

**ELECTRONIC EAVESDROPPING AND WIRETAPPING:  
How 20<sup>th</sup> Century Technology Can Cause 21<sup>st</sup> Century Headaches for You and Your Client**

by  
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In a day and age where everyone can go to Radio Shack and purchase their own miniaturized microphone, recording device and spy camera it has become abundantly clear that every spouse is a potential James Bond. It is not uncommon to be asked by your client: “Can I record secretly conversations with my spouse?” Unfortunately it is more common that the family law practitioner is merely told about recordings long after they have been made or even after they have been republished. As a result, learning the answer to the question is only part of the lawyer’s job. Learning how to advise your clients and how to extricate your client from a potentially criminal quagmire is equally important - the answer is not as simple as the question.

American Courts have long recognized a right to privacy and the Federal Wiretap Statute is based upon protecting this privacy right. States have followed suit and both state and federal law prohibit certain types of audio recordings and methods of eavesdropping. However, there are important differences in both state and federal law which can provide a different standard as to when a client can or cannot record another person’s conversations and how that recording may be used.

When the client informs the practitioner of indisputable evidence that the other spouse only wants custody to obtain an advantage in child support or as a method to get even with the

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client, it is time to make further inquiry as to the nature of that “proof.” When questioned by the family practitioner as to the manner in which the client has obtained the proof, the practitioner is many times told that the proof was obtained through the undisclosed recording of their spouse’s telephone conversation with a third party or obtained from the spouse’s home computer via e-mail. These recorded conversations, made without the knowledge of the participants to the conversation, can become extremely complicated.

If you are lucky enough to have a client who asks for legal advice before acting, then you must advise the client that they may violate State or Federal Wiretap Statutes if they record these conversations and thereby expose themselves to criminal penalties, and possible severe civil penalties. If you are unlucky enough to have a client who records first and asks questions later, then how and where your client acted may determine whether the law has already been violated. How you handle the recording evidence may also subject the practitioner to criminal and civil sanctions as well.

This article is intended to provide an overview of the federal law and excerpts of various state law statutes and cases which interpret the various issues raised in addressing eavesdropping. This article is not intended as a comprehensive collection of state and federal law but rather an overview from various states and jurisdictions to ensure that the practitioner knows what questions to ask before dispensing advice.

## **TELEPHONIC INTERCEPTION**

### **FEDERAL OVERVIEW**

The federal statute prohibiting eavesdropping is called the “Federal Wire and Electronic Communications Interception and Interception of Oral Communications Statute.” This statute is commonly referred to as the “Federal Wiretapping Statute.” This statute, found at 18 USC 2511(1)(a), makes it a crime for any person who “intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.” Violation of this statute is punishable by a fine or 5 years in prison. There are exceptions to the rule; both statutory and those created by federal caselaw.

### **PARTY TO THE CALL EXCEPTION**

18 USC 2511(2)(d) provides that it is not unlawful for a person to intercept a wire, oral or electronic communication “where such person is a party to the communication . . .” (emphasis added). This exception applies unless the interception was done for the purpose of committing a crime or tort violation the laws of the U.S. or any state.

### **FEDERAL MARITAL HOME EXCEPTION**

Another exception to the federal prohibition on eavesdropping is referred to as the “marital home” exception, however, not all federal circuits recognize this exception. The Circuit Courts have long been divided into two schools. The minority school has created a “marital home” exception to the wiretapping statute, whereas the majority school has held that no such exception exists.

The leading Federal case establishing the marital home exception in the minority of jurisdictions was Simpson v. Simpson<sup>4</sup>. In Simpson, the husband suspected his wife of infidelity. As a result, he attached a taping and recording device to the phone line in the house to record his wife’s conversations. He played the tapes to several people. After discovering the recording the

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<sup>4</sup>490 F.2d. 803 (5<sup>th</sup> Cir. 1977).

wife sued husband for civil remedies. The court created a marital home exception, and denied civil recovery. In reaching its conclusion, the court cited the legislative hearings and reports wherein the Congress stated “nobody wants to make it a crime for a father to listen on his teenage daughter or some such related problem.” The court obviously had an aversion to the Federal intervention in marital home activity. Despite the fact that the statute itself contains no such exception, the court decided to create a “marital home” exception from the legislative history. In affect the court was legislating rather than adjudicating the case.

Similar conclusions were reached at the federal level in Anonymous v. Anonymous<sup>5</sup>, and London v. London<sup>6</sup>. The courts in the Anonymous and London cases, similarly held that because the recordings took place in the family home, involved family members, that the taping of the conversation was akin to listening to the conversations on an extension phone in a person’s home. For that reason, they found that there was no violation of the federal statute.

The Simpson viewpoint, however, is clearly in the minority in the federal courts and was recently overruled in Glazner v. Glazner, 321 F.3d 1336 (11<sup>th</sup> Cir. 2003)(en banc.). In Glazner, the court overruled the Simpson decision stating clearly that there is no marital home exception found in the statute.

The majority of federal circuits follow the statute, interpreting the law as it reads, instead of expounding their own version of the act. The overruling of Simpson by the Glazner, is in accord with the historical criticism of Simpson for creating a “marital home” exception despite the legislative history and the language of the federal act.<sup>7</sup> It is apparent from the language of the

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<sup>5</sup>558 F.2d 677 (2d. Cir. 1977)

<sup>6</sup>420 F. Supp. 944 (S. D. N. Y. 1976).

<sup>7</sup>See Heggy v. Heggy, 944 F.2d 1537 (10th Cir. 1991); United States v. Jones, 542 F.2d 661 (6<sup>th</sup> Cir. 1976), Kempf v. Kempf, 868 F.2d 970 (8th Cir. 1989); Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984); Nations v. Nations, 670 F.Supp. 1432 (W.D.Ark. 1987); Flynn v. Flynn, 560

federal statute that congress did not intend to defer wiretapping to the states and that one of the goals of the wiretap statute was to precisely forbid marital wiretapping. The Simpson court likened the marital home exception to interspousal immunity, which is based on maintaining marital harmony. However, the majority finds this logic flawed. It would seem that someone feeling compelled to wiretap their spouse in their own home does not seek to promote a harmonious marriage. The Courts have moved away from the Simpson exception and the majority find that there is not a marital home exception in the federal wire tap act.

In United States v. Jones<sup>8</sup>, the 6<sup>th</sup> Circuit court held that there was no “marital home” exception. The Jones court was highly critical of the rationale and decision from the Simpson case. The Simpson court had commented that without the “marital home” exception, the Federal Statute might conflict with state statutes, which grant interspousal immunity from court claims. The Jones court found that the federal statute made no such explicit exception as written, nor did the act indicate any such intent. The court was very critical of the Simpson decision noting that judicial review the Simpson court employed of reviewing the legislative history to create an exception is not common practice. The Jones court stated that normally a court will not review legislative history when a federal statute is clear on its face. For these reasons, the Jones court refused to establish a marital home exception.

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F.Supp. 922 (N.D.Ohio 1983); Heyman v. Heyman, 548 F.Supp. 1041 (N.D.Ill. 1982); Gill v. Willer, 482 F.Supp. 776 (W.D.N.Y. 1980); Turner v. PV Intern. Corp., 765 S.W.2d 455 (Tex.Ct.App. 1988); Ex Parte O'Daniel, 515 So.2d 1250 (Ala. 1987); Rickenbaker v. Rickenbaker, 226 S.E.2d 347, (N. C. 1976); Stamme v. Stamme, 589 S.W.2d 50 (Mo.Ct.App. 1979); See also Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979).

<sup>8</sup>542 F.2d 661 (6<sup>th</sup> Cir. 1976)

In Pritchard v. Pritchard<sup>9</sup>, the 4<sup>th</sup> Circuit court followed the reasoning in United States v. Jones, stating that the statute clearly made no “marital home” exception. The Pritchard court found that a husband who wiretapped the family phone and recorded his wife’s conversations with third parties, while they were still married, was clearly liable under the statute. In reviewing the legislative history of the federal act, the Pritchard court found that congress was aware of the extent of wiretapping in family situations and that it was the clear intent of congress to prohibit such wiretapping.

Similarly, in Kempf v. Kempf<sup>10</sup>, the husband secretly recorded wife’s conversations with a third person over the telephone by attaching a tape recording device to an extension phone in their basement. The tape recordings, which revealed an extra marital affair, were introduced into evidence at the parties’ divorce trial. The wife filed an action against husband in federal court. The 8<sup>th</sup> Circuit court rejected the reasoning in Simpson finding that there was no exception for interspousal recordings in the federal statute. The court held:

Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping.

Some cases involve wiretapping in the marital home by third persons. For example, Kratz v. Kratz<sup>11</sup>, involved a case in which the husband hired a private detective who wiretapped the family phones. The court went into great detail articulating that the statute prohibiting such conduct was clear and that the wife had a right of privacy, even in the marital home. Most federal

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<sup>9</sup>732 F.2d 372 (4<sup>th</sup> Cir. 1984).

<sup>10</sup>868 F.2d 970 (8<sup>th</sup> Cir. 1989).

<sup>11</sup>477 F. Supp. 463 (E.D. Penn. 1979)

courts have continued to reject the Simpson doctrine and the minority viewpoint in numerous other cases including Heyman v. Heyman<sup>12</sup> and Heggy v. Heggy<sup>13</sup>.

### **CONSENT**

18 USC 2511(2)(d) provides that it is not unlawful for a person to intercept a wire, oral or electronic communication “... where one of the parties to the communication has given prior consent . . .” (emphasis added). This exception applies unless the interception was done for the purpose of committing a crime or tort violation the laws of the U.S. or any state.

Consent obtained by one party to the conversation is an explicit exception to the prohibition on eavesdropping and wiretapping. To avoid civil and criminal penalties parties to the litigation often argue that consent has been obtained either vicariously or through a party’s actions. These arguments are gaining acceptance in many of the jurisdictions, both state and federal.

### **VICARIOUS CONSENT EXCEPTION**

There is a developing theory in some jurisdictions which can override the strict interpretation of the state and Federal wiretapping laws. Attaining consent of one party to a conversation is an exception to the federal prohibition and most state prohibitions against wiretapping. The question arises whether a custodial parent provide consent for his or her child vicariously? If the answer is yes, a custodial parent could always record conversations between the child and another individual (the other spouse) without anyone’s knowledge and then later assert that they provided consent on behalf of the child.

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<sup>12</sup>548 F. Supp. 1041 (N.P.I. II 1982)

<sup>13</sup>699 F. Supp. 1514 (W.D. Okla 1988).

One federal circuit court to address this issue is the sixth circuit in Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998). In Pollock, the court adopted and accepted the concept of “vicarious consent” so long as the consenting parent demonstrates a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. In that case the ex-wife tape recorded her 14 year old daughter and her ex-husband and then later stated that she provided the necessary consent for the 14 year old despite the 14 year old child’s disapproval. The court found that this action by the wife did not violate the federal statute.

An Alabama Appellate Court, in Silas v. Silas<sup>14</sup>, has also used the consent exception to 18 U.S.C. A. Section 2510 to hold that a tape recording made by a father of a conversation between the mother and a minor child was consented to on behalf of the minor by the custodial parent father. Under Alabama law like the federal law, consent is a defense to eavesdropping or tape-recording of a private conversation. The Court looked at the common law duty of protection of a minor child and felt that there are limited instances where a parent could vicariously consent on the behalf of a minor to the taping of telephone conversations. The court held that the parent must have a reasonable good faith basis for believing the minor child is being abused, threatened or intimidated by the phone call.

The Michigan Court has also addressed the concept of vicarious consent. In Williams v. Williams<sup>15</sup>, the custodial father made two audio recordings of telephone conversations between his 5 year old son and the non-custodial mother. Mother filed a civil action against father under federal and state law. Father’s defense was that he had provided consent to the recording as the custodial parent on behalf of his son. The Michigan court rejected the concept of vicarious

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<sup>14</sup> 680 So. 2d 368 (Ala. Civ. App. 1996)

<sup>15</sup>581 N.W.2d 777 (Mich.App. 1998)

consent noting that there was no specific exception in the federal or state statutes for custodial parents. The court was unwilling to take judicially create an exception for custodial parents. In arriving at this conclusion the court stated:

However, we are also cognizant that granting a parent the ability to consent on behalf of his or her child in this context is likely to have widespread implications and may encompass surreptitious actions by parents with less than laudable motives.

Two New Jersey cases are also illustrative of the consent theory. The first is State v. Diaz<sup>16</sup>, in which a babysitter was indicted for aggravated assault and endangering the welfare of a minor. The parents had hired a private company to install video and audio surveillance equipment after they had noticed bruises on their child. The court held that the New Jersey wiretap statute did not apply because there exists a vicarious consent of a child for the parents to monitor care givers under these circumstances.

In Cacchiarelli v. Boniface<sup>17</sup>, the trial court held that this vicarious consent of a minor applies to one parent recording the conversations of a minor with the other parent.

The Kentucky Court of Appeals in Chapman v. Commonwealth of Kentucky also adopted the vicarious consent exception applying the standard created by the sixth federal circuit in Pollock v. Pollock.<sup>18</sup> Chapman involved the issue of whether recordings in violation of the federal wiretapping statute should be excluded from evidence in the defendant's criminal trial. The federal statute contains an evidence exclusion for illegally obtained recordings. The State argued that the father had provided vicarious consent to the recordings on behalf of his son who was a party to

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<sup>16</sup>308 N.J. Super.504, 706 A 2<sup>nd</sup> 264 (1998)

<sup>17</sup>325 N.J. Super. 113 (Ch. Div. 1999).

<sup>18</sup>Chapman v. Commonwealth of Kentucky, No. 1998-CA-002100-MR (Ky.App. Jan. 28, 2000).

the conversations. The Kentucky court stated “[i]n applying the Pollock test to determine whether Chapman's ex-husband could vicariously consent to the recording on behalf of his son, the question is whether he had a good faith, objectively-reasonable basis for believing that it was necessary and in the best interest of his son to consent on his behalf to the taping of the conversation.” The court concluded that the ex-husband suspected his son was involved in drug trafficking and therefore he had a reasonable basis to tape record those conversations.

The vicarious consent exception has been rejected by at least one court. The West Virginia Supreme Court of Appeals declined to allow this exception in West Virginia DHHR v. John L.<sup>19</sup> Although the West Virginia court noted that vicarious consent had been adopted by one federal court in the context of a wiretapping case, it determined that “under the specific facts of the case before us, we hold a parent has no right on behalf of his or her children to give consent under W.Va. Code, 62-1D-3(c)(2), or 18 U.S.C. §§ 2511 (2)(d), to have the children's conversations with the other parent recorded while the children are in the other parent's house.”<sup>20</sup>

In Collins v. Collins, a Texas case, the Court held that wire tapping of conversations between a mother and child by the father was an illegal wiretap.<sup>21</sup> The Court went on to discuss whether this illegally obtained evidence could be admissible. These tapes were not admitted in evidence because the tapes were illegally obtained under the Federal

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<sup>19</sup>West Virginia DHHR v. John L., (West Virginia Court App. decided December 15, 1994).

<sup>20</sup>West Virginia DHHR v. John L., (West Virginia Court App. decided December 15, 1994); See also Thompson v. Dulaney, 838 F. Supp. 1535, 1544 (D. Utah 1993)(where federal court held "as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, *vicarious consent* will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children."

<sup>21</sup> Collins v. Collins 904 S. W 2d 792 (Tex. Ct. App. 1995)

and State wiretap Statute and because criminal and civil statutes made specific provision for the disposition of interceptive communications.

The growing trend to court adoption of a “vicarious consent” exception is born from the sixth federal circuit, but it has roots in state family law. Although vicarious consent is also not contained within the statute or the legislative history of the federal act, it has been distinguished from the “marital home exception” without difficulty.

### **IMPLIED CONSENT FROM A PARTIES’ ACTIONS**

Some courts have allowed consent to be implied from the actions of the parties. In Stewart and Stewart<sup>22</sup>, the Mississippi Supreme Court held that a party had consented to recordings by her actions and statements. In Stewart the husband had filed for divorce in Mississippi and the parties separated in 1991. Wife had telephone conversations with a female in which she discussed sexual activity the two women had been involved with together. The husband had placed a recording device on wife’s telephone and had recorded these conversations. Despite acknowledging that it was her voice and she made those statements wife sought to exclude the recordings from evidence arguing they were illegally obtained and therefore should be excluded. Wife made the statement at trial that “she had the impression that . . . [husband] had "rigged" the phone and she wanted to "give him an earful" for doing so.” The Mississippi Supreme court rejected wife’s arguments that the tape recordings were illegally obtained finding “consent to interception of a phone call may be inferred from knowledge that the call is being monitored or taped.” The court went further stating “. . . [wife] had knowledge that her conversation was being taped as evidenced by her testimony that she had the impression that . . .

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<sup>22</sup>645 So. 2d 1319 ( Miss. 1994).

[husband] had ‘rigged’ the phone and wanted to ‘give him an earful’ for doing so.” As such the court held that wife had consented to the recordings.

Several other courts have adopted the concept of implied consent to recordings.<sup>23</sup> One possible way to preserve this argument to allow recordings to be admitted is to simply put the other party on notice that recordings will be made of telephone and personal conversations. Once this is done, later a litigant is free to argue that the other party had knowledge they were being recorded and therefore consented to the recordings by not taking steps to stop the recordings.

### **EXTENSION PHONE EXCEPTION**

Both the federal and majority of state statutes have provided for exception for an extension telephone.<sup>24</sup> The issue of an extension phone is discussed extensively in the Massachusetts Court decision, Commonwealth v. Charles Vieux<sup>25</sup>. Congress clearly exempted such activity from 18 U.S.C. 2510(5)(a)(i)<sup>26</sup>. There has been a clear attempt on the part of Congress and the case law to exempt ordinary eavesdropping in the context of the family home. The interception issue is not reached at all when an extension phone in the family home is used to listen in on a conversation. It has never been the intent of the Congress to subject parents to criminal and civil penalties when they listened in on phone conversations of a minor child out of concern for the well being of the minor child or where a person inadvertently listens to a conversation by picking up an extension phone. The wire tapping statute is directed specifically against interception by sophisticated electronic equipment not against minor unsophisticated

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<sup>23</sup>United States v. Gomez, 900 F. 2d 43 (5th Cir. 1990); See also United States v. Edmond, 718 F. Supp. 988 (DDC 1989); United States v. Abreu, 730 F. Supp. 1018 (D. Colorado 1990); United States v. Jones, 839 F. 2d 1041 (5th Cir. 1988); and United States v. Kolodziej, 706 F. 2d 590 (5th Cir. 1983).

<sup>24</sup>, 18 U.S.C. 2510(5)(a)(i).

<sup>25</sup>671 N.E. 2d. 989 (Mass. App. Ct. 1996).

<sup>26</sup>See also Anonymous v. Anonymous, 558 F.2d. 677 (2d. Cir. 1997).

incidentally means of eavesdropping such as picking up a phone receiver or tape recording a call which could already be heard.

In the Mississippi case, Wright v. Stanley<sup>27</sup>, the business use exception under 18 U.S.C. 2510 (5)(d)(i) was recognized as a basis to find that the interception of the tape recording of a father's conversation with his children was admissible. The court reasoned that this section does not prohibit a person from taping a conversation within his own home that he is legally authorized to listen by picking up his extension phone. The Mississippi Court relied on the decisions in Simpson and Anonymous. It was argued in this case that the recordings were not intercepted by a spouse and not taped at the marital home since the spouses were divorced. The Courts found that if there is no prohibition against a spouse recording a conversation of another spouse within the marital home, then it follows that there would be nothing prohibiting a custodial parent from recording the conversations of the children in the custodial home. The crux of these arguments is that it is permissible to record what can be heard by an individual by simply picking up an extension phone. The violation of the state wiretap statutes failed in this case because there was a subscriber exemption, and therefore, if you were the telephone subscriber and you intercept a communication on that phone, the Mississippi wiretap Statute did not apply. This reasoning has been followed in other cases in other states.

A New Mexico case, Templon v. Mountain Bell Tel. Co., v. Toups<sup>28</sup>, raised an interesting issue. The husband and wife separated and divorced. The husband moved out of the marital home and took the marital home phone number to his new living quarters. The wife got a new telephone with a new phone number. Without wife's knowledge, the husband called the

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<sup>27</sup>700 SO2d 274 (S.C. of Miss. 1997).

<sup>28</sup>97 N.M. 699 (Ct. of App. 1982).

telephone company and asked for an extension phone of her number to be placed at his home. The wife complained to the company, but the phone company found no wiretap. The wife eventually terminated her service and the extension at the husband's home was discovered. Mountain Bell, the telephone company, was found to have a duty to get consent when installing an extension phone off premises. Therefore, both the husband and Mountain Bell could be pursued for damages.

Both federal and state wiretap statutes have been implemented to protect against invasions of privacy of citizens. In the context of family law cases, this issue comes up with regard to civil liability and damages, and also with the use of taped conversations in divorce trials and custody trials. In the majority of states, the unauthorized taping of a spouse's conversation would lead to both damages and possibly criminal liability. Therefore, in matrimonial cases, clients should be advised not to tape their spouse's conversations, unless it is consented to or they specifically fall within one of the enumerated exceptions of the state statute.

### **STATE LAW**

Most state statutes are very similar to the federal wiretapping law and mirror the provisions. A typical state statute is found in New Jersey's Wiretapping Statute, which provides as follows:

“Except as otherwise specifically provided in this act, any person who:

- a. Purposely intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication; or
- b. Purposely discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
- c. Purposely uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom,

knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication;

shall be guilty of a crime of the third degree. Subsection b. and c. of this section shall not apply to the contents of any wire, electronic or oral communication, or evidence derived therefrom, that has become common knowledge or public information” (N.J.S.A. 2A:156A-3).

The New Jersey statute parallels the federal wiretapping statute as is standard in many state jurisdictions. A review of state case law shows similar issues and discussions as those found under federal law.

State courts have generally followed the federal majority interpretation, rejecting the Simpson created exception. New Jersey, Alabama, California, North Carolina, Missouri, Georgia and Florida are among just a few of the states which have adopted the federal majority position in interpreting state law and federal law. These courts followed the majority federal opinions stating that it was quite evident that the similar state statutes and federal statute contain no explicit exception for an aggrieved spouse to tape record the other party’s conversations.

Justice Brandeis, wrote:

“The evil incident to invasion of privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of both persons at the end of the line is invaded and all conversations between them upon any subject, and although properly confidential and privileged may be overheard. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared to ‘wire-tapping’ Olmstead v. United States, 277 U.S. 438, 574-76, 48 S.Ct. 564, 571, L.Ed. 944 (1928) Brandeis, J. dissenting)”

Commenting on the trauma created by the invasion of privacy, the New Jersey Court held:

“There is no reason whatsoever to allow spouses to perform non-consensual tortuous acts against each other than there is to allow them to perform them against third parties. The right of privacy extends within the confines of the marital home. It is not somehow dissipated into the air upon the taking of marriage vows. Moreover since the

instant case involves a claim for civil damages arising from a taping designed to prove marital infidelity, can it seriously be argued that a viable marital home or relationship exists. Rather, as is the norm in cases dealing with estranged spouses living under the same roof, the need for privacy is probably greater than under normal living conditions. A secretive taping of a spouse's call under these conditions is an invasion in a most egregious fashion." (M. G. v. J.C. at 479).

The Federal Wiretap Statute, 18 U.S.C. 2510, specially prohibits interception and disclosure of wire, oral, or electronic communications. The statute also lists specifically enumerated exceptions. There are also various exceptions for operators at switchboards, operators of citizens band, amateur and general mobile radio services and, marine aeronautical services. This prohibition of interception of communications is based on the legislative intent to protect from both private and public invasions of privacy including those invasions from law enforcement. The prohibition against interception is very broad and even for law enforcement to conduct an interception, there must be a Court Order in place. This broad prohibition reflects the public policy of the federal government and also the majority of the states.

A minority of state courts have followed the reasoning from the 5<sup>th</sup> Federal Circuit in *Simpson v. Simpson*. For example, the Louisiana Court system is in the minority when it comes to recognizing the marital home exception. In *Robinson v. Robinson*<sup>29</sup>, the Louisiana court found that when the taping was done of a conversation between the wife and a private investigator who she had hired that there was no interception. Although the wiretap occurred, it was done in the course of a marital matter and it did not rise to the level of a violation of 18 U.S.C. 2510. The Court cited and followed the reasoning in *Simpson* as an authority for this proposition. A minority of other courts have also followed the minority viewpoint.<sup>30</sup>

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<sup>29</sup>499 So. 2d. 152 (La. Ct. App. 1986).

<sup>30</sup>*Baumrind v. Ewing*, 279 S.E.2d 359 (S.C. Ct. App. 1981).

## STATE MARITAL HOME EXCEPTION

The vast majority of state courts confronting the issue of wiretapping and electronic surveillance have rejected the marital home exception.<sup>31</sup> In Turner v. P.V. International<sup>32</sup>, the Texas Court also refused to recognize the Simpson created caselaw exception to the wiretapping statute.<sup>33</sup> In Turner, the suit was brought by the third party against the husband. The Court ruled that the transcripts of the wiretapping tape could be used as evidence. The Court felt that the Simpson case created an exception which was not found in the act itself and therefore, stated that no express exception in 18 U.S.C. 2510 et seq. for electronic interceptions of conversations between a spouse and a third party existed without prior consent. The Court refused to create an exception even when the wire tap device was in the spouse's residence.

In a Tennessee case, Mimms v. Mimms<sup>34</sup>, the tape recordings of conversations in which only the wife was taped were admissible where the conversation was actually overheard by the husband. There was no attempt to intercept the phone conversation by husband but instead they were recorded because they could be heard by husband without any extra effort on his part. The wife was in the garage speaking on the telephone in a normal tone of voice and the husband stood outside a window where he could hear her. There was no evidence to show that any of the transcripts of this phone conversation were the result of a phone conversation, which was otherwise inaudible to the normal human ear. The husband testified that he could hear the entire conversation even though he had moved the tape recorder closer to better record the

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<sup>31</sup>Standiford v. Standiford, 598 A.2d 495 (Md.Sp.App. 1991);Turner v. PV Intern. Corp., 765 S.W.2d 455 (Tex.Ct.App. 1988); Ex Parte O'Daniel, 515 So.2d 1250 (Ala. 1987); Rickenbaker v. Rickenbaker, 226 S.E.2d 347, (N. C. 1976); Stamme v. Stamme, 589 S.W.2d 50 (Mo.Ct.App. 1979);

<sup>32</sup>765 S.W. 2d 455, 470 (Tex. Ct. App. 1989).

<sup>33</sup>See also Kent v. State, 809 S.W.2d 664, 668 (Tex.App. 1991).

<sup>34</sup>780 S.W. 2d. 739 (Tenn. Ct. App. 1989).

conversation. The Court found no evidence of illegal wiretapping of any means in this case merely by the recording of an otherwise audible conversation.

Missouri has also rejected the minority viewpoint. In Stamme v. Stamme<sup>35</sup> the Missouri Court of Appeals addressed whether secretly recorded audio recordings made by husband of wife and third persons. After a full review of the statute and the relevant caselaw the Missouri court concluded that no express exception for domestic surveillance was contained in the statute and therefore the marital home exception created by the Simpson decision was bad law.

In an interesting California case, People v. Otto<sup>36</sup>, the husband had been secretly recording conversations between his wife and another man. To the husband's shock, his wiretapped conversations revealed a plot on how to murder the husband. The husband was in fact eventually murdered in his home. Upon discovery of the wiretapped tapes by the police, suspicion focused on the wife and her lover, and they were convicted of his murder. Both parties objected to the admissibility of the taped conversations. The California Attorney Generals Office tried to use the "implied interspousal or wire tap exception" to use the tapes as evidence. This wire tap exception, which is recognized in only a minority of states, would have allowed a family member to wire tap the family's phone. The Court looked at the language of the statute, and determined that the "interspousal wiretap exception" was not specifically enumerated in the federal act.

The California Court analyzed the legislative history behind the "Omnibus Crime Control and Safe Street Act" which created the federal wiretapping statute. The Court concluded that the legislative history indicated Congress was aware of the problem of interspousal surveillance and could have exempted it if they so desired. In dismissing the Simpson exception, the Court

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<sup>35</sup>589 S.W.2d 50 (Mo. Ct. App. 1979).

<sup>36</sup>831 P.2d 1178 (Cal. 1992).

concluded that the language of Title 3, 18 U.S.C. 2511 is clear, the legislative history is clear and majority of courts have found no such exception.

### **SPECIFIC STATE EXCEPTIONS/DIFFERENCES**

Some state statutes differ from the federal statute by either creating a more prohibitive statute or by creating distinctions between telephone conversations and conversations in person. For example, Oregon's statute, ORS 165.540 contains a slightly different approach to the issue of electronic eavesdropping. ORS 165.540 provides that no person shall "obtain or attempt to obtain the whole or any part of a conversation by means of any device . . . if all of the participants in the conversation are not specifically informed that their conversation is being obtained."<sup>37</sup> Violation of this statute is a Class A misdemeanor. This prohibition applies to "conversations" only. This statute requires that all of the participants to an in person "conversation" consent to the recording. However, the statute has a more liberal standard for telephone recordings which are defined as recordings of "telecommunications." These telephone recordings only require the consent of one party to the communication. Oregon caselaw has interpreted this to allow a variety of recordings. For example, in *State v. Lissy*<sup>38</sup>, the court found that the legislative history supported the conclusion that the statute was intended to allow anyone to record a telephone conversation in which any party to the telephone conversation, even the recorder, consents.<sup>39</sup>

Unlike the federal wiretapping statute the Oregon statute provides a specific exception for recordings in the marital home. ORS 165.540(3) provides that the general prohibition on

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<sup>37</sup>ORS 165.540(1)(c)(emphasis added).

<sup>38</sup>747 P2d 345 (Or. Ct. of App. 1987)

<sup>39</sup>See also *State v. Underwood*, 648 P2d 847 (Or. Ct. of App. 1982)(Court stated that any party that is in a telephone conversation may record without the other parties' knowledge); In *Re Binns*, 910 P2d 382, fn. 1 (Or. Ct. of App. 1996)(telephone recording secretly made by client during conversation with lawyer did not violate the statutes prohibition because client was a participant in the conversation).

recordings “shall not apply to subscribers or members of their family who perform the acts prohibited in subsection (1) in their own homes.” (Emphasis added). The Oregon statute specifically contains a “marital home” exception which would cover many of the types of recordings at issue in the family law context.

In *State v. Bichsel*<sup>40</sup>, a defendant was charged for violating the statute where she audio recorded a police officer with a recording device which was in plain sight. The police officer stopped the defendant for questioning. The defendant was tape recording police radio communications from a police scanner. The tape recorder was in plain view and remained turned on as the police officer stopped the defendant and questioned her. The defendant argued that the recording was legal because the officer could see the recorder at all times and that a third party had warned him that the defendant had a recorder with her.

The Oregon appellate court rejected these arguments stating “[t]he legislature clearly intended to require persons recording the conversations of others to give an unequivocal warning to that effect.” The court clarified this position holding that the statute requires individuals to be “specifically informed” of the recording. The court concluded that the warnings of uninvolved third parties do not give an unequivocal warning.

A second Oregon case is found in *State v. Capel*<sup>41</sup>, where the defendant objected to the use of an audio recording made by a private citizen and parent. A parent recorded a telephone conversation between her 19 year old son and the defendant. The recording was made in the parent’s home on a device attached to her own home telephone. The Oregon court did not address the Oregon statute prohibiting recording most likely because the recording was made in

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<sup>40</sup>790 P2d 1142 (Or. Ct. App.1990)

<sup>41</sup>966 P2 232 (Or. Ct. App.1998)

her home. Instead the Oregon court analyzed the federal wiretapping statute. This case provides some guidance to practitioners regarding the Oregon Appellate Court's view on these wiretapping issues.

In reviewing the federal statute, the Oregon Court in *Capell* noted that “[m]ost of the federal courts that have considered the reach of the act in the context of a parent-child relationship have held that the exception applies to the recording of conversations that are pertinent to a child's well-being.” The Oregon court made this statement despite the reality that the majority of federal circuits do not follow that position as stated. The Court in *Capell* went further to cite cases from the second, seventh and tenth federal circuits to uphold the exception from federal penalties when parents record their children's conversations out of concern for their well-being. The court did, however, make a specific notation in discussing the legislative history of the federal statute stating that Congress' concern “was with wiretapping for purposes of commercial espionage and marital litigation”. (Emphasis added).

The *Capell* decision, although a criminal case, does suggest that the Oregon appellate court is sympathetic to the situation where a parent tape records a conversation between his or her child and another individual without notice or consent.

Some states such as Florida have stricter rules for wiretapping and eavesdropping when compared to 18 U.S.C. 2511 (2)(d), which permits taping with the consent of only one party. The Florida Statute requires the consent of all of the parties to the conversation to be obtained, not just one person. The Florida Court has found that federal law does not preempt state law, which is offering a greater privacy protection but that the defendants in the case were still required to prove the elements of the defense before it could be applied to their case.<sup>42</sup>

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<sup>42</sup>Woods vs. State of Florida, 654 So. 2d. 218,220 (Fla. Dist. Ct. App. Div. \_\_\_\_\_).

The review of state caselaw clearly establishes that the majority of state courts have held that State Wire Tape Statutes, which have been modeled on the federal act, have no exception for domestic or interspousal surveillance. The minority of states which allow this type of recording do so based almost solely upon the reasoning of the 5<sup>th</sup> circuit in *Simpson and Simpson*, 490 F2d 803 (1977).

### **CIVIL PENALTIES**

Typically both civil and criminal penalties are imposed on an individual violating state statutes. A typical state civil penalty statute is found in New Jersey, N.J.S.A. 2A: 156A-24. This statute provides:

“Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this act shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

- a. Actual damages, but not less than liquidated damages computed at the rate of \$100.00 a day for each day of violation or \$1,000.00, whichever is higher.
- b. Punitive damages; and
- c. A reasonable attorney’s fee and other litigation costs reasonably incurred.”

The initial case in New Jersey in regard to interspousal wiretapping was decided August of 1991 in *M.G. Plaintiff v. J.C., Defendant*<sup>43</sup>. The husband in that case surreptitiously recorded his wife’s telephone conversations in the marital home. The conversations disclosed that the wife was having a non-heterosexual affair. The husband confronted the wife and threatened to use the tapes in a custody battle, as well as disclosing the tapes to friends and family. As a direct result, the wife suffered extreme emotional distress and required extensive psychological care. The

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<sup>43</sup>254 N.J. Super 470 (Ch. Div. 1991).

husband went one step further and played the tapes for the wife's sister and offered to play them for other family members and friends. The wife's attorney made a claim for civil damages under the wiretapping statute. The New Jersey Judge commented on the manner in which the disclosure was made and that it had completely shattered the wife, who was experiencing nightmares and was severely depressed. The court stated that she manifested symptoms of guilt identical to those experienced by many rape victims. The court awarded \$10,000 in compensatory damages and in consideration of the husband's willful and wanton disregard of the wife's right to privacy, he was assessed \$50,000 in punitive damages.

The court in *M.G. Plaintiff v. J.C., Defendant* noted that although there were no reported New Jersey cases regarding interspousal wiretapping, he could utilize the significant amount of federal case law on the subject, since the New Jersey Statute is virtually identical to the Federal Statute controlling the use of electronic surveillance.

Some parties attempt to get around civil liability under state statutes by arguing that the state spousal tort immunity provides protection. In *Burgess v. Burgess*<sup>44</sup>, after the parties' separation and while their divorce was pending the husband gained access to the marital residence. He climbed into the attic and spliced into the phone line attaching a recording device. He made numerous recordings which he later played for neighbors and used in the marital dissolution case to gain an advantage. Husband argued to the Florida Supreme Court that although he was subject to criminal liability, he was immune from civil liability for his actions because of the doctrine of inter-spousal tort immunity. The Florida Supreme Court rejected this

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<sup>44</sup>447 So. 2d 220 (Fla. 1984).

argument finding that the state statute prohibiting this type of activity was an exception to the doctrine of interspousal immunity. In reaching its conclusion the Florida Court noted:

“Eavesdropping, by nature, undermines the faith and trust upon which the institution of marriage is founded. A rule of law which leaves such repugnant behavior unsanctioned can hardly be said to preserve the marital unit. Moreover, the doctrine of inter-spousal tort immunity, if applied in the instant case, would result in an inequitable operation of this statute.”<sup>45</sup>

Most state statutes, like the federal statute provide for civil liability for violations of the statute. The liability in some cases involves the opportunity for punitive damages on the theory that a violation of the statute is a violation of constitutional privacy rights. In some cases, individuals have attempted to hold third persons civilly liable for using or disseminating recordings in a dissolution proceeding. In *Kearney v. Kearney*<sup>46</sup> the Washington Appellate Court addressed whether third persons could be civilly liable for disclosing and disseminating secretly recorded conversations. In *Kearney*, the wife secretly recorded conversations between the husband and their son suspecting that husband was emotionally abusing the children. The wife then provided the recordings to the Guardian Ad Litem (GAL) appointed by the court to protect the children’s interests. The GAL then provided the recordings to the psychological evaluator who used the recordings as a basis for her decision that husband’s time with the children be supervised. The report and transcripts of the tapes were filed with the court. Husband filed suit against the GAL and the psychological evaluator alleging civil liability for violation of his privacy and for disseminating the recordings. The Florida court concluded that liability under the state statute was imposed upon the person recording and not individuals divulging the material. The result

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<sup>45</sup>447 So. 2d 220 (Fla. 1984).

<sup>46</sup>974 P2d 872 (Wash. App. Div. 1999).

may be different in states where the statutes extend liability to dissemination of illegally obtained information.<sup>47</sup>

### CELLULAR AND CORDLESS PHONE INTERCEPTION

Is it a violation of the wiretapping statute to intercept a cellar phone call or a cordless phone? Interception devices are easy to purchase and easy to use. There is very little case law which deals with the issue as it relates to cybersex and divorce. The Supreme Court of Louisiana in the case entitled *State v. Neisler*<sup>48</sup> sheds light on the issue.

The question was whether a cellar or cordless phone transmission was protected under the wiretap statute. The Louisiana Supreme Court held that the Louisiana or Federal Wiretap Statutes do not protect cordless telephone transmissions. The Court reasoned that the definitions of "wire" and "electronic" communications under both the state and federal statutes expressly exclude "the radio portion of a cordless telephone handset communication that is transmitted between the cordless telephone and the base unit." In that sense a cordless transmission is an "oral communication" and would not be protected if there were not an expectation of privacy. In a footnote to that decision the Court drew the distinction between cordless telephone transmissions and cellular transmissions:

- A. FN11. A note about the difference between a radio transmission over a cellular phone, which is a protected communication under the act, and a radio transmission between a cordless telephone and its base unit, which is not, might be helpful at this point. *United States v. Carr*, 805 F. Supp. 1266, 1269-709 (E.D.N.C. 1992) (citations omitted), provides the following excellent explanation of the differences between cellular and cordless telephones:

Cellular telephones, such as those more and more frequently seen in private automobiles or in briefcases, transmit messages by microwaves utilizing a series of overlapping "Cells" which comprise a single cellular system. "When a caller dials a number on a cellular telephone, a transceiver sends signals over the air on a radio frequency to a cell site. From there the signal travels over phone lines or a microwave to a

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<sup>47</sup>See as an example the following states which prohibit divulging or disseminating secretly recording information without consent of the sender or the receiver: Delaware Statute section 1335; Georgia Code 16-11-62; Hawaii Code Sec. 711-1111.

<sup>48</sup> *State v. Neisler* 655 So. 2<sup>nd</sup> 252 (1995)

computerized mobile telephone switching office (“MTSO”) or station. This technology makes many channels available and reuses frequencies in non-adjacent cells to provide mobile communications for thousands of users simultaneously.” The mobile transmitters, low power signals, and the constant switching of frequencies as users move from cell to cell render eavesdropping on a cellular phone conversation relatively difficult. However, the radio frequencies utilized readily [sic] are received by commercially available, relatively inexpensive scanners, and also may be picked up by ham radio equipment as well as ordinary television sets and VCR’s.

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A Cordless telephone of the type used by Defendants ... is a two-way radio transmitter/receiver [It] “consists of a handset and a base unit wired to a landline and a household/business electrical current. A communication is transmitted from the handset to the base unit by AM or FM radio signals. From the base unit the communication is transmitted over wire, the same as regular telephone calls. The radio portions of these telephone calls can be intercepted with relative ease using standard AM radios.”

Thus, the differences between the broadcast portion of these two devices are ones of degree, not of kind; both involve radio broadcasts along pre-selected portions of the electromagnetic spectrum which may be easily intercepted with a minimal level of technical expertise. In the context of the wiretap act(s), the only thing that distinguishes them is congressional intent.

FN12. “Oral communication” is defined by the Act to mean “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication [as defined by the act]”.

The Court also analyzed the 1991 amendments to the Federal Wiretap Act. Those amendments specifically exclude a protection for cordless telephone transmission because Congress did not wish to criminalize the interception of radio transmissions which are easily picked-up by AM scanners, other cordless handsets, or any number of ubiquitous and mundane radio receivers commonly found in the ordinary American household which are capable of intercepting such transmissions.

In State v. Tango<sup>49</sup> the New Jersey Appellate Division held that cellular telephone calls that used landlines, at least in part, were covered by the 1968 Federal Wiretap Act and were not affected by passage

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<sup>49</sup> State v. Tango 287 N.J. Super 416 (App. Div. 1996)

of the Electronic Communications Privacy Act (ECPA) in 1986, which brought all cellular communications within the ambit of the wire tap act. Thus, it would appear that statute and case law protect cellular phone transmissions from interception in New Jersey.

Some states like New Jersey have adopted a more restrictive wiretap statute than the Federal Act. For example, New Jersey's Wiretap Statute<sup>50</sup> defines a "wire communication to include "any electronic storage of such communication, and the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit". This is the opposite of the Federal Statute, which exempts cordless phones. The addition of electronic storage broadens the New Jersey Act tremendously.

## CONCLUSION

With the extensive use of the telephone in furtherance of extra-marital relationships and the resulting divorce litigation, we must be aware of wiretapping violations. A spouse who is attempting to prove their partner's infidelity by telephonic wiretapping could clearly be in violation of a state statute and/or federal statute, unless there was consent or authorization. The law is complex and we all must be aware of the pitfalls in order to protect our clients from damage awards and potential criminal exposure.

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<sup>50</sup> N.J.S.A. 2A:15.6A-2

## APPENDIX

The Federal statute contained at U.S.C.A. 2511 provides as follows:

- (4) Except as otherwise specifically provided in this chapter 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:
    - (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
    - (ii) such device transmits communications by radio, or interferes with the transmission of such communication; or
    - (iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or
    - (iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or
    - (v) Such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;
  - (f) 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 the interception of a wire, oral, or electronic communication in violation of this subsection;
  - (g) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
  - ...
  - (g) It shall not be unlawful under this chapter or chapter 1212 of this title for any person:

- (i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;
- (ii) to intercept any radio communication which is transmitted:
  - (I) by any station for the use of the general public, or that relates to ships, aircraft, vehicle, or persons in distress;
  - (II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communication system, including police and fire, readily accessible to the general public;
  - (III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or
  - (IV) by any marine or aeronautical communications system;
- (v) to engage in any conduct which:
  - (I) is prohibited by section 633 of the Communications Act of 1934; or
  - (II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;
  - (III) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or
  - (IV) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision of the use of such system, if such communication is not scrambled or encrypted.

(4) (a) Except as provided in paragraph (b) of this subsection or in the subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then:

- (i) If the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication

that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

#### Section 2701. Unlawful access to stored communications

(a) Offense. - Except as provided in subsection (c) of this section whoever -

- (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
- (2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents 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.

(b) Punishment. - The punishment for an offense under subsection (a) of this section is -

- (1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain -

(A) a fine under this title or imprisonment for not more than one year, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than two years, or both, for any subsequent offense under this subparagraph; and

- (2) a fine under this title or imprisonment for not more than six months, or both, in any other case.

(c) Exceptions. - Subsection (a) of this section does not apply with respect to conduct authorized -

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

- (10) in section 2703, 2704 or 2518 of this title.