"THE PITFALLS OF ILLEGAL EAVESDROPPING; CRIMINAL, CIVIL, ETHICAL .... WHERE DOES IT END"

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Texas Society of Certified Public Accountants, Dallas Chapter, "Surviving as an Expert and Making Money", June, 1992

Kaufman County Bar Association, "Nuts and Bolts at Mediation - From Beginning to End", March, 1993

State Bar of Texas, Marriage Dissolution Institute, Fort Worth, Texas, "Mediation From A Mediator's Viewpoint", May, 1993


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Texas Family Law Practice for Paralegals, "Preparation for Mediation: The Mediation Notebook - Practical Tips, Dallas, Texas, March 24, 1995

State Bar of Texas, 21st Annual Advanced Family Law Course, Dallas, Texas, "Preparing For and Making Good Use of Mediation", August, 1995

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Fultz v. Lilliam, 942 F.2d 396 (1991)


In Re: Bates, 555 S.W.2d 420 (Tex. 1997)


Steve Jackson Games, Inc. v. United States Secret Service, 36 F3d 457 (5th Cir. 1994)

Summer v. Gillespie, 608 S.W.2d 897 (Tex. 1990)


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V.T.C.A. Penal Code §16.02(c)(15)(Vernon 1994)

V.T.C.A. Penal Code §16.05(b-e) (Vernon-1998)


Wright v. David L., 453 S.W.2d 646 (1994)

Young v. Young, 536 N.W.2d 254 (1995)
THE PITFALLS OF ILLEGAL EAVESDROPPING: CRIMINAL, CIVIL, ETHICAL ..........WHERE DOES IT END?

In the family law industry, an attorney is often confronted with knowledge that electronic eavesdropping is a component to an ongoing case. Whether your client is the perpetrator or subject of this illegal act could have a dramatic impact on the case itself. The scope of this article is to not only survey the admissibility of such evidence, but also analyze more far-reaching considerations such as criminal, civil and ethical liabilities resulting from the commission of the act itself.

I. WHAT CONSTITUTES A LEGALLY HARVESTED RECORDING OR EAVESDROPPING

For many years it has been permissible to record any conversation to which the recording person is a party, without the necessity of advising the other conversant as to the making or taking of such recording. In Re: Bates, 555 S.W.2d 420 (Tex. 1997). This case involved the corruption trial of a State District Judge accused of bribery. In its reasoning, the Court held that there was no protection of privacy or need to verify the identity of the participants or prove the right of presumption of such to parties of a secretly taped conversation and that one engages in such a conversation at his own peril.

The Supreme Court, in deciding Bates, relied in part on the earlier case of Cummings v. Jess Edwards, Inc., 455 S.W.2d 767 (Tex.Civ.App.-Corpus Christi - 1967, writ ref'd n.r.e.), wherein it was held that a taped telephone conversation may be used for impeachment purposes if the proper predicate is laid. In Cummings, a private investigator recorded his telephone conversation with a witness which was later offered in an attempt to impeach the witness at trial with the recording. The jury was allowed to hear the tape after a seven-point foundation was established. The foundation requires:

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

If this foundation is not established, opposing counsel must specifically object: a general objection will not suffice to preserve error. Ultimately, however, the admissibility of the recorded telephone conversation when used for impeachment rests within the discretion of the court.

Despite the Texas Supreme Court's adoption of the Cummings foundation, confusion continued to surround the application of the test. Most notably, the last prong of the test which required the testimony be voluntary without any form of inducement proved particularly troubling. The court addressed this issue in Summer v. Gillespie, 608 S.W.2d 897 (Tex. 1990), a battery suit in which the only witnesses were the contestants. The only unbiased evidence was an audiotape recording which was inadvertently made during the incident. The court ruled that there was no need to verify the identity of the participants or prove that the statements were made voluntarily since the identity of the parties and the voluntary nature of the discourse, both of which are required under Cummings, could be inferred from the circumstances. Additionally, the court concluded that if a person can testify that he either heard and recorded a conversation or heard a conversation and can testify that the recording is a fair representation of the conversation, it follows that the recording device was capable of taking testimony and that the operator was competent.

However, the voluntary nature of the recording is countermanded where the elicited testimony is induced by the person recording the conversation. In re: T.L.H., 630 S.W.2d 481 (Tex.Civ.App - Corpus Christi 1990), concerned a child custody suit in which the mother wanted to introduce audio and videotapes of an interview between her child and a psychologist. During the trial, the psychologist admitted that he "went to some lengths to stress the child." The court found that the psychologist's technique and the presence of the mother influenced the child and acted as an inducement for some of the recorded statements. In addition, the tape could not satisfy the fourth prong of the Cummings test, e.g. a showing that no changes, additions, or deletions had been made, since the tape contained numerous spots where the recorder had been turned on and off. Thus, the court ruled the tapes were inadmissible because the testimony of the child was
induced and accuracy of the recording could not be verified. Furthermore, the judge determined that under the circumstances the child's recorded testimony amounted to hearsay. The Court recognized that the use of the taped conversation in the present situation could be distinguished from the use in Cummings and Summer, where the tape recorded conversation was being utilized for impeachment. Ultimately, the Court of Appeals ruled it was an abuse of discretion and reversible error when the trial court allowed the tapes into evidence.

II. ILLEGALLY OBTAINED RECORDINGS, EAVESDROPPING.

While Bates and Cummings establish perimeters under which telephone conversations may be recorded and serve as admissible evidence, the general rule is that a person who is not a party to a conversation may not eavesdrop or make a recording of same and such conduct is likely violative of Federal and State criminal statutes. However, the perpetrator is subjected to both Federal and State civil liability as well.

The following is a list of cases and holdings relevant to this issue. It is important to note that Texas formerly subscribed to a doctrine that eavesdropping amongst spouses was exempt from liability via the interspousal tort immunity doctrine. However, since Texas courts have eliminated that concept, liability has been regularly applied:


b. No spousal exception exists for admissibility of evidence procured through electronic or mechanical eavesdropping under Title III of Omnibus Crime Control and Safe Streets

c. Federal Wiretapping Act. Prohibiting nonconsensual interception of telephone conversations, applied to conversations between spouses, despite claim that such conversations were subject to interspousal immunity. Young v. Young, 536 N.W.2d 254 (1995).

d. Rationale underlying doctrine of interspousal immunity, that of preserving domestic tranquility and preventing collusive suits between husband and wife, would not be served by prohibiting wife from maintaining action against husband for wiretapping in violation of this chapter. Heyman v. Heyman, 548 F.Supp. 1041 (1982).

e. Divorced wife who voluntarily taped former husband's conversations with their children had intent required for federal wiretapping violation, even if she did not act with bad purpose or in disregard of law. Thompson v. Dulaney, 838 F. Supp. 1535 (1993).

f. Not all wiretap interceptions involving spouses will be actionable; interceptions must be intentional, intercepting spouse must have knowledge that information was obtained through interception of communication in violation of section, and party being intercepted must not have consented. Thompson v. Dulaney, 970 F.2d 744 (1992), on remand 838 F.Supp. 1535.

g. Husband was liable under federal wiretapping statute for unauthorized interception and recording of telephone conversations between third party and his wife, as statute prohibits all unauthorized interspousal wiretapping committed within marital home. Walker v Carter, 820 F. Supp. 1095 (1993).

h. Former husband was potentially liable to former wife for damages caused by illegal obtaining of tape-recorded telephone conversation between former wife and her boyfriend, even though former husband claimed he was ignorant of the law prohibiting such tape-recording; it was conceded that former husband knew of or at least acquiesced in placing wiretap on phone lines to intercept conversation, and ignorance as to existence of law was no excuse. Fultz v Lilliam, 942 F.2d 396 (1991).


j. Parent has no right on behalf of his or her children to give consent under federal wiretap statute to have children's conversations with the other parent recorded while the children are in the other parent's house. Wright v. David L., 453 S.W.2d 646 (1994).

k. Tape of conversation between Defendant and ex-wife was admissible under Omnibus Crime Control and Safe Streets Act, despite
defendant's contention that ex-wife made tape in order to blackmail him, in light of finding that ex-wife's purpose in taping conversation was to turn tape over to government in hope of obtaining better deal for herself. U.S. v. Zarnes, 33 F.3d 1454 (1994).


m. Title III, which prohibits the interception, use or disclosure of wire communication by any person, except as specifically provided, applies to conduct of one spouse wiretapping telephone communication of other spouse within marital home. Kempf v. Kempf, 868 F.2d 970 (1989).

III. TEXAS CRIMINAL STATUTE:

A. It is a criminal offense for a person to unlawfully intercept, or unlawfully disclose or use a wire, oral or electronic communication, V.T.C.A. Penal Code, §16.02(b) (Vernon-1994) and V.T.C.A. Penal Code, §16.05(b-e) (Vernon-1998). Furthermore, a person whose wire, oral or electronic communication is intercepted, disclosed or used in violation of the Code of Criminal Procedure or in violation of Penal Code chapter 16 has a civil cause of action against anyone who intercepts, discloses or uses or solicits another person to intercept, disclose or use the communication and is entitled to recover damages.

The range of punishment for a criminal offense ranges from a state jail felony to a second degree felony. Punishment may range from a fine or up to five years in jail, or both, depending on the section violated.

B. Definition of Violation:

"Wire communication" means aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including the use of such a connection in a switching station, furnished or operated by a person authorized to engage in providing or operating the facilities for the transmission of communications as a communications common carrier. The term includes the electronic storage of a wire communication. Tex. Code Crim. Proc. art., 18.20 sec. (1) (Vernon 1998 Supp).

"Intercept" means the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device. Tex. Code Crim. Proc., art 18.20, sec (3) (Vernon 1998 Supp).

"Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system. V.T.C.A. Penal Code §16.02(c)(15)(Vernon 1994).

IV. FEDERAL CRIMINAL STATUTE.

The relevant federal statute is 18 U.S.C.A. §2510-2513, 2515-2521 (West 1970 and 1995 Supp). Under this statute, 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," commits a federal offense for which he can be fined and/or imprisoned for up to five years. An interception is "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." In Simpson v. Simpson, 490 F.2d 803 (5th Cir), cert.denied, 419 U.S. 897 (1974), the Fifth Circuit Court of Appeals held that the federal statute did not apply to recordings made by the husband of his wife's telephone conversations on the marital residence telephone. (See U.S. v. Schrimsher, 493 F.2d 848 (5th cir. 1974) intercepting calls of former lover, when never married and not part of household, was criminal). Other circuit courts have gone each way: Pritchard v. Pritchard, 732 F2d 372 (4th cir. 1984), and U.S. v. Jones, 542 F2d 661 (6th Cir. 1976), both held that the statute does not apply to interspousal tapping of the marital residence phone; Anonymous v. Anonymous, 558 F2d 577 (2nd Cir. 1977), agreed with Simpson that the statute does not apply in such circumstances. Note, however, that all of the aforementioned cases which did not impose sanctions against the recording spouse pre-date the elimination of the doctrine of interspousal tort immunity and pre-date the Texas criminal statute.

V. CIVIL LIABILITIES; STATE AND FEDERAL.

It has been held that under the Civil Practice and Remedies Code, §123.001-123.004 (Vernon, 1986), and the Federal wiretapping statute, 18 U.S.C.A. §2510-2521 (West 1990 and 1995 Supp), a person, including a spouse, whose communication is unlawfully intercepted, disclosed or intentionally used is entitled to recover damages in a civil action and obtain an injunction prohibiting the divulgence or use of information obtained by the unlawful interception.

A. Texas Statute: 123.001, et seq. Civil Practice & Remedies Code:

(1) "Communication" means speech uttered by a person or information including speech that is transmitted in whole or in part with the aid of a wire or a cable.

(2) "Interception" means the aural acquisition of the contents of a communication through the use of an electronic, mechanical, or other devise that is made without the consent of a party to the communication, but does not include the ordinary use of:
   (a) a telephone or telegraph instrument or facility or telephone and telegraph equipment;
   (b) a hearing aid designed to correct subnormal hearing to not better than normal;
   (c) a radio, television, or other wireless receiver; or
   (d) a cable system that relays a public wireless broadcast from a common antenna to a receiver.

B. Section 123.002, Cause of Action:

(1) A party to a communication may sue a person who:
   (a) intercepts, attempts to intercept, or employs or obtains another to intercept or attempt to intercept the communication;
   (b) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication; or
   (c) as a landlord, building operator, or communication common carrier, either personally or through an agent or employee, aids or knowingly permits interception or attempted interception of the communication.

(2) This section does not apply to a party to a communication if an interception or attempted interception of the communication is authorized by Title 18, United States Code, Section 2516.

C. Sec. 123.004, Damages

A person who establishes a cause of action under this chapter is entitled to:

(1) an injunction prohibiting a further interception, attempted interception or divulgence or use of information obtained by an interception;
(2) statutory damages of $1,000;
(3) all actual damages in excess of $1,000;
(4) punitive damages in an amount determined by the court or jury; and
(5) reasonable attorney's fees and costs.

D. Article 18.20, Code of Criminal Procedure, is entitled "Interception and use of wire, oral or electronic communications" and is effective until September 1, 2005. It reiterates the language of Sec. 123.001, et seq, in Sec. 16, "Recovery of Civil Damages Authorized," as well as setting forth in great detail what is permitted or prohibited in the interception of communication in the criminal law contest. Texas Penal Code, Sec. 16.02, "Unlawful Interception, Use or Disclosure of Wire, Oral or Electronic Communications" is also effective until September 1, 2005.

E. Statute of Limitations

The criminal statute of limitations for the state offense is three years. TEX. CODE CRIM. PROC. art. 12.01(5)(Vernon Supp. 1994). Collins, supra, note 6 at p. 804, provides that because the civil action sounds in tort for invasion of privacy, it is governed by a two-year statute of limitations. If the claim is for use of illegally-acquired information, the statute of limitations begins to run on the date of use, not the date of acquisition.

VI. INTERCEPTION OF CELLULAR TELEPHONE CONVERSATIONS

A. Section 250 Definitions:

1. As used in this chapter (18 USCS sec. 2510 et seq.) - (2) "oral communication" means 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 terms does not include any electronic communication.

(2) Section 12 recites that "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include -
   (a) any wire or oral communication;
   (b) any communication made through a tone-only paging device; or
   (c) any communication from a tracking device (as defined in section 3117 of this title);
   (d) electronic funds transfer information stored by a financial institution in a
communications system used for the
 electronic storage and transfer of funds.

B. Section 2511. Interception and disclosure of
wire, oral, or electronic communications prohibited.
(1) Except as otherwise specifically provided in
this chapter (18 USCS, Sec. 2510 et seq.) 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;
   (d) 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:
shall be punished as provided in subsection (4)
or shall be subject to suit as provided in
subsection (5).

This section goes on to distinguish what
would be lawful conduct.

(2) (c) it shall not be unlawful under this
chapter (18 USCS Sec. 2510 et seq.) for a person
acting under color of law to intercept a wire, oral
or electronic communication, where such person
is a party to the communication or one of the
parties to the communication has given prior
consent to such interception.
   (d) It shall not be unlawful under this
chapter (18 USCS Sec. 2510 et seq.) for a person
acting under color of law to intercept a wire, oral
or electronic communication, where such person
is a party to the communication, or 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.

The case law since the enactment of the federal
statutes and the Texas statutes has dealt with
interception of telephone conversations, specifically
land based. There is no published appellate opinion
concerning the interception of cellular telephone
conversation.

VII. VIDEO TAPE EVIDENCE
With the amendment of the Rules of Evidence,
the predicate for admissibility of photographs and
photographic images has changed greatly. Currently,
the only predicate is that the photo accurately reflects
the image it purports to be. There is no longer a
requirement that the person taking the photo be
identified or that the equipment used to take the photo
be in working condition. Photographic exhibits,
therefore, are readily admissible and are very helpful
demonstrative aids. Video tapes are also admissible
and are great jury tools, as well as demonstrative aids.
They allow witnesses to testify from an enlarged
screen without being in the courtroom. The use of
video tapes only becomes problematic when the tape
has been made covertly.

Audio and video surveillance devises used by
government officials must comply with the
requirements of the Fourth amendment. The Fourth
Amendment does not apply to private actions. Title
III does not address visual surveillance either. Texas
Civil Practice & Remedies Code, Sec. 123.001,
identified interception of "speech" only through use of
an electronic device. Mere eavesdropping or
photographing would not be actionable. However, the
problem arises when both images and conversations
are recorded. Texas does not have any statute that
directly addresses the use of video equipment.
However, other states have dealt with this issue.
California's Privacy Act defines a video recorded as a
"recording device".

The premier Texas case on videotaping is Boyles
v. Kerr, 855 S.W.2d 593 (Tex. 1993). In that case the
supreme Court awarded damages to a party who had
been the subject of a videotape without her knowledge
or consent. The party taping the encounter had
consented. By analogy to wiretapping cases, one
party's consent would have been sufficient to vitiate
any damage. The consenting party used the videotape
to inflict emotional distress upon the non-consenting
party. Resultantly, the case turned upon the use of the
tape. Justice Gonzalez, in his concurring opinion,
cited Billings v. Atkinson, 489 S. W. 2d 858 (Tex.
1973). Billings was the first case in Texas to
recognize a cause of action for "willful invasion of
privacy".

The facts in Billings lend themselves to
surveillance by a third party. Mrs. Billings was
speaking with a neighbor on the telephone when she
heard popping noises on her phone line. She ended the
call and went outside to see if she could see any cause
for the noise. Atkinson a telephone repairman was
working on the terminal box behind her house. The
next day, a second repairman returned and discovered
a wire tap device attached to Mrs. Billings phone line.
The Billings sued for mental anguish. The trial court
granted judgment n.o.v. for the defendant and the
appellate court affirmed. The Supreme Court
reversed, finding that the unwarranted invasion of an individual’s privacy is a tort. The Restatement (second) of Torts (1977) defines a cause of action for invasion of privacy as:

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

While Texas may not have established a cause of action for video surveillance, Texas has recognized a tort claim for invasion of privacy. At least five (5) jurisdictions have decisions relating to video surveillance. And, if the video has sound, then there would be the possibility of statutory damages for electronic interception.

VIII. ELECTRONIC MAIL

A relatively new area of interest is electronic mail. E-mail presents its own evidentiary problems. It is federal crime to intercept e-mail while it is stored, in route, or after receipt. The question against becomes what is a reasonable expectation of privacy? Does a person using a laptop or personal computer have a reasonable expectation that the communication sent will be protected from the curious or nosey? Certainly, if the communication is posted to a chat room or on a bulletin board, then any argument of privacy or confidentiality has been waived. But, if the communication is a personal letter to a friend or family member, is it reasonable to believe that only the receiver will have access to the communication?

Electronic mail utilizes phone lines, wire cables, and/or fiber optic cables. Would it then by definition be brought within the protection of the Electronic Communication Privacy Act? Absolutely. While there are programs that will isolate individual messages and cyberspace investigators that can download almost anything, that type of action will result in criminal punishment, civil damages, and inadmissible evidence.

In 1986, congress passed the Stored Wire and Electronic Communications and Transactional Records Act. It was later amended in 1988. The Act, 18 USCS Sec. 2701-2711 (1994), is referred to as Title II of the ECPA. It deals specifically with e-mail and similar stored communications.

Sec. 2701. Unlawful access to stored communication.

(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 damages, or private commercial gain-
  - (a) a fine under this title or imprisonment for 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
- (3) in section 2701, 2704 or 2518 of this title.

Section 2707 creates a civil cause of action, which includes all appropriate equitable or declaratory relief, damages, including actual damages, reasonable attorney’s fees and litigation costs.

The Fifth Circuit decided the case of Steve Jackson Games, Inc. v. United States Secret Service, 36 F3d 457 (5th Cir. 1994). A computer system used by an employee of Steve Jackson Games, Inc. (S.G.) was seized by the federal government under warrant. The employee was suspected of hacking into a Bell Telephone computer system. An electronic bulletin board service for S.G. subscribers was on the seized system. The Secret Service read the stored and undelivered bulletin board e-mail during the course of the investigation. Some of the stored information was deleted. S. G. sued the federal government. The Court found that the government had violated the Privacy Protection Act and Title II of the ECPA. Damages were awarded to S.G.
A second case involving e-mail was United States v. Maxwell, 42 M.J. 568 (1995). Colonel Maxwell was a subscriber to AOL. His service on AOL allowed him to use up to five screen names; he used four. One of his screen names was reported to the FBI as an AOL subscriber transmitting and receiving visual images portraying child pornography. The FBI sought a warrant. AOL extracted the information the FBI was seeking, including all transmissions under each of Col. Maxwell's screen names. The warrant only listed one screen name and that one was misspelled. Irrespective of the discrepancy, AOL turned over all of col. Maxwell's files to the FBI. Simultaneously, the military magistrate authorized a search of Col. Maxwell's quarter. Col. Maxwell's computer was seized as evidence. Three separate depictions of child pornography were found on his computer.

Not surprisingly, Col. Maxwell argues a constitutional claim of privacy. The appellate court's analysis used a two-prong test. To establish that the claimant had a legitimate expectation of privacy in the invaded place, he must prove:

1. that he had an actual, or subjective expectation of privacy, and,
2. that his individual expectation of privacy was one that society objectively recognizes as reasonable.

IX. CAVEAT FOR ATTORNEYS

Depending on the level of involvement, it is possible for an attorney to expose themselves to criminal or civil liability. Texas Penal Code, Chapter 71, sets out its prohibition against Organized Criminal Activity. Furthermore Chapter 15.02, Texas Penal Code addresses Criminal Conspiracy. If an attorney has knowledge of a wiretapping episode and becomes involved in its execution, he, too, is potentially guilty of these criminal acts.

A careful reading of the civil statutes also suggests that the hunter could transcend to the hunted and rather than "the attorney of record", could be reduced to another party to the lawsuit. If illegal eavesdropping episodes are discovered, it can transform an otherwise "great facts" case into a "bad facts" one.