to the federal wiretap law extends to “electronic communications,” which are defined as any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in

whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but do not include -

- a) any wire or oral communication;
- b) any communication made through a tone-only paging device; or
- c) any communication from a tracking device (as defined in section 3117 of this title);
- d) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds. *See* 18 USC §2710.

And, because electronic mail utilizes phone lines, television cables, and certain types of fiber optic cables, it falls within the protection of the ECPA. The ECPA provides in general that it is an offense to:

- (1) intentionally access without authorization a facility through which an electronic communication service is provided; or
- (2) intentionally exceed an authorization to access that facility; and thereby obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. §2701.

The punishment for an offense under the ECPA includes fine or imprisonment from 6 months to 2 years, or both, depending on the purpose for which the offense is committed.

The prohibitions of the ECPA do not apply, among other things, to conduct authorized by the the e-communications service, the user.

Also, §2707 of the ECPA creates a civil cause of action, which includes all appropriate equitable or declaratory relief, damages, including actual damages, reasonable attorney's fees and litigation costs.

An early case illustrates the utility of the ECPA to the protection of e-mail communications. A computer system used by an employee of Steve Jackson Games, Inc. (SG) was seized by the federal government under warrant, because the employee was suspected of hacking into a Bell Telephone computer system. An electronic bulletin board service for SG subscribers was on the seized system. The Secret Service read the stored and undelivered bulletin board e-mail, and during the course of the investigation, some of the stored information was deleted. SG subsequently sued the federal government, and the court found that the government had violated the Privacy Protection Act and Title II of the ECPA. Damages were awarded to SG. *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5<sup>th</sup> Cir. 1994).

The illegality of intercepting e-mail provides a comparable basis for arguing evidentiary inadmissibility of wrongfully intercepted electronic information as that discussed above regarding information obtained from wiretaps.

### C. Surveillance

Surveillance not utilizing wiretapping or electronic communication interceptors is generally limited to photographic techniques. The admissibility of a photographic representation requires only that the image be shown to accurately reflect the subject of the photograph or videotape at a given time, and to have relevance to a material issue. *S.D.G. v. State*, 936 S.W.2d 371, 381 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1996, writ denied).

Audio and video surveillance that is employed by government officials must comply with the requirements of the Fourth Amendment. The Fourth Amendment however, does not apply to private actions. Texas Civil Practice & Remedies Code §123.001 identifies interception of communications only through use of an electronic device. If a person simply eavesdropped on a conversation or photographed another person, these situations would not be actionable.

Videotaping can expose the voyeur to liability, however. In *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), the Supreme Court awarded damages to a woman who was videotaped in sexually explicit circumstances without her knowledge or consent. The Court cited *Billings v. Atkinson* in upholding the woman's claim because it was the first case in Texas to recognize a cause of action for willful invasion of privacy. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). *Billings* involved surveillance by a third party. Mrs. Billings was in a conversation with a neighbor on the telephone when she heard strange noises on her telephone line. She hung up and went outside to see if she could determine the cause of the noise. Mr. Atkinson, a telephone repairman, was working on the terminal box behind her house. The following day, another telephone repairman visited the same terminal box and discovered a wire-tapping device attached to Mrs. Billings' telephone line. The Billings sued Atkinson for mental anguish. The trial court granted Atkinson a judgment n.o.v. and the appellate court affirmed. The Supreme court reversed these decisions, finding that the unwarranted invasion of an individual's privacy is a tort. The Restatement (second) of Torts (1977) defines a cause of action for invasion of privacy as:

One who intentionally intrudes, physically or otherwise, upon the solitude of seclusion of another or in his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Certainly video surveillance can constitute an invasion of privacy.

### D. Attorney's Exposure

An attorney may be exposed to criminal or civil liability by participating in the unlawful interception of information. Chapter 15.02 of the Penal Code addresses criminal conspiracy, and provides:

- (a) A person commits criminal conspiracy if, with intent that a felony be committed:
  - (1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and
  - (2) he or one or more of the m performs an overt act in pursuance of the agreement.
- (b) An agreement constituting a conspiracy may be inferred from acts of the parties.

If an attorney has knowledge of a client's intent to wiretap, and becomes involved in the planning or execution of the act itself, a criminal conspiracy may be alleged.

### **Further Reading**

Applicability, in civil action, of provisions of Omnibus Crime Control and Safe Streets Act of 1968, prohibiting interception of communications (18 U.S.C.A. § 2511(1)), to interceptions by spouse, or spouse's agent, of conversations of other spouse. 139 ALR Fed 517.

Applicability of provisions of Omnibus Crime Control and Safe Streets Act of 1968 prohibiting interception of wire or oral communications (18 USCA § 2511(1)) to interception by spouse, or spouse's agent, of conversations of other spouse in marital home. 55 ALR Fed 936.

Construction and application of 18 USCA § 2511(1)(a) and (b), providing criminal penalty for intercepting, endeavoring to intercept, or procuring another to intercept wire, oral, or electronic communication. 122 ALR Fed 597.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner. 57 ALR3d 172.

"Caller ID" system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections. 9 ALR5th 553.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer. 24 ALR4th 1208.

Electronic Eavesdropping by Concealed Microphone or Microphone-Transmitter, 30 Am Jur Proof of Facts, p. 113.

Wiretapping, 29 Am Jur Proof of Facts, p. 591

Excluding Illegally Obtained Evidence, 5 Am Jur Trials 331

Admissibility of evidence obtained by eavesdropping on cordless telephone conversations. 86 Colum.L.Rev. 323 (1986)

Can parents vicariously consent to recording a telephone conversation on behalf of a minor child?: An examination of the vicarious consent exception under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Debra Bogosavljevic, 2000 U.Ill.L.Rev. 321

Domestic relations and eighth circuit court of appeals. Robert E. Oliphant and Susan Elizabeth Oliphant, 16 Wm.Mitchell L.Rev. 645 (1990)

E-mail and voice mail: Employee privacy and the federal wiretap statute. 44 Am.U.L.Rev. 219 (1994)

Fundamental role of privacy and confidence in the network. Joel R. Reidenberg & Francoise Gamet-Pol, 30 Wake Forest L.Rev. 105 (1995)

Interspousal wiretapping: A costly game. C. Dan Wyatt III, 6 S.C.Law. 14 (July/Aug. 1994).

Keeping "private e-mail" private: A proposal to modify the Electronic Communications Privacy Act. Robert S. Steere, 33 Val. U.L.Rev. 231 (1998)

Evidence, admissibility of, see LaFave and Israel § 4.1 et seq.

Principal purpose of Electronic Communications Privacy Act (ECPA) amendments to federal wiretap law was to extend to 'electronic communications' the same protections against unauthorized interceptions that wiretap law had been providing for 'oral' and 'wire' communications via common carrier transmissions. *Brown v. Waddell*, C.A.4 (N.C.) 1995, 50 F.3d 285

Husband's complaint alleging that wife, during pendency of divorce proceedings, installed tape-recording device on her own telephone in order to intercept, monitor and record telephone calls made by husband to minor child, without authorization by husband, stated claim within purview of the federal wiretapping statutes. *Platt v. Platt*, C.A.8 (Mo.) 1989, 951 F.2d 159

Under Electronic Communications Privacy Act (ECPA), which is commonly known as the Federal Wiretap Act and which concerns the interception of electronic communication, retrieving numbers from memory of pager does not constitute "interception" within meaning of ECPA, but is merely accessing stored electronic communications, which requires search warrant rather than court order to obtain. *U.S. v. Reyes*, S.D.N.Y.1996, 922 F.Supp. 818

Can parents vicariously consent to recording a telephone conversation on behalf of a minor child?: An examination of the vicarious consent exception under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Debra Bogosavljevic, 2000 U.Ill.L.Rev. 321

Domestic relations and eighth circuit court of appeals. Robert E. Oliphant and Susan Elizabeth Oliphant, 16 Wm.Mitchell L.Rev. 645 (1990)

Interspousal wiretapping: should state law or federal statute govern? Note, 10 Hamline L.Rev. 255 (1987)

Is your spouse taping your telephone calls?: Title III and interspousal electronic surveillance. Scott J. Glick, 41 Cath.U.L.Rev. 845 (1992)

Tape of conversation between defendant and ex-wife was admissible under Omnibus Crime Control and Safe Streets Act, despite defendant's contention that ex-wife made tape in order to blackmail him, in light of finding that ex-wife's purpose in taping conversation was to turn tape over to government in hope of obtaining better deal for herself. *U.S. v. Zarnes*, C.A.7 (Ill.) 1994, 33 F.3d 1454, rehearing and suggestion for rehearing en banc denied, certiorari denied 115 S.Ct. 2286, 515 U.S. 1126, 132 L.Ed.2d 288

Tape recordings which are only partially unintelligible are admissible unless those portions are so substantial as to render the recording as a whole untrustworthy and determination as to trustworthiness of tape recording is left to sound discretion of trial judge. *U. S. v. Llinas*, C.A.5 (Fla.) 1979, 603 F.2d 506, certiorari denied 100 S.Ct. 1030, 444 U.S. 1079, 62 L.Ed.2d 762

Ownership of home and telephone by wife's parents and their conduct in hiring lawyers and experts for wife's custody suit were not basis for holding them liable to husband under Title III for wife's interception from home of husband's telephone conversations with child. *Thompson v. Dulaney*, C.A.10 (Utah) 1992, 970 F.2d 744, on remand 838 F.Supp. 1535, 139 A.L.R. Fed. 765

For interception and disclosure of wire communications to be a crime, it must be done with bad purpose, without justifiable excuse, stubbornly, obstinately or perversely. *U.S. v. Ross*, C.A.8 (Ark.) 1983, 713 F.2d 389

For purposes of statute permitting a party to an oral communication to intercept a conversation if interception is not for purpose of committing any criminal or tortious act, the "tortious purpose" must be a tortious purpose other than the mere intent to surreptitiously record an oral conversation. *Roberts v. Americable Intern Inc.*, E.D.Cal.1995, 883 F.Supp. 499

Where divorced husband, who had custody of parties' eight-year-old daughter, covertly recorded, at his own home, telephone conversations between daughter and his ex-wife, such action involved mere marital dispute and did not rise to level of criminal conduct proscribed by this section. *Anonymous v. Anonymous*, C.A.2 (N.Y.) 1977, 558 F.2d 677.

A custodial parent's good faith concern for his minor child's best interests may, without liability under the Federal Wiretapping Statute, empower the parent to intercept the child's conversations with her non-custodial parent. *Campbell v. Price*, E.D.Ark.1998, 2 F.Supp.2d 1186

Attorneys, tape recorders and perfidy. *Stanley S. Arkin*, 211 N.Y.L.J. 3 (April 14, 1994).

Evidence, 29A Am Jur 2d §§ 592, 593, 609-612, 614, 615, 634

Admissible or inadmissible evidence, see *Wright & Graham: Evidence* § 5191 et seq.