

If Your Client Records, Do You Get to Press Play?

Wiretapping in Family Law

By John E. Barbush

Attorneys engaging in the practice of family law must familiarize themselves with the law concerning the recording, use and admissibility of phone conversations. Whether it is a client asking whether he or she should record a soon to be ex-spouse's phone calls, a client who brings you a tape recording of their ex-spouse admitting drug use, determining how to use a 911 phone call in a VPO hearing, advising a client that phone calls may be tape recorded and to act accordingly, or being confronted in discovery or a hearing with a tape recording of your client—the area of family law frequently involves wiretapping. Indeed, practitioners unfamiliar with some of the basics of wiretapping law not only do their clients a disservice, but also expose them to potential criminal and economic liability.

Every attorney should have at least a passing familiarity with the Oklahoma Security of Communications Act (OSCA). The OSCA makes it a felony for any person to willfully intercept or procure any other person to intercept any wire, oral or electronic communication unless specifically allowed under §176.3. Thus, the ability to properly advise a client on when it is appropriate to tape record telephone conversations is imperative. The OSCA also provides that no portion of an illegally intercepted communication shall be used as evidence in any trial, hearing or other proceeding before any court, grand jury, department, officer, agency or regulatory body.¹

The OSCA is Oklahoma's response to the Federal Wiretap Act² which sets forth the minimum

protections citizens of the United States must be afforded while allowing states the freedom to enact laws which are not inconsistent and provide even more protection for its citizens. The Federal Wiretap Act also specifically provides for a private cause of action.³

In Oklahoma, any party to a conversation can tape record it as long as it is not being done to commit a criminal act. No permission, disclosure or consent is necessary from the other party or parties to the conversation. "It is not unlawful pursuant to the Security of Communications Act for...a person not acting under color of law to intercept a wire, oral or electronic communication when such person is a party to the communication or when one of the parties to the communication has given prior

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consent to such interception unless the communication is intercepted for the purpose of committing any criminal act."⁴

However, recording telephone conversations to which one is not a party can have grave consequences. In *Heggy v. Heggy*,⁵ the 10th Circuit, in an appeal from the Western District of Oklahoma, held Title III applies to inter-spousal wiretapping within the marital home. In *Heggy*, the ex-spouse was awarded compensatory and punitive damages as well as attorney fees in a case against her ex-husband who had routinely tape recorded her telephone conversations for six months prior to their divorce without consent. The court specifically held that misunderstanding the law was no defense. As a result of *Heggy*, a family law practitioner must practice under the assumption that wiretapping laws apply to domestic relations cases in Oklahoma.

Most attorneys are familiar with the law on wiretapping when it comes to the recording of conversations to which one is a participant. The more troubling questions arise when a family lawyer is faced with a tape-recorded conversation involving a minor child recorded by a parent who was not a party to the conversation. Because there are no Oklahoma cases specifically addressing this scenario, there is little direct guidance on the legality or admissibility of the recording in such a situation.

EXTENSION TELEPHONE EXEMPTION

In *Newcomb v. Jogle*,⁶ the 10th Circuit, in an appeal from the Northern District of Oklahoma, held a parent's taping of telephone conversations of a minor child and ex-spouse was not a violation of Title III due to the "extension telephone exemption" contained in 18 U.S.C. §25103(a)(1). Although there are no Oklahoma decisions adopting the extension telephone exemption, Oklahoma's OSCA contains the exact same definition relied upon by *Newcomb*.⁷ Consequently, a very strong argument can be made that a parent is entitled to tape a minor child's telephone conversations without violating

either federal or state law based upon *Newcomb's* ruling on 18 U.S.C. §25103(a)(1) and the same definition found at 18 O.S. §176.2(B). Such was the holding in *Wright v. Stanley*⁸ when the Mississippi court compared the federal act to its own SCA.

With the exception of Michigan,⁹ every state that has addressed the issue of parental tape recording of minor children's telephone conversations has allowed the practice either under the finding of an "extension telephone exemption," the adoption of the theory of vicarious consent, or a combination of both. A lawyer must be familiar with the distinction between these justifications as the theory of vicarious consent imposes requirements which are not applicable when an "extension telephone exemption" is adopted.

THEORY OF VICARIOUS CONSENT

The theory of vicarious consent is essentially the recognition of the fact that a parent is legally obligated to protect a child from harm and to provide for their best interests. Further, since a minor can only contract or give consent through a parent, the same parent may consent on the minor's behalf — with or without their knowledge — to the taping of a phone conversation involving the minor.¹⁰ *Thompson v. Dalany*¹¹ adopted vicarious consent giving the parent the right to consent to tape recording of a minor's telephone conversations, even with the other parent, based upon *Newcomb* and Utah law. *Thompson* held that the vicarious consent doctrine is necessary for a parent to protect a child from abuse and harassment. However, *Thompson* also concluded that a parent could only intercept such communications when a good faith basis existed to justify invoking the consent. Thus, a parent who lives in a jurisdiction which has adopted the vicarious consent doctrine would have to be able to show a court a good faith basis that existed justifying the need to tape record the minor's telephone conversation. Without such a "good faith basis" the interception would be deemed a violation, subjecting the parent to potential

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1. 18 O.S. §176.3(a)(4).
 2. 18 O.S. §176.3.
 3. 18 U.S.C. §2511, Title 18 of the United States Code and Title 18 USC §2511.
 4. 18 U.S.C. §2511.
 5. 2009 WL 279470.
 6. 2009 WL 279470.
 7. 18 O.S. §176.2(B), 18 O.S. App. §176.2(B)(1).
 8. 2009 WL 279470.
 9. 480 Mich. 101, 737 N.W.2d 1210 (2007).
 10. 2009 WL 279470.
 11. 2009 WL 279470.
 12. 18 O.S. §176.3(a)(4).
 13. 2009 WL 279470.
 14. 2009 WL 279470.
 15. 18 O.S. §176.2(B), 18 O.S. App. §176.2(B)(1).
 16. 2009 WL 279470.
 17. 480 Mich. 101, 737 N.W.2d 1210 (2007).
 18. 2009 WL 279470.
 19. 2009 WL 279470.

10. 2009 WL 279470.
 11. 2009 WL 279470.
 12. The author would like to acknowledge the editorial assistance of attorney Tracy Pines and Dan Steing.

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