

Domestic Eavesdropping and Wiretapping: Admissibility of Intercepted Communications

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The technology of surveillance has become an issue for attorneys representing litigants in dissolution proceedings. Body bugs, miniature tape recording devices and wiretap transmitters are readily available to those who feel compelled to provide their attorneys and the court secret recordings of their spouses and children. As one commentator points out,^(fn1) the motivation for spousal wiretapping is this all-too-frequent lament made to the attorney: "He/she comes off amiable and virtuous in court. How is the judge going to know what he/she is really like?" By virtue of this perception, the litigant (and perhaps his or her uninformed attorney) is tempted to render additional, but in many instances unlawful, assistance to the trier of fact.

This article is intended to familiarize the family law practitioner with the perils of eavesdropping and wiretapping when such activities are confined to a domestic setting. According to one commentator, a lack of familiarity with such issues resulting in the

ill-advised use and dissemination of illegally obtained evidence could subject the client, the lawyer, the private investigator, the secretary who transcribes secret tapes and anyone who used or discussed the tapes to various liabilities under federal law.^(fn2)

Federal Law

Liabilities

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Act") governs the interception of communications.^(fn3) This federal law *inter alia* imposes criminal felony liability not only for the act of wiretapping but also for the disclosure or use of the contents of any communication that was known to be wiretapped.^(fn4) Further, criminal liability under the Act can be imposed not only on the wiretapper but on any person who *procures another* to intercept or endeavor to intercept any wire, oral or electronic communication.^(fn5) [*Emphasis added.*]

It should be noted that under the Act, it is not unlawful for a person to intercept a wire or oral communication in instances where the person is a party to the communication or where one party previously has given consent, unless the communication is intercepted for the purpose of committing a criminal or tortious act.^(fn6)

In addition to the foregoing criminal liability, a civil damage action may be brought against the offender for actual damages or profits realized, or for a statutory fine of \$100

per day for each day of violation or \$10,000, whichever is greater.(fn7) Reasonable attorney fees and costs as well as punitive damages also may be awarded.

Wiretapping of Children

Until August 23, 1991, no federal or state court had determined whether a custodial parent's interception, within the family home, of telephone conversations between a minor child and a third party (without the child's knowledge or consent) constituted a violation of the child's rights of privacy under Title III of the Act. The Tenth Circuit rendered an opinion on this issue in the case of *Newcomb v. Ingle*.(fn8)

In *Newcomb*, a mother who was the custodial parent wiretapped, inside her home, telephone conversations between her son and her former spouse. One of these recordings revealed that the child's father had been instructing the child and his brother, over the telephone, as they set fire to the mother's home. This tape recorded conversation later was used to obtain a criminal conviction against the father and juvenile findings as to the children. When one of the children reached the age of majority, he sued his mother and others for money damages for both the wiretapping and the use of the tape recordings under the civil damage recovery provisions of the Act.

The *Newcomb* court held that Title III did not apply to the interception. Therefore, the custodial parent's interception (by wiretap) of the minor's telephone conversations in her home, without the child's knowledge or consent, was not protected by Title III. The court gave five reasons for its holding. First, 18 U.S.C. § 2510 (5)(a)(i) exempts from the wiretapping act communications intercepted by a business phone customer in the ordinary course of its business through the use of a business extension phone.(fn9) Second, "[n]o persuasive reason exists why Congress would exempt a business extension and not one in the home."(fn10) Third, the court found the difference between listening in on an extension and tapping the line within the home in the context of this case to be immaterial.(fn11)

Fourth, the court expressly found that Congress intended an exemption to the Act to apply to interceptions of communications via business phone extensions and home extensions. Then, citing the case of *Simpson v. Simpson*, the court went on to reason that

Congress must have intended to abjure from deciding a very intimate question of familial relations---that of the extent of privacy *family members* may expect *within the home* vis-
\$aG-vis each other.(fn12) [*Emphasis added.*]

The *Simpson* court was the first federal circuit to hold that the wiretap provisions of Title III lacked sufficient definiteness to evidence a congressional intent to create a criminal federal cause of action prohibiting interspousal wiretapping.

Fifth, the court stated that the circuits were split on the permissibility of inter-spousal wiretapping under Title III and that interspousal wiretapping still was "qualitatively different" from a custodial parent tapping a minor child's conversations within the family

home. Nevertheless, the court strongly suggested that interspousal wiretapping was permissible.(fn13)

From the viewpoint of the family law practitioner, *Newcomb* leaves open four important questions. The first is whether a parent who is not the legal custodian permissibly can wiretap, under Title III, a minor child who is visiting in his or her home. The second is whether the exspouse in *Newcomb* successfully could have maintained (on the theory of an interspousal wiretap) an action against his former spouse for money damages under 18 U.S.C. § 2520, even if his son could not.

The third unanswered question is whether the Tenth Circuit in *Newcomb* was lining up with those circuit courts that had found interspousal wiretapping to be outside the protections afforded by Title III. The final question is whether a Colorado court, when interpreting state law, is obligated to accept *Newcomb* as binding precedent.

Wiretapping of Spouses

One month after rendering its opinion in *Newcomb*, the Tenth Circuit decided *Heggy v. Heggy*.(fn14) The *Heggy* court, sitting with a different panel of judges from those who had decided *Newcomb*, held that Title III applies to prohibit wiretapping within the marital home.

"The import of *Newcomb* and *Heggy* for the family law practitioner is that this is an area fraught with danger."

In *Heggy*, the husband, a law enforcement officer, had installed, without his wife's knowledge or consent, a wiretap on an extension phone in a barn adjacent to the marital home to record his wife's conversations. At the time the wiretap was installed, the husband and wife were living together in the marital home. The wiretap lasted three months. Following a dissolution proceeding, the ex-wife sued her former husband in federal court for civil damages under Title III of the Act. The jury returned a verdict in her favor for \$75,000 in compensatory damages and \$140,000 in punitive damages.(fn15)

The Tenth Circuit's four-part rationale in *Heggy* appears to differ significantly from the rationale it followed in *Newcomb*. First, disregarding the *Newcomb* court's interpretation of the statute, the *Heggy* court found the statute to be clear and unambiguous on its face and was unwilling to find an implied exemption for interspousal wiretaps. Second, the *Heggy* court, in reaching its decision, gave little weight to its own *dicta* in *Newcomb* regarding (1) application of the business phone exemption to a family phone and (2) the immateriality of the difference between listening on an extension and tapping the line.(fn16)

Third, as mentioned previously, the *Newcomb* court had relied on *Simpson*(fn17) for its conclusion, while the *Heggy* court rejected *Simpson* and found that the "language of the statute was sufficiently clear and unambiguous" to prohibit interspousal wiretapping.(fn18) Fourth, there appear to be philosophical differences between the

Newcomb and *Heggy* decisions. However, the *Heggy* court chose not to repudiate its holding in *Newcomb*, even though the rationale it applied to hold interspousal wiretaps prohibited under the Act could have been equally applicable to the wiretapping of children.

The import of *Newcomb* and *Heggy* for the family law practitioner is that this is an area fraught with danger. The dangers that exist rest not only on the decisions themselves but also on the fact that the accuracy of advice given to a client based on precedent may be of short duration.

Colorado Law

Liabilities

Congress has chosen not to preempt the field when it comes to regulating the interception of wire, oral or electronic communication.^(fn19) As a result, Colorado (like many other states) has enacted legislation pertaining to wiretapping and eavesdropping with corresponding criminal and civil penalties.^(fn20) Lawyers who think that *Newcomb* provides a safe harbor in regard to the wiretapping of children should be aware that federal law only provides "the minimum" constitutional standards for protecting an individual's rights of privacy.^(fn21) Thus, stricter state standards may exist if a state determines that they are necessary to protect spouses and children and their constitutional rights of privacy from wiretapping or eavesdropping.^(fn22)

The issue for the Colorado family law practitioner is whether Colorado has adopted a standard that is stricter or higher than the federal government's. Because there are no reported civil decisions or precedent on which the practitioner can rely, reference must be made to criminal cases.

In the case of *People v. Oates* (which involved the issue of whether the insertion of an electronic tracking device in a sealed container of chemicals constituted an unlawful search), the Colorado Supreme Court held that Colorado Constitution Art. II, § 7 protects (at least from governmental intrusion) "a greater range of privacy interests than does its federal counterpart."^(fn23) As a result, the court disregarded federal precedent and determined that it would not be bound by decisions of the U.S. Supreme Court which interpret the scope of privacy interests protected by the Fourth Amendment in a more limited fashion.^(fn24) Consideration also should be given to the strong dissent in *Oates*, which stated:

While I believe that the Colorado Constitution must ultimately be interpreted by the Colorado Supreme Court, I do not believe that this Court should depart from the United States Supreme Court decisions interpreting identical language in the Federal Constitution without principled reasons for doing so.^(fn25)

One year after the *Oates* decision, the Colorado Supreme Court decided the case of *People v. Wahl*.^(fn26) In *Wahl*, the defendants argued that their rights of privacy under

the Colorado Constitution--- specifically Article II, § 7---were violated through the unauthorized use of a pen register on a telephone belonging to one of the defendants. The court chose to ignore its decision in *Oates* and held that the Colorado statute governing electronic surveillance is closely patterned after and designed to complement the policies of the federal Act. Federal authorities explaining the federal Act should thus be accorded *great weight* in interpreting the Colorado statute.(fn27) [*Emphasis added.*]

The foregoing decisions demonstrate how difficult it will be for a Colorado attorney reasonably to predict what a Colorado prosecutor or court will do with an interspousal/child wiretapping case. Compounding this, and in spite of the case law, it still could be argued that a plain reading of the Colorado statutory language evidences a legislative intent to provide Colorado residents with a higher standard of protection in regard to their rights of privacy than that afforded by federal law.

For example, under the Colorado statutory scheme, a person who is not visibly present can be convicted of a criminal offense of eavesdropping if he or she knowingly overhears a conversation without the consent of at least one of the principal parties.(fn28) In contrast, federal law imposes liability only if the overheard oral communication was accomplished through any electronic, mechanical or other device.

In addition, as previously noted, *Newcomb* held that under federal law an express exemption to statutory liability existed for the use by a business customer of a business extension phone to intercept a communication. The *Newcomb* court found an immaterial difference to exist between listening in on an extension and tapping the line, at least under the facts of that case. However, the Colorado statute does not find such a difference to be immaterial. Under Colorado law, eavesdropping or wiretapping devices may be installed (as a defense to liability) on a person's "premises" for security or business purposes only if "reasonable notice of the use of such devices is given to the public."(fn29)

Civil Remedies

Unlike its federal counterpart, Colorado's wiretapping and eavesdropping statutes provide only limited statutory authorization for the recovery of civil damages for a violation.(fn30) The only statutory violation which appears to be pertinent to interspousal/child wiretapping would be the

knowing *access*, use, manipulation or damage to a telecommunication device without the authority of the owner or person who has the lawful *possession* or use thereof.(fn31)

This violation could be applicable to spouses living separate and apart where one spouse accesses "a telecommunication

device" by placing a wiretap on the other spouse's telephone. However, it does not appear to be available when spouses reside in the same residence unless a court were to construe the terms "lawful possession or use thereof" in a very narrow fashion. Finally, while a tort action for invasion of privacy still is available, the Colorado statute does not authorize civil relief against a person who discloses or uses the contents of a communication which has been intercepted by eavesdropping or wiretapping.

Admissibility of Intercepted Communications

There exist under both federal and state law express statutory prohibitions pertaining to the admissibility or use as evidence of intercepted wire or oral communications.(fn32) The federal statute prohibits the admissibility into evidence of not only the contents of the intercepted communication but also "any evidence derived" or ultimately obtained from the intercepted wire or oral communication. Further, the federal statute prohibiting admissibility is not limited solely to federal proceedings but is applicable 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.(fn33)

To the extent that an intercepted communication---whether obtained by wiretapping or eavesdropping---falls outside the minimum constitutional protection of federal law, the Colorado statute still may preclude its admissibility. This especially is the case should a court determine that Colorado's eavesdropping and wiretapping statutes provide a higher standard of protection in regard to a spouse's or child's rights of privacy.

However, it should be noted that some uncertainty exists as to whether Colorado's statutory prohibition pertaining to the admissibility of wiretap evidence was intended legislatively to apply to civil proceedings in which the offending party is not a governmental entity but rather a spouse or parent. The basis for this uncertainty rests first on the fact that the statutory prohibition is located within Colorado's Code of Criminal Procedure, and second on the necessity of producing for the other party a court order as a condition precedent to admissibility.(fn34)

Conclusion

If a client with a tape likens it to Watergate,

If the lawyer is not leery of those secrets dark and dreary,

If he fails to be wary,

He may find a fate contrary, when the FBI comes knocking, knocking at his office door.(fn35)

NOTES

1. Greene, "Woods Have Eyes as Walls Have Ears: Intraspousal Wiretapping and Eavesdropping in Domestic Relations Cases," 56 *Fla. B.J.* 643 (1982).

2. Warner, "Spouses Who Listen to Each Other Illegally," 7 *ABA Fam. Advocate* 28 (1985).

3. 18 U.S.C. § 2510 *et seq.* The pertinent wiretap provisions of Title III of the Omnibus Crime Control and Safe Streets Act were amended by the Electronic Communications Privacy Act of 1986.

4. 18 U.S.C. § 2511.

5. 18 U.S.C. § 2511(a).

6. 18 U.S.C. § 2511(d).

7. 18 U.S.C. § 2520(b)(c).

8. 944 F.2d 1534 (10th Cir. 1991). In *Newcomb*, the court indicated that "[n]o cases address the situation we have here" (a child suing custodial parent under 18 U.S.C. § 2520 for wiretapping within the family home). However, a custodial parent's wiretap within the family home of a child's conversations with a non-custodial parent previously was considered in the case of *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977), which characterized the fact pattern as an interspousal wiretap case. *See also, Platt v. Platt*, No. 88--1983, slip op. at 2 (8th Cir. May 10, 1989) (custodial mother wiretapping child's conversation with father) cited and discussed in "Oliphant, Domestic Relations and the Eighth Circuit Court of Appeals," 16 *Wm. Mitchell L.Rev.* 668--69 (1990).

9. *Newcomb, supra*, note 8 at 1536.

10. *Id.*

11. *Id.*

12. *Id.*, citing *Simpson*, 490 F.2d 803, 809 (5th Cir. 1974).

13. *Newcomb, supra*, note 8 at 1536. Note: The Fourth, Sixth and Eighth Circuit Courts of Appeals have held that interspousal wiretapping is actionable under Title III. *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *U.S. v. Jones*, 542 F.2d 661 (6th Cir. 1976). The Second and Fifth Circuits have held that Title III does not apply to interspousal wiretaps. *See, Anonymous, supra*, note 8; *Simpson, supra*, note 12.

14. 944 F.2d 1537 (10th Cir. 1991).

15. In addition to these damages, the Tenth Circuit remanded for a determination of the wife's reasonable attorney fees and costs on appeal under 18 U.S.C. § 2520.

16. *Newcomb*, *supra*, note 8 at 1536.

17. *Simpson*, *supra*, note 12.

18. *Heggy*, *supra*, note 14.

19. *U.S. v. Curreri*, 388 F.Supp. 607 (D.Md. 1974).

20. Colorado statutes pertaining to wiretapping and eavesdropping are found in CRS §§ 16--15--101 to 104 and 18--9--301 to 312. Title 16 provisions pertaining to wiretapping and eavesdropping are located within the Colorado Code of Criminal Procedure and, for the most part, relate to procedures state officials need to follow in order to obtain a valid court order permitting wiretapping or eavesdropping. Title 18 provisions are located in the Colorado Criminal Code and relate to criminal offenses involving communications, including wiretapping and eavesdropping. Violation of Colorado's wiretapping or eavesdropping statute can result in felony penalties being imposed.

21. *U.S. v. McKinnon*, 721 F.2d 19, 21 (1st Cir. 1974).

22. *Curreri*, *supra*, note 19.

23. 698 P.2d 811, 815 (Colo. 1985).

24. *Id.* See also, *People v. Rister*, 803 P.2d 483, 489 (Colo. 1990), and dissent of Justice Quinn at 491.

25. *Oates*, *supra*, note 23 at 822. Dissent by Justice Erickson.

26. 716 P.2d 123 (Colo. 1986).

27. *Id.* at 128.

28. CRS § 18--9--304(1)(a).

29. CRS § 18--9--305(1).

30. CRS § 18--9--309.5.

31. CRS § 18--9--309.5(2)(a).

32. 18 U.S.C. § 2515; CRS § 16--15--102(9) (10).

33. 18 U.S.C. § 2515.

34. CRS § 16--15--102(9).

35. With this author's apologies to Edgar Allan *Poe*, *The Raven*.