Hidden Landmines for the Family Law Practitioner: Attorney Liability under State and Federal Wiretap Statutes

by
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I. Introduction

Family law practitioners commonly encounter cases that implicate the state and federal wiretap statutes. A client may give his attorney an audio or video recording of a spouse and seek to use the recording as evidence in a custody or divorce case. Clients often ask their attorneys for advice on how to gather evidence to support a claim, for example, that a spouse is hiding marital assets or to further a claim for sole custody or removal. Frequently these issues arise in the context of highly contentious custody cases or cases involving a cheating spouse. These highly emotional issues may lead clients to seek out evidence, including illegal wiretap evidence, at all costs. Attorneys can easily find themselves trapped between advocating on behalf of a client, who may be very insistent upon gathering and using such evidence, and potentially finding themselves liable under the state and federal wiretap statutes.

While some courts disagree,[1] the majority view is that the Wiretap Act applies in the family context.[2] There is no interspousal exception to liability in the text of the Act, and legislative history shows congressional knowledge and intent that the Act

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1 *See* Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977); Simpson v. Simpson, 490 F.2d 803, 805 (5th Cir. 1974), *overruled by* Glazner v. Glazner, 347 F.3d 1212 (11th Cir. 2003).

2 Glazner v. Glazner, 347 F.3d 1212, 1215-16 (11th Cir. 2003); Thompson v. Dulaney, 970 F.2d 744, 748 (10th Cir. 1992); Kempf v. Kempf, 868 F.2d 970, 973 (8th Cir. 1989); Pritchard v. Pritchard, 732 F.2d 372, 374 (4th Cir. 1984); United States v. Jones, 542 F.2d 661, 668 (6th Cir. 1976).

applies to family matters.[3] One study even found that 79 percent of reported wiretaps were executed in the family context.[4] Furthermore, as discussed in this article, the volume of cases dealing with liability for illegal wiretapping in family law cases show the prevalence of wiretaps in such cases.

Because new technology makes it easier to capture audio and video recordings on popular devices, including smartphones and tablets, family law practitioners are likely to be faced with an ever-increasing number of complicated legal issues in this realm. Unfortunately, the state and federal wiretap statutes present a minefield of liability, even for the most knowledgeable family law practitioner.

The wiretap statutes are very broad-sweeping. As a result, many everyday actions technically implicate criminal or civil liability for attorneys or their clients, including commonplace activities such as using a baby monitor or videotaping family events.[5] This issue was recently highlighted by the Illinois Supreme Court in its decisions declaring the Illinois eavesdropping statute unconstitutional.[6] This decision by the Illinois Supreme Court was based, in part, on the large number of everyday actions that may subject people to liability under the statute.[7] The Illinois eavesdropping statute has been revised and recently signed into law.[8]

Furthermore, federal and state wiretap statutes, including the new Illinois statute, may allow for civil and criminal liability

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3 *See Thompson*, 970 F.2d at 747-48.

4 Richard C. Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law Privacy Intrusion Tort*, 82 NEB. L. REV. 693, 695-96 (2004) (citing NAT'L COMM'N FOR THE REVIEW OF FED. & STATE LAWS RELATING TO WIRETAPPING & ELEC. SURVEILLANCE, ELEC. 160 (1976)).

5 *See* Elizabeth Pride, *Down the Rabbit's Hole: Baby Monitors, Family Movies and Wiretap Law*, 23 J. AM. ACAD. MATRIM. LAW. 131 (2010).

6 People v. Melongo, 6 N.E.3d 120, 127 (Ill. 2014); People v. Clark, 6 N.E.3d 154, 162 (Ill. 2014).

7 *See Clark*, 6 N.E.3d at 161-62.

8 *See* 2014 Ill. Legis. Serv. P.A. 98-1142 (S.B. 1342) (West) (revising the Illinois Eavesdropping Statute, in part, to add that the recorded conversation must be "private" and the recording done in a "surreptitious manner" for the actions to be unlawful); Monique Garcia, *Quinn Signs New Illinois Eavesdropping Rules into Law*, CHI. TRIB., Dec. 30, 2014, *available at* http://mychicagotribune.com/#section/-1/article/p2p-82425304/.

in connection with any number of factual scenarios, many of which remain untested. New issues continue to arise with ongoing technological advancements. Whether a person's actions violate the wiretap statutes is generally a highly fact-based inquiry, dealing with issues including intent, knowledge, motive, and privacy expectations. Consequently, the wiretap statutes are laced with the potential for attorney liability.

This article discusses attorney liability in connection with the wiretap statutes as an aid to the family law practitioner. Part II provides a brief overview of the state and federal wiretap statutes. Part III analyzes common issues implicating attorney liability and professional conduct violations in connection with the state and federal wiretap statutes. Part IV offers guidance to help family law practitioners navigate the wiretap statutes and avoid the hidden landmines.

II. Overview of the Wiretap Statutes

A basic understanding of the state and federal wiretap statutes will aid in understanding the liability traps for family law practitioners.[9] The federal wiretap statute ("Wiretap Act") was originally enacted as Title III of the Omnibus Crime Control and Safe Street Acts of 1968. The U.S. Supreme Court had just decided *Katz v. United States*,[10] in which the Court determined that the Fourth Amendment protected individuals' reasonable privacy expectations where new technology endangered that privacy interest.[11] The Wiretap Act strengthened the privacy protections of its preceding law, the Federal Communications Act from 1934 ("FCA"), given new technological advancements.[12] The Wiretap Act was amended again in 1986 to keep pace with new technology.[13] The current Wiretap Act is found in Title I of the Electronic Communications Privacy Act ("ECPA") of 1986.[14]

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9 For a more expansive review of the history of the Wiretap Act, see Turkington, *supra* note 4, at 700-05.

10 Katz v. United States, 389 U.S. 347 (1967).

11 *Id.* at 353.

12 *See* Gelbard v. United States, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III); Turkington, *supra* note 4, at 701-02.

13 *See* Turkington, *supra* note 4, at 703.

14 18 U.S.C. §§ 2510 - 2522 (2014).

In addition, all states, with the exception of Vermont, have wiretap statutes.[15] The state statutes are at least as restrictive as the federal Wiretap Act.[16] Some state statutes contain greater restrictions than the federal Wiretap Act, including twelve states that require two-party consent, meaning consent of all parties to the conversation, to avoid liability.[17] The federal statute and the remaining state statutes only require consent of one party to the conversation. This article focuses on the federal statute, but due to the restrictive nature of certain state statutes, additional liability may attach under these state statutes.

A. *Actions that Violate the Wiretap Act*

The Wiretap Act protects the privacy of wire and oral communications.[18] In pertinent part, it imposes civil and criminal penalties for anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."[19] "Oral communication" as used in the Wiretap Act "means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[20] The Wiretap Act

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15 *See* GINA STEVENS & CHARLES DOYLE, CONG. RESEARCH SERV., 98-326, PRIVACY: AN OVERVIEW OF FEDERAL STATUTES GOVERNING WIRETAPPING AND ELECTRONIC EAVESDROPPING 151 (2012).

16 *See* United States v. Mora, 821 F.2d 860, 863 n.3 (1st Cir. 1987) (noting that "[g]enerally speaking, insofar as wiretapping is concerned, states are free to superimpose more rigorous requirements upon those mandated by the Congress,but not to water down federally-devised safeguards.") (internal citations omitted).

17 California: CAL. PENAL CODE § 632 (2014); Connecticut: CONN. GEN. STAT. § 53a-189 (2015); Florida: FLA. STAT. ANN. § 934.03 (2015); Illinois: 720 ILL. COMP. STAT. § 5/14-2 (2014) (amended by 2014 Ill. Legis. Serv. P.A. 98-1142 (S.B. 1342) (West); Maryland: MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2015); Massachusetts: MASS. GEN. LAWS ch. 272, § 99(c)(1) (2015); Michigan: MICH. COMP. LAWS § 750.539c (2015); Montana: MONT. CODE ANN. § 45-8-213 (2015); New Hampshire: N.H. REV. STAT. ANN. § 570-A:2 (2015); Pennsylvania: 18 PA. CONS. STAT. ANN. § 5703 (2015); Washington: WASH. REV. CODE § 9.73.030 (2015); Lane v. Allstate Ins. Co., 969 P.2d 938, 940 (Nev. 1998) (holding that the Nevada statute requires two-party consent).

18 18 U.S.C. § 2510(1-2).

19 18 U.S.C. § 2511(1)(a).

20 18 U.S.C. § 2510(2).

defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[21]

Therefore, a person violates the Wiretap Act by obtaining an audio recording of another person, whether by use of a smartphone, recording device attached to a phone, video recording, or otherwise, where the recorded person expected that the communication would not be recorded. The Wiretap Act does not prohibit silent video recordings, without audio. While exceptions apply, as discussed below, this prohibition casts a wide net.[22]

The Wiretap Act's reach extends even further to impose liability for anyone who uses or discloses the communications described above, "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."[23] This "use and disclosure" liability presents added challenges for the family law practitioner, as in the case where a client presents his or her attorney with an audio recording. Attorneys need to know what actions they can take in representing their clients without subjecting themselves to liability under the wiretap statutes. This question involves many challenging and unclear issues which are analyzed in Parts III and IV below.

It is important to note that the Wiretap Act only governs interceptions of wire, oral, or electronic communications while in the process of being transmitted.[24] Once the transmission is complete, actions to obtain this information are instead regulated by the Stored Communications Act, which applies to electronic communications while in electronic storage.[25] For example, obtaining copies of someone's email, once received and stored, ab-

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21 18 U.S.C. § 2510(4).

22 *See, e.g.*, *Clark*, 6 N.E.3d at 161 (recognizing that the Illinois version of the Wiretap Act "criminalizes a whole range of conduct involving the audio recording of conversations that cannot be deemed in any way private," including recording "(1) a loud argument on the street; (2) a political debate in a park (3) the public interactions of police officers with citizens," to name a few); *see also* Pride, *supra* note 5, at 135.

23 18 U.S.C. § 2511(1)(c), (d).

24 18 U.S.C. § 2511(1)(a).

25 18 U.S.C. §§ 2701 – 2711 (2014).

sent authority may violate the Stored Communications Act but not the Wiretap Act.

B. *Relevant Exclusions and Exceptions from Liability*

The text of the Wiretap Act itself excludes certain conduct from liability. A person is not liable under the Wiretap Act if the interception of the communication is not done intentionally. The Wiretap Act imposes liability for "intentional" interceptions.[26] Therefore, if a person accidently records a conversation, for example by mistakenly pushing a button on a tape recorder or accidently touching record on a smartphone, this conduct does not violate the Wiretap Act.

The Wiretap Act also does not impose liability if a party to the communication consents to the recording.[27] The federal Wiretap Act, like the majority of state wiretap statutes, is a one-party consent statute. Under one-party consent statutes, only the consent of one party to the communication is required.[28] This requirement is satisfied by the consent of any party to the communication, including that of the person doing the recording. However, this consent is insufficient in the minority of states that require two-party consent, in which case consent of all parties to the communication is required.

Further, in the majority of jurisdictions, case law has expanded the definition of consent to include vicarious consent on behalf of a minor child in specific circumstances where it is necessary to protect the child. In this case, a guardian may record a

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26 18 U.S.C. § 2511(1)(a); *see Thompson*, 970 F.2d at 748 (explaining that liability is imposed under the Wiretap Act only for intentional, not inadvertent, interceptions).

27 18 U.S.C. § 2510(2) (defining "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation").

28 18 U.S.C. § 2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

conversation between a child and a third party, often the other parent, and avoid liability under the Wiretap Act. Even though the guardian is not a party to the conversation, the guardian's ability to vicariously consent on behalf of the child is sufficient to constitute consent under the Wiretap Act.[29]

However, practitioners should be mindful that courts have only applied the vicarious consent exception in the following limited context:

> [A]s long as the guardian has a *good faith basis* that it is *objectively reasonable* for believing that it is *necessary* to consent . . . to the taping of 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.[30]

In *Pollock v. Pollock*, the Court stressed that this vicarious consent exception only applied in certain situations, such as "verbal, emotional, or sexual abuse by the other parent."[31] The court directed that this exception "should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest.'"[32] Therefore, a determination of the consenting parent's motive and intent in intercepting the communication is necessary to determine whether the parent's actions violate the Wiretap Act.

Some jurisdictions also recognize what is referred to as the "extension phone exception" when intercepting equipment provided "by the phone company or connected to the phone line" is used in the "ordinary course of business."[33] For a communication to be "intercepted" as defined by the Wiretap Act, it must be captured by an "electronic, mechanical, or other device."[34]

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29 Vicarious consent on behalf of the child is sufficient to constitute consent under one-party consent statutes, including the federal Wiretap Act and the majority of state statutes. However, in two-party consent states, even vicarious consent on behalf of the child is insufficient to avoid liability where the other parties to the conversation have not consented.

30 Pollock v. Pollock, 154 F.3d 601, 608 (6th Cir. 1998) (citing Thompson v. Dulaney, 838 F. Supp. 1535, 1544 (D. Utah 1993)) (emphasis added).

31 *Pollock*, 154 F.3d at 610.

32 *Id.*

33 Babb v. Eagleton, 616 F. Supp. 2d 1195, 1203 (N.D. Okla. 2007); *see* Scheib v. Grant, 22 F.3d 149, 153-55 (7th Cir. 1994).

34 18 U.S.C. § 2510(4).

Since use of an extension phone does not capture communications by any of the means stated in the Wiretap Act, it arguably exempts such actions from liability under the Act.[35] This exception is inconsistently applied in family law cases and cannot be relied on to exempt clients or their attorneys from liability.[36]

Finally, as previously noted, the vast majority of jurisdictions do not recognize an interspousal exception to liability under the Wiretap Act.[37]

C. *Criminal and Civil Penalties for Violating the Wiretap Act*

A person who violates the Wiretap Act is subject to criminal and civil liability, regardless of whether the violation is based on an unlawful interception of communication or the later use or disclosure thereof. Additionally, the Wiretap Act's broad exclusionary rule will bar all recordings obtained in violation of the Wiretap Act from being admitted as evidence in any legal proceeding.[38]

Criminal liability may include a fine or imprisonment for up to five years or both.[39] Civil liability may include actual damages or statutory damages in the amount of $10,000 or $100 per day for each violation, whichever is greater.[40] An injured party may also seek punitive damages, profits made as a result of the violation, injunctive relief, and attorneys' fees.[41] However, the Wiretap Act limits the time for commencement of a civil action to no

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35 *See Babb*, 616 F. Supp. 2d at 1203.

36 *See* Turkington, *supra* note 4, at 707 (noting that "recognition of a marital conflict and parental extension phone exception for electronic surveillance under the Wiretap Act has been limited and subject to considerable critical commentary").

37 *See* cases cited *supra* notes 1-3.

38 18 U.S.C. § 2515 states as follows:

> 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.

39 18 U.S.C. § 2511(4)(a).

40 18 U.S.C. § 2520(c)(2).

41 18 U.S.C. §§ 2520(b), (c).

"later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation."[42]

Given the breadth of the Wiretap Act as discussed above, it is easy for practitioners to unintentionally violate the Act and subject themselves to liability.

III. Attorney Liability for Violations of State and Federal Wiretap Statutes

Many cases involving the wiretap statutes, both civil and criminal, deal with liability issues of family law practitioners. Often, aggrieved plaintiffs will include claims for tort liability in addition to claims for violations of the wiretap statutes. Attorneys should also be aware that their actions in dealing with the wiretap statutes may result in disciplinary action for violations of the Rules of Professional Conduct or incite a malpractice action.

The below analysis provides an overview of common issues and fact patterns implicating liability for family law practitioners under the wiretap statutes. There remain many unanswered questions about actions that run afoul of the wiretap statutes and Code of Professional Conduct due to the unending number of potential fact patterns yet to be examined and many conflicting applications of the statutes. Yet, these cases still aid in understanding how to avoid common traps leading to attorney liability at the hands of the wiretap statutes.

A. *Civil and Criminal Liability Under the Wiretap Statutes*

Civil suits against family law attorneys for violating the wiretap statues are more prevalent compared to criminal prosecutions, but cases where attorneys have been criminally prosecuted for violating the wiretap statutes are not unheard of. This discussion focuses on civil liability. However, the issues presented in civil and criminal cases are substantially similar, with the primary difference being that the burden of proof is much higher in a criminal prosecution for violation of the wiretap statutes compared to a civil suit.[43]

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42 18 U.S.C. § 2520(e).

43 *See* United States v. Wuliger, 981 F.2d 1497, 1509 (6th Cir. 1992) (stating in reference to section 2511(1)(d) of the Wiretap Act that "the government

In civil suits, the person who is the subject of an allegedly unlawful recording, commonly a party to a domestic relations case, will sue the person who obtained the recording, frequently the other party to the domestic relations case, and may also join the party's attorney in the suit. To prevail in a suit under the Wiretap Act, the civil claimant must prove that the defendant intentionally intercepted communication in violation of the Act or intentionally used or disclosed such unlawfully intercepted communication, knowing or having reason to know that the communication was unlawfully intercepted.[44] There is no attorney immunity under the Wiretap Act,[45] although some state courts have recognized attorney immunity for state law claims.[46] Wiretap Act claims proceed against attorneys "even when the attorney used the intercepted communication in the course of judicial proceedings."[47]

The most common fact scenario involving attorney defendants in family law cases is attorney liability based on the attorney's use or disclosure of a communication intercepted by the client, as opposed to attorneys actually intercepting communica-

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must prove beyond a reasonable doubt that the defendant knew or had reason to know that the recordings he used were obtained in violation of the Act").

44 18 U.S.C. §§ 2511(1)(a), (c), (d).

45 *See Wuliger*, 981 F.2d at 1507 (stating that "[n]othing in the [Ohio] Code [of Professional Responsibility] 'authorizes' the defendant to violate Title III in carrying out his professional duties"); Lewton v. Divingnzzo, 772 F. Supp. 2d 1046, 1057 (D. Neb. 2011) (stating that "the court was unable to find any binding authority holding that an attorney who uses a communication intercepted in violation of the federal Wiretap Act is entitled to blanket immunity from Title III liability."); Babb v. Eagleton, 616 F. Supp. 2d 1195, 1207 (N.D. Okla. 2007)(stating that "First, attorney did not cite, and the Court did not locate, any authority holding that an attorney who uses a communication intercepted in violation of Title III is entitled to some type of privilege or immunity from Title III liability").

46 In *Scheib v. Grant*, 22 F.3d 149, 156-57 (7th Cir. 1994), the court held that the defendants, an attorney and *guardian ad litem* involved in a removal case, had absolute immunity from liability under the Illinois Eavesdropping Statute where they used recorded conversations solely "in a manner intimately associated with the state court removal proceeding." The court reasoned that "the truth-seeking process of a judicial proceeding will be most securely advanced if attorneys do not fear civil or criminal liability as the consequence of misjudging the legality of disclosing particular information." *Id.* at 156.

47 *Babb*, 616 F. Supp. 2d at 1207 (citing *Wuliger*, 981 F.2d at 1507-08); *see also Thompson*, 838 F. Supp. at 1548.

tions themselves. To establish liability for use or disclosure of an intercepted communication, the plaintiff must prove that the initial interception violated the Wiretap Act and that the defendant used or disclosed the communication "knowing or having reason to know" that the communication was obtained in violation of the Act.[48] Thus, in addition to proving that the initial interception violated the Wiretap Act, the plaintiff must also prove that the defendant knew "sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III."[49]

A review of relevant case law shows that attorney liability for use or disclosure of a communication intercepted by a client generally turns on the following three issues: (1) whether the client's actions violated the Wiretap Act; (2) whether the attorney knew or had reason to know that the client unlawfully intercepted the communication; and (3) whether the attorney's actions constitute "use" or "disclosure" under the statute.

1. *The Client's Violation of the Wiretap Statutes*

The first issue in determining attorney liability for using or disclosing a communication intercepted by the client is whether the client in fact intercepted the communication in violation of the wiretap statutes.[50] The plaintiff must still prove that the original interception violated the statute. Otherwise, there is no liability for the later use or disclosure of that communication.[51] For this issue, attorneys are at the mercy of their client's actions and whether any exceptions apply to shield the client, and the attorney by extension, from liability. The attorney can raise as a defense to his or her liability the same exceptions to liability for the initial interception available to the client.[52]

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48 18 U.S.C. § 2511(1)(c), (d); *see also Thompson*, 970 F.2d at 749.

49 *Thompson*, 970 F.2d at 749; *see also Lewton*, 772 F. Supp. 2d at 1059.

50 *See Babb*, 616 F. Supp. 2d at 1206 (recognizing that "if no unlawful interception initially occurred, there can be no liability for subsequent use or disclosure of the interceptions by Attorney and Law Firm") (internal citations omitted).

51 *See Thompson*, 970 F.2d at 749.

52 *See Babb*, 616 F. Supp. 2d at 1207.

For example, in *Pollock v. Pollock*, in the midst of a prolonged custody case, the mother taped telephone conversations between her daughter and third parties, including her ex-husband, the daughter's father.[53] The father sued the mother and her attorneys for violating the Wiretap Act.[54] The mother reported at least one recorded conversation to her attorneys in the custody case, and the attorneys in turn reported the conversation to the Crimes Against Children Unit.[55]

At issue in the case was whether the vicarious consent doctrine exempted the mother's actions from liability under the Wiretap Act.[56] The court reasoned that for the vicarious consent doctrine to apply, the mother's actions in recording her daughter's conversations must have been motivated by a genuine concern for her daughter's best interests.[57] Since there were conflicting facts regarding the mother's true motivations, the court remanded the case to the trial court to resolve this issue.[58]

The court further reasoned that the liability of the mother's attorneys would be determined, in part, by the issue of fact regarding the mother's liability, namely her motivations in recording her daughter's conversations.[59] If the vicarious consent exception applied, the mother and her attorneys would be exempted from liability under the Wiretap Act.[60] However, if the mother's motivations were such that the vicarious consent exception did not apply, the liability of the attorneys would then be determined based on whether they knew or had reason to know the mother's interceptions violated the Wiretap Act.[61]

Similarly, in *Babb v. Eagleton*, the attorney defendant was sued by his client's ex-husband for violations of the Wiretap Act.[62] The client used a telephone recording device to record conversations between her children and their father, the client's

53 *Pollock*, 154 F.3d at 603.
54 *Id.* at 602.
55 *Id.* at 604.
56 *Id.* at 602-03.
57 *Id.* at 611.
58 *Id.* at 611, 613.
59 *Id.* at 612-13.
60 *Id.* at 612.
61 *Id.* at 613.
62 *Babb*, 616 F. Supp. 2d at 1198.

ex-husband, on at least sixteen occasions.[63] The client recorded the conversations after filing a motion to modify custody.[64] The client then disclosed the intercepted communications to her attorney and the parenting coordinator involved in her pending custody case.[65]

The ex-husband sued the client, her stepfather, her attorney, the attorney's law firm, and the parenting coordinator.[66] The ex-husband alleged that the attorney and parenting coordinator violated the Wiretap Act for using and disclosing the intercepted communications in the custody case.[67] All defendants filed motions to dismiss.[68] The attorney raised as arguments for dismissing the case the same arguments the client made regarding applicable exceptions to liability for the initial interceptions.[69] Since the court determined that these arguments failed to substantiate the client's motion to dismiss, they likewise failed to substantiate the attorney's motion to dismiss.[70] The court determined, in part, that the ex-husband stated a claim against the attorney and denied the motion to dismiss.[71]

As these cases demonstrate, the attorney's liability for using or disclosing communications intercepted by a client is tied, in part, to whether the client's actions violate the Wiretap Act. Therefore, before using or disclosing such information, it is advisable for attorneys to use due diligence to determine how the information was obtained, as further discussed in Part IV below.

2. *The Attorney's Knowledge of the Client's Actions in Violation of the Wiretap Act*

The second issue that commonly arises in connection with attorney use and disclosure liability is whether the attorney knew or had reason to know that the client unlawfully intercepted the communication. Ignorance of the law does not provide a shelter

63 *Id.* at 1197-98.
64 *Id.* at 1197.
65 *Id.* at 1198.
66 *Id.*
67 *Id.* at 1198.
68 *Id.*
69 *Id.* at 1207.
70 *Id.*
71 *Id.* at 1210.

from liability.[72] However, if the attorney did not know or have reason to know the facts that would show the client's interception was unlawful, the attorney will not be liable under the Wiretap Act for using or disclosing the intercepted communication. This issue presents a question of fact for a jury to decide.[73]

Case law provides little guidance regarding how much investigation the attorney is required to conduct to avoid liability. Because the attorney having "reason to know" the relevant facts may subject the attorney to liability, regardless of actual knowledge,[74] it is advisable for attorneys to do their due diligence to determine how the client obtained the recording rather than choose to remain ignorant of these facts.

By way of example, in the criminal case of *United States v. Wuliger*, the attorney's conviction for using and disclosing recordings made by his client was reversed on appeal and remanded for a new trial due to the failure of the jury instructions to properly state the knowledge the attorney was required to have for a conviction.[75] The defendant, attorney William Wuliger, was initially convicted under the Wiretap Act for "intentionally using the contents of telephone conversations recorded in violation of section 2511(1)(a) on three separate occasions."[76] Mr. Wuliger was the divorce attorney for Mr. Ricupero.[77] Mr. Ricupero used a wiretap device to record his wife's telephone calls over a one week period.[78] Mr. Ricupero then gave the tapes to Mr. Wuliger to use in his divorce case and represented to Mr. Wuliger that Mrs. Ricupero knew her telephone calls were being recorded.[79] Mr. Wuliger used the tapes

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72 *See Thompson*, 970 F.2d at 749 (stating that defendants are "presumed to know the law") (internal citations omitted); Lewton v. Divingnzzo, 772 F. Supp. 2d 1046, 1059 (D. Neb. 2011).

73 *Pollock*, 154 F.3d at 613 (stating that whether the attorneys "knew, or should have known, that the material came from an unlawful wiretap, however, is a question of fact for the jury."); *Thompson*, 838 F. Supp. at 1548 ("Whether [the attorneys] knew the material came from an unlawful wiretap, . . . is a question of fact which this Court may not decide").

74 18 U.S.C. §§ 2511(1)(c), (d)(2014).

75 *Wuliger*, 981 F.2d at 1509.

76 *Id.* at 1499.

77 *Id*.

78 *Id*.

79 *Id.* at 1500.

during his cross-examination of Mrs. Ricupero at a court hearing, at her deposition, and at the deposition of a third party.[80]

Mr. Wuliger was convicted of violating the Wiretap Act, fined $5,000, and placed on probation for two years, on the condition that he surrender his law license and serve thirty days of home detention.[81] However, the conviction was reversed on appeal because the instructions failed to require the government to prove that Mr. Wuliger "knew or had reason to know the recordings were nonconsensual."[82]

This case exemplifies why it is important for attorneys to ask questions of clients about how the client obtained the recording. If the attorney had reason to know that the client obtained the recording in violation of the Wiretap Act, even if the attorney had no actual knowledge of the facts leading to this conclusion, the attorney could be subject to criminal and civil liability under the Act.

3. *The Definition of Use and Disclosure Under the Wiretap Act*

The third issue frequently involved in attorney use and disclosure cases is whether the attorney's actions constitute "use" or "disclosure" in violation of the statute. The Wiretap Act does not define these terms, leaving the door open to varying interpretations by courts. Citing the Webster's Dictionary definition of "use" as "to put into action or service," courts have reasoned that "use" connotes an active action compared to the passive action of listening.[83] Generally, an attorney does not violate the Act by simply reviewing the information provided by a client.[84]

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80 *Id.*

81 *Id.* at 1499.

82 *Id.* at 1503.

83 Dorris v. Absher, 179 F.3d 420, 426 (6th Cir. 1999) (quoting WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 2523 (1986)); Fields v. Atchison, Topeka, & Santa Fe Ry. Co., 985 F. Supp. 1308, 1313–14 (D. Kan.1997), *opinion withdrawn in part on reconsideration by* Fields v. Atchison, Topeka & Santa Fe Ry., 5 F. Supp. 2d 1160 (D. Kan. 1998) (same).

84 *See Dorris*, 179 F.3d at 426 (holding that "listening alone is insufficient to impose liability for 'using' illegally intercepted communications"); *see also* Reynolds v. Spears, 93 F.3d 428, 432–33 (8th Cir. 1996) (same); *Fields*, 985 F. Supp. at 1313–14, *opinion withdrawn in part on reconsideration by* Fields, 5 F. Supp. 2d 1160 (same); *but see Thompson*, 838 F. Supp. at 1547 (holding that

Arguably, since it is the lawyer's duty in representing a client to advise clients whether their actions violate the law,[85] it may be necessary for the attorney to review a recording presented by a client in order to adequately advise the client. An attorney's actions also do not violate the statute when acting pursuant to the judge's direction or court order.[86]

By contrast, use and disclosure in violation of the Wiretap Act does include using the unlawful recordings or information gained therefrom in depositions or court proceedings.[87] While not uniformly applied by courts, unlawful interceptions are generally not permitted to be used for impeachment purposes in civil cases, although they may be used for impeachment purposes in criminal cases.[88] It also violates the Wiretap Act to provide copies of unlawfully obtained communications to third parties, including expert witnesses.[89] Even as in *Pollock* where the attorneys reported the conversations intercepted by their client to the Crimes Against Children Unit, allegedly with good intentions,[90] the court determined that it was undisputed that the at-

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listening to tapes and reading documents regarding an unlawful interception constitutes "use" of same in violation of the Wiretap Act).

85 MODEL RULE of PROF'L CONDUCT R. 1.2(d)(2014) states as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

86 18 U.S.C. § 2520(d)(1) (including a good faith reliance on a court order as a defense); *see* Storment v. Gossage, 791 F. Supp. 215, 221 (C.D. Ill. 1992) (holding that the attorney was not liable when the judge gave him permission to review the recordings and he reported their content back to the judge).

87 18 U.S.C. § 2515 (prohibiting the use of intercepted wire or oral communications in court proceedings); *see Wuliger*, 981 F.2d at 1500.

88 *See* Williams v. Poulos, 11 F.3d 271, 287-88 (1st Cir. 1993) (holding that an unlawful interception could not be used for impeachment purposes in a civil suit but could be used for this purpose in a criminal action); *Wuliger*, 981 F.2d at 1506 (declining to recognize an impeachment exception to the Wiretap Act in civil cases, but noting that such an exception may apply in criminal cases); Chen v. Stewart, 123 P.3d 416, 426 (Utah 2005) (stating that there is no impeachment exception in civil cases under the Utah and federal wiretap statutes); *but see* Culbertson v. Culbertson, 143 F.3d 825, 827 (4th Cir. 1998) (determining that it was not improper to use recordings for impeachment purposes).

89 *See Pollock*, 154 F.3d at 604; *Lewton*, 772 F. Supp. 2d at 1060.

90 *Pollock*, 154 F.3d at 604.

torneys used or disclosed the intercepted conversations in violation of the Wiretap Act.[91]

Further illustration of unlawful use or disclosure by attorneys is provided by the case of *Lewton v. Divingnzzo*. In *Lewton*, the court granted summary judgment in favor of the plaintiff, in part, on the issue of an attorney's liability for using and disclosing the plaintiff's intercepted communications because the attorney intentionally disclosed them to third parties.[92] In the midst of a custody case, the mother inserted a recording device into her child's teddy bear and recorded many communications of the father and others.[93] The mother gave the recordings to her attorney, William Bianco, who was representing her in the custody case.[94] Mr. Bianco told the father's attorney about the recordings and sent him a copy of the transcripts of the recordings.[95] After the father's attorney filed a motion in limine to exclude the recordings as illegally obtained and before the judge ruled on the issue, Mr. Bianco sent a copy of the recordings to the *guardian ad litem*, her attorney, two mental health professionals appointed by the court, and the judge.[96] After the judge ruled that the recordings were not admissible, Mr. Bianco attempted to retrieve the recordings he gave to third parties and advised them not to listen to the recordings.[97]

The father and additional plaintiffs sued the mother, her father, the mother's attorney, and the attorney's law partner and law firm for violating the Wiretap Act and brought additional state law claims, including a claim for invasion of privacy.[98] On the plaintiff's motion for summary judgment, the court determined that the attorney was liable under the Wiretap Act for disclosing the recordings to the third parties involved on the custody case.[99] The court reasoned that it was in keeping with the Wiretap Act for Mr. Bianco to notify the father's attorney of the existence of the recordings and to provide a copy of the recordings to

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91 *Id.* at 613.
92 *Lewton*, 772 F. Supp. 2d at 1060.
93 *Id.* at 1048.
94 *Id.* at 1050.
95 *Id.*
96 *Id.* at 1051.
97 *Id.* at 1052.
98 *Id.* at 1048.
99 *Id.* at 1060.

the judge to rule on their admissibility.[100] However, the court held that Mr. Bianco violated the Wiretap Act by distributing the recording to all other third parties, even with the purpose of furthering his client's positions in the pending custody case.[101] Nevertheless, because the third parties who received a copy of the recordings from Mr. Bianco returned them or kept them confidential and Mr. Bianco did not advise his client to make the recordings, the court did not order Mr. Bianco to pay damages to the plaintiffs.[102]

As shown by the above analysis, attorneys should first determine whether a recording obtained by a client constitutes a clear violation of the applicable wiretap statutes. This determination may include listening to the recording. If there is a clear violation, the attorney should advise the client of the violation and proceed no further. If after completing sufficient due diligence there appears to be no violation, before using or disclosing the recording in any manner, the attorney should advise the judge of the existence of the recording so as to permit the judge to rule on its legality or admissibility. In all cases, attorneys should proceed with caution and fully explain the risks to the client.

Given the lack of clarity provided by the wiretap statutes and relevant case law, attorneys may find themselves trapped between their duty to zealously represent their clients[103] and their fear of liability for using or disclosing wiretap evidence to advocate on behalf of their clients. The above analysis provides general direction to navigate this terrain. However, since the wiretap statutes and application of them vary significantly, attorneys should also familiarize themselves with nuances applicable in the jurisdictions where they practice.

B. *Tort Liability*

While trying to decipher what actions violate the state and federal wiretap statutes, it may be easy to forget about the privacy torts. Attorneys should be mindful of the privacy torts both with regard to their own actions and when advising clients in dealing with the wiretap statutes. The same actions that impli-

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100 *Id.* at 1058.

101 *Id.* at 1060.

102 *Id.*

103 *See* MODEL RULES OF PROF'L CONDUCT, Preamble, 9.

cate liability under the state and federal wiretap statutes may also render the defendant liable to the plaintiff based on tort invasion of privacy claims. When bringing suit pursuant to the state and federal wiretap statutes, plaintiffs regularly include additional claims for invasion of privacy.[104]

Even when a person's actions do not violate the Wiretap Act, due to an applicable exception to liability or otherwise, those same actions could still render a person liable in a tort invasion of privacy claim.[105] For example, a video taken without audio does not violate the Wiretap Act, but the video may still give rise to a claim for invasion of privacy.

Since the privacy torts are state common law actions, they vary from state to state. They generally include those torts articulated by William L. Prosser, namely: (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of the plaintiff's name or likeness.[106]

The tort of intrusion upon seclusion fits the fact patterns of many Wiretap Act claims. The elements of the claim vary between states but are generally similar to the definition in the *Restatement (Second) of Torts*: "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or 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."[107]

Therefore, as noted above, recording a video, without audio, of private matters may substantiate a claim for intrusion upon seclusion even if not actionable under the Wiretap Act. Attorneys should consider the privacy torts when advising clients whether a client's actions may subject the client to liability. At-

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104 *See Lewton*, 772 F. Supp. 2d at 1048 (plaintiff brought suit for violation of the state and federal wiretap statutes, invasion of privacy, and conspiracy to commit invasion of privacy); *see also Pollock*, 154 F.3d at 605 (including a claim for invasion of privacy under Kentucky common law).

105 *See* Bailey v. Bailey, No. 07-11672, 2008 WL 324156 (E.D. Mich. Feb. 6, 2008) (holding that use of keylogging software may still constitute a tort claim even though not actionable under the Wiretap Act); Schulman v. Group W Prod., Inc., 955 P.2d 469 (Cal. 1998) (holding that recordings that did not violate the California Wiretap Act still constituted a state law privacy intrusion claim).

106 William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

107 RESTATEMENT (SECOND) OF TORTS § 652B (1977).

torneys who misadvise clients could subject themselves to liability for invasion of privacy or conspiracy to commit an invasion of privacy.[108] Additionally, failure to advise a client of potential liability in tort may render attorneys subject to malpractice claims. Simply because a person's actions do not run afoul of the state and federal wiretap statutes does not shield that person or his or her attorney from tort liability for invasion of privacy.

C. *Professional Conduct Violations*

Even if an attorney's conduct does not render the attorney liable under state or federal wiretap statutes, the attorney's conduct may constitute an ethics violation. It is clear that actions that violate state and federal wiretap statutes also violate ethics rules.[109] However, it is less clear based on state ethics opinions whether actions that do not violate the law may still subject attorneys to disciplinary actions.

At issue in ethics opinions dealing with the wiretap statutes are Model Rules of Professional Conduct 8.4(c) and 4.4(a), as adopted by the states. Model Rule 8.4(c) states that "[i]t is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"[110] Model Rule 4.4(a) directs that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[111]

In 1974, the American Bar Association ("ABA") initially determined in a formal opinion that attorneys should not record

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108 *See Lewton*, 772 F. Supp. 2d at 1048 (plaintiff included a claim for conspiracy to commit invasion of privacy); *see also* Clayton v. Richards, 47 S.W.3d 149, 156 (Tex. App. 2001) (questions of fact precluded summary judgment in favor of defendant private investigator as to whether he knowingly aided wife in invading her husband's privacy).

109 *See* CHARLES DOYLE, CONG. RESEARCH SERV., R42650 WIRETAPPING, TAPE RECORDERS, AND LEGAL ETHICS: AN OVERVIEW OF QUESTIONS POSED BY ATTORNEY INVOLVEMENT IN SECRETLY RECORDING CONVERSATION-3 (2012) (stating that there is "no dispute that where it is illegal to record a conversation without the consent of all of the participants, it is unethical as well").

110 MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

111 MODEL RULES OF PROF'L CONDUCT R. 4.4(a).

any conversations without the consent of all parties involved.[112] In 2001, the ABA issued a new opinion that changed course from its prior broad-sweeping prohibition. In its 2001 opinion, the ABA concluded that it is not a per se violation of the Rules of Professional Conduct for attorneys to record conversations where such recordings are legal under applicable state and federal laws.[113] However, an attorney "may not represent that the conversation is not being recorded" if it is in fact being recorded.[114] The ABA also advised that a lawyer who records conversations in violation of the applicable state or federal laws may also violate Rules of Professional Conduct 8.4 and 4.4.[115]

State ethics opinions vary greatly, due in part to this change of course in the ABA's ethics opinions.[116] Many states either rejected the new ABA ethics opinion or have not withdrawn earlier opinions that aligned with the ABA's initial prohibition of all covert recordings by attorneys.[117] A substantially greater number of states' ethics opinions align with the ABA's 2001 opinion.[118] Also, many states have yet to provide direction on this issue.[119]

The general theme of recent state ethics opinions is to strongly encourage attorneys to avoid all covert recordings, even though, where legal, these recordings would not necessarily subject the attorney to disciplinary action.[120] Because attorneys

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112 ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 337 (1974).

113 ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 01-422 (2001).

114 *Id.*

115 *Id.*

116 *See* Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 ST. MARY'S L.J. 661, 664 (2008), for a more expansive discussion of ethics opinions dealing with the wiretap statutes.

117 *See* DOYLE, *supra* note 109, at 4 (citing state ethics opinions where Colorado and South Carolina rejected the ABA's 2001 opinion and Arizona, Idaho, Indiana, Iowa, Kansas, and Kentucky have not withdrawn opinions that pre-dated the ABA's 2001 opinion).

118 *Id.* (citing state ethics opinions for Alabama, Alaska, Hawaii, Maine, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, and Vermont).

119 *Id.* at 5.

120 *See, e.g.,* Nebraska Ethics Advisory Comm., Formal Op. 06-07 (2006) (advising that "while the better practice for attorneys is to disclose or obtain

have an ethical obligation to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation,"[121] covert recordings are likely to violate this obligation, or at least appear unethical.[122] Moreover, attorneys should not covertly record opposing attorneys in the course of litigation.[123] To avoid disciplinary actions, family law practitioners should proceed with extreme caution when recording a conversation without consent of all parties involved, or simply avoid this action altogether. When advising clients, attorneys should also err on the side of caution to avoid violations of Rules 8.4 and 4.4 in addition to criminal or civil liability.

IV. Navigating the Minefield

The state and federal wiretap statutes contain many unanswered questions and lack of uniformity in application, thus creating liability traps for attorneys. The above analysis provides direction for family law practitioners to help avoid liability. Primarily, attorneys should avoid covertly recording conversations themselves because this action too easily implicates professional ethics violations, in addition to potential liability under the wiretap statutes or otherwise. For the same reasons, attorneys should

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consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation"); New Mexico Ethics Advisory Comm., Formal Op. 2005-03 (2005) (advising, in part, that "[d]espite the withdrawal of ABA Formal Opinion 337, the Committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party's knowledge. . . In doing so, the Committee does not mean to opine that under no circumstances would the practice be permissible"); Association of the Bar of City of New York, Formal Op. 2003-02 (2004) (advising that lawyers may record conversations in specific circumstances but noting that "undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice").

121 MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

122 *See* Bast, *supra* note 116, at 676 (noting that attorneys have high ethical standards in part to "promote public confidence in attorneys and in the legal system").

123 *See* Nissan Motor Co., Ltd. v. Nissan Computer Corp., 180 F. Supp. 2d 1089, 1097 (C.D. Cal. 2002) (holding that it is unethical for an attorney to covertly record conversations with an opposing attorney because "deception, artifice, and trickery" are inherent in this action); *see also* People v. Selby, 606 P.2d 45, 47 (Colo. 1979).

proceed with extreme caution if advising a client to obtain covert recordings, whether directly or through a private investigator, or avoid so advising altogether.

If a client discloses that he or she has a recording that the client wants to use in a pending legal proceeding, the attorney should first do his or her due diligence to determine critical facts. Attorneys should determine whether a client has violated the federal or applicable state wiretap statute or may be otherwise liable, including potential liability for invasion of privacy. It is important to know whether the recording contains audio or only video, since only audio recordings violate the wiretap statutes. Also, since only intentional recordings are subject to liability under the wiretap statutes, it is important to ask whether the client intended to make the recording or whether it was done accidentally. If needed, attorneys may listen to the recording to understand its contents, although not all courts agree that this action is lawful under the wiretap statutes.[124]

Attorneys should ask their clients questions to determine whether the subjects of a recording consented to the recording. This may include a direct question whether the parties consented. However, additional facts are relevant to this inquiry, including, for example, where the device was located in comparison to the subjects of the recording when the recording was made and whether the subjects could see the device. If the subjects were able to see that they were being recorded, this may substantiate an argument for implied consent.[125] General facts about the circumstances surrounding the recording are also important because it is relevant to liability under the wiretap statutes and privacy torts whether the subject of the recording had a reasonable expectation that the intercepted communication would remain private and free from being recorded.

If this due diligence clearly shows that the client's actions violate the wiretap statutes or would render the client subject to liability in tort or otherwise, attorneys should advise their clients as such and take no further action in dealing with the unlawful

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124 *See supra* discussion in Part III(A)(3).

125 *See* United States v. Workman, 80 F.3d 688, 693 (2d Cir. 1996) (recognizing implied consent pursuant to the Wiretap Act); People v. Ceja, 789 N.E.2d 1228, 1240 (Ill. 2003) (stating that implied consent applies to the Illinois eavesdropping statute).

recordings. If the client insists upon using the recording in the pending litigation or forwarding it to third parties, the attorney should withdraw from the case. Likewise, if the client continues to act in violation of the wiretap statutes after being advised of the illegality of such actions, the attorney should withdraw from the case. Any further action may subject the attorney to liability for using or disclosing the recordings or conspiring to commit a wiretap statute violation or invasion of privacy.

Attorneys generally have no affirmative obligation, absent court order, to disclose a recording obtained by a client to an opposing party or counsel. Model Rule of Professional Conduct 1.6 permits disclosure in certain circumstances that may be implicated by wiretap act violations but does not mandate such disclosure.[126] Furthermore, the attorney-client privilege protects privileged communications, including discussions relevant to the wiretap acts. This privilege belongs to the client and may only be waived by the client.[127] However, attorneys may waive the privilege when defending against a criminal or civil suit, including a malpractice claim brought by their client.[128]

If there appears to be no violation after completing thorough due diligence and it furthers the client's interests to use the recording in a pending case or forward it to third parties, attorneys should first submit the issue of legality or admissibility to the court for adjudication. Attorneys should refrain from taking any action to forward the recordings to third parties or otherwise use or disclose information learned from the recordings, even if the sole purpose of such action is to advocate on behalf of the client. Any use or disclosure, whatever the purpose, may subject the attorney to liability. As such, attorneys should proceed with caution and notify their clients of all risks involved in using or disclosing the recordings or information obtained therefrom.

It is also important to keep in mind all potential causes of action against clients, including the privacy torts, if entering into a settlement agreement. If such agreement includes a liability waiver, it must be broad enough to include all potential claims,

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126 MODEL RULES OF PROF'L CONDUCT R. 1.6.

127 *See In re* Seagate Tech., LLC, 497 F.3d 1360, 1372 (Fed. Cir. 2007); Brigham & Women's Hosp. Inc. v. Teva Pharm. USA, Inc., 707 F. Supp. 2d 463, 469-70 (D. Del. 2010).

128 MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5).

not just those pursuant to the wiretap statutes. Be mindful that even if this liability waiver protects the client, the aggrieved party may still be able to pursue a claim against the client's attorney.

Ultimately, the key for family law practitioners to successfully navigate the wiretap statutes is to understand the statutes and their applications in the jurisdictions in which they practice, including the issues yet to be resolved. Poorly advising a client may subject the attorney to liability under the wiretap statutes and also to a malpractice suit by the client.

V. Conclusion

It is evident from a review of the wiretap statutes and their applications that they present a minefield of liability for the family law practitioner. The varying state and federal statutes, changing statutes, inconsistent application, and unclear guidance for attorneys are challenging to navigate. Outcomes of civil or criminal actions are unpredictable because the issues involve highly fact-based inquiries for a jury to decide. Furthermore, new issues will arise as technology continues to advance.

Attorneys must be armed with knowledge of the wiretap statutes applicable in the jurisdictions where they practice to navigate the statutes without injury. The best practice is to research the nuances in each jurisdiction, conduct thorough due diligence to determine if a client violated the statutes, and in all cases, proceed with caution.