

WIRETAPPING AND DIVORCE: A SURVEY AND ANALYSIS OF THE FEDERAL
AND STATE LAWS RELATING TO ELECTRONIC EAVESDROPPING
AND THEIR APPLICATION IN DIVORCE CASES

by

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I. INTRODUCTION

A divorce client may inquire about obtaining evidence for his divorce case by tape-recording his wife's telephone calls to third parties without her knowledge. Alternatively, a client may appear in her attorney's office with audiotapes in hand which purport to contain telephone conversations between her husband and third parties. Perhaps instead, the tapes contain conversations between her spouse and a third party which were made with a voice-activated tape recorder secretly placed under the table over which the conversations took place. It is imperative that the attorney know how to respond to these circumstances; ignorance of the law applicable to electronic eavesdropping can expose both attorney and client to civil liability and criminal penalties under federal law.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968¹ (herein the "Wiretap Act" or the "Act") provides for criminal penalties,² civil damages, and injunctive relief³ for certain described acts relating to the interception and disclosure of wire, oral, or electronic communications. State law may also impose criminal penalties or civil liability for such acts.⁴ The relevant state statutes may be even more proscriptive than the federal wiretap law. Advances in technology since the passage of

the 1968 Act, specifically the advent of cellular, cordless, and fiber optic telephone technology as well as electronic communications, led to a comprehensive updating of the Act in 1986.⁵

According to the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, 68 percent of all reported wiretapping matters involve an attempt by a spouse to obtain evidence for use against the other spouse in a domestic matter.⁶ Another 11 percent were the result of other domestic surveillance, including parental and courtship eavesdropping.⁷ Thus, nearly 80 percent of reported wiretapping matters involve wiretaps within the family context. Given these statistics, it is no surprise that the wiretap issue frequently presents itself in the context of a divorce or family law case.

The application of federal and state laws to incidents of wiretapping in family circumstances has been the source of ongoing legal debate in the case law as well as the scholarly journals of the legal profession.⁸ However, a clear nationwide trend is emerging toward applying these laws in the domestic context.

This article will analyze the federal statute in its present form including the most useful interpretations by the different federal circuits, based upon its legislative history. The article then addresses specific fact patterns which seem to arise with frequency in divorce cases⁹ and discusses litigation strategy.

Finally, the article will review statutes pertaining to electronic eavesdropping in each of the fifty states, and will describe their application.

II. TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

a. General Prohibitions of the Act

The Act imposes criminal penalties, and creates a civil cause of action against any person who:

1. intentionally intercepts "any wire, oral or electronic communication";

2. uses or tries to use "any electronic, mechanical, or other device to intercept any" such communication;

3. discloses 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"; or

4. uses or tries to use the contents of any such communication with that knowledge.¹⁰

The Act also prohibits the manufacture, assembly, possession, or sale of any electronic, mechanical, or other device knowing that the design of the device "renders it *primarily* useful for the surreptitious interception of wire, oral, or electronic communications." It is criminal conduct to advertise the

availability of such a device by any person who knows or has reason to know that the advertisement "will be sent through the mail or transported in interstate or foreign commerce."¹¹

The legislative history shows there was no intention on the part of Congress to ban the manufacture of all devices capable of being used to intercept wire and oral communications; the crucial test considered by the drafters was "whether the design of the device renders it primarily useful for surreptitious listening."¹²

The Act defines the terms it uses. For instance, a "wire communication" is "any 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 like connection between the point of origin and the point of reception."¹³ Excepted from "wire communication" is "the radio portion of a cordless telephone communication which is transmitted between the cordless handset and the base unit."¹⁴

An "oral communication" is "any oral communication by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation," but excepting electronic communications.¹⁵ An "electronic communication" is 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."¹⁶ Wire and oral communications, and "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone

handset and the base unit," are excepted from the definition of "electronic communication."¹⁷

Thus, the Act protects both telephone conversations and oral communications against electronic eavesdropping. Oral communications are protected only where there is a reasonable expectation of privacy.¹⁸

Certain persons are are not subject to criminal or civil liability under the Act. Switchboard operators and agents of wire or electronic communication services who are engaged in activities necessarily incident to the rendition of their service are excluded from the operation of the Act.¹⁹ Employees of the Federal Communications Commission operating in the normal course of their employment are not liable.²⁰ Persons acting under color of law are also excepted from the operation of the Act, where such persons are parties "to the communication or where one of the parties to the communication has previously consented to such interceptions."²¹ Certain foreign intelligence gathering activity is also excluded from the operation of the act.²² Persons who intercept communications through the use of an extension telephone used in the ordinary course of business are also excluded from liability under the Act.²³

The Act also does not proscribe the interception of communications made readily accessible, by design, to the general public.²⁴ Thus, interceptions of radio communications transmitted by any governmental, law enforcement, civil defense or public

safety communications system readily accessible to the general public are allowed.²⁵ Also allowed are interceptions of marine, aeronautical, citizens band, mobile radio service transmissions, and communications causing interference to any lawfully operating station or consumer electronic equipment, so long as such communication is not scrambled or encrypted.²⁶

b. Criminal Penalties

Violations of the provisions of the Act pertaining to the interception of these communications carry penalties including imprisonment for up to five years, as well as mandatory civil fines of \$ 500.00, pursuant to Section 2511 of the Act.²⁷ Section 2512 of the Act provides that violations relating to the manufacture, assembly, possession or advertisement of devices primarily useful for the surreptitious interception of communications *shall* be fined not more than \$10,000.00 or imprisoned not more than five years, or both.²⁸

c. Evidentiary Considerations

Section 2515 of the Act prohibits the use of intercepted communications, as well as any evidence derived from them, as evidence in any trial, hearing, or other proceeding in any court 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 the Act."²⁹ The Act provides that an aggrieved person in any proceeding may move to suppress the contents of any intercepted communication, or evidence derived from such a

communication, on the grounds that (1) the communication was unlawfully intercepted; (2) the order authorizing the interception is insufficient on its face; or (3) the interception was not made in conformity with the order of authorization or approval.³⁰

The statutory reference to orders authorizing interceptions of communications would not normally pertain to divorce cases; instead, the provision refers to orders obtained under Section 2518 of the Act, wherein investigative or law enforcement officers may obtain judicial permission to place wiretaps in the scope of a criminal or other investigation.

d. Civil Remedies and Limitation of Actions

Section 2520 of the Act authorizes the recovery of civil damages from any person or entity violating its terms, and shows how to compute statutory damages which may be as high as the greater of the plaintiff's actual damages, or \$10,000.00.³¹ The Act also provides for the recovery of (1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) punitive damages in appropriate cases; and (3) a reasonable attorney's fee and other litigation costs reasonably incurred.³² A civil action brought under 18 U.S.C. § 2520 must be commenced no later than two years after the date upon which the claimant had a reasonable opportunity to discover the violation.³³

e. Legislative History Relating to Domestic Wiretaps

The legislative history of the Act reflects an intention to draft an all-encompassing Act creating "an essentially comprehensive ban on the interception of oral communications . . .

applicable to the overwhelming majority of cases involving the unlawful interception of such communications . . .".³⁴ The dual purposes of the Act were (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.³⁵ The Act was drafted to meet the constitutional criteria set forth by the United States Supreme Court in Katz v. United States,³⁶ in which the Court declared unconstitutional a New York statute authorizing electronic eavesdropping by law enforcement officers investigating certain specified crimes.³⁷

A review of the early cases interpreting the Act reveals considerable debate over whether its civil remedies and criminal penalties should apply to interspousal electronic surveillance in the domestic relations context.³⁸ Simpson v. Simpson³⁹ is one of the two most significant early opinions on the applicability of the Act to interspousal wiretapping. In Simpson, the Fifth Circuit Court of Appeals held that the federal wiretap statute was inapplicable to a husband's wiretap interceptions of his wife's telephone conversations with a third party.⁴⁰

In reaching its ultimate holding, in Simpson the court listed seven groups of legislative hearings preceding the enactment.⁴¹ The court considered the pre-enactment hearing testimony of Professor G. Robert Blakey⁴² that "the two major private uses" of electronic surveillance equipment were in commercial eavesdropping and "domestic relations investigations."⁴³ The comments of Senator

Edward Long in the Hearings on the Invasions of Privacy are also noted:

The three largest areas of snooping in this . . . field are (1) industrial (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these areas . . . we expect to explore this terrain thoroughly.⁴⁴

There is additional evidence in the hearing testimony indicating that Congress was cognizant of the domestic relations context when enacting the statute.⁴⁵ This sentiment is also apparent from the Senate debate regarding the bill.⁴⁶ The only reasonable conclusion based upon the plain language of the statute, when considering the other indicators in its legislative history, is that the Act was intended to apply in all contexts, including domestic relations, unless otherwise expressly excluded by its terms.

The Act was amended by the Electronic Communications Privacy Act of 1986.⁴⁷ The 1986 amendments were intended to clarify federal privacy protections and standards "in light of dramatic changes in new computer and telecommunications technologies."⁴⁸ Accordingly, the 1986 amendments protect cellular, microwave, and fiber optic communications, including electronic and voice mail.⁴⁹ The amendments do not protect the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.⁵⁰ The wire portion of a cordless communication, however, remains fully protected by the Act.⁵¹

III. IS THERE AN INTERSPOUSAL EXCEPTION TO THE APPLICATION OF

THE WIRETAP ACT?

The origin of debate over the application of the Wiretap Act to interspousal electronic eavesdropping can be traced to the two seminal early opinions, the Fifth Circuit case of Simpson v. Simpson and the Sixth Circuit case of United States v. Jones.⁵²

A. The Simpson View: Exclusion of Interspousal Surveillance

Simpson involved the electronic interception by a husband of the conversations of his wife with a third party over the telephone in the marital home, and whether or not such conduct was prohibited by the Act.⁵³ In that case, the husband attached a recording device to the telephone line in his wife's home and intercepted conversations between his wife and another man.⁵⁴ The husband then played the tapes to various neighbors and family members. Simpson arose in the context of post-divorce litigation. The ex-wife brought a civil action for damages against her ex-husband pursuant to 18 U.S.C. § 2520.

The court found "the naked language" of the Act reached the case.⁵⁵ Nevertheless, the court said it was "of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts."⁵⁶

To justify its result, the Simpson court engaged in what it considered "a long, exhaustive, and inconclusive" review of the legislative history.⁵⁷ The court found "no clear indication that Congress intended to intrude into the marital home."⁵⁸ The court

was further swayed by two additional considerations: first, that Congress included an exception for extension telephones in the prohibitions of the Act;⁵⁹ and second, that given the severity of the criminal penalties, if the defendant were unsuccessful in the civil case, he could be exposed to those penalties without any specific Congressional directive regarding its application in this context.⁶⁰ Limiting its decision to the specific facts of the case, the court found the statute did not create a federal cause of action for the grievances of one spouse against another in such circumstances, given that the dispute did not go beyond the marital home of the parties.⁶¹

The Simpson court distinguished an interception by a third party of a communication in the marital home, *even if* it were instigated by the other spouse: "to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse."⁶²

B. The Jones View: No Exception for Interspousal Surveillance

In U.S. v. Jones the Sixth Circuit Court of Appeals responded with the view that there is no statutory exception for interspousal wiretaps.⁶³ U.S. v. Jones was a 1976 case involving a criminal indictment. The defendant had been accused of placing a recording device on his wife's telephone after their physical separation. He was accused of using the recordings in his divorce case.⁶⁴ The district court dismissed the indictment in reliance

upon Simpson, the Fifth Circuit case, finding an that there was an "implied exception" to the Act for purely interspousal wiretaps placed on telephones within the marital home.⁶⁵

The government appealed, and the Sixth Circuit Court of Appeals determined the Simpson view to be "untenable" because it "contradicts both the explicit language of the statute and the clear intent of Congress expressed in the Act's legislative history."⁶⁶ The Jones court's consideration of the plain language of the statute, in conjunction with the legislative history, "inescapably [led] to the conclusion that [the Act] establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation."⁶⁷

The Jones court was unimpressed by the distinction drawn in Simpson between interceptions by third parties -- even if instigated by a spouse -- and direct interspousal interceptions. It was "a classic distinction without a difference."⁶⁸ The end result, said the court, is the same: the privacy of the unconsenting parties to the intercepted conversation has been invaded.⁶⁹ The Jones court also held "there is a vast difference between overhearing someone on an extension and installing an electronic listening device to monitor all incoming and outgoing telephone calls."⁷⁰

- c. The Federal Court Decisions After Simpson and Jones, and the Trend Toward the Jones View.

The debate over the application of the Act to wiretapping in

domestic relations situations appears to revolve around whether or not an implied interspousal exception can be read into the Act. While support for the Simpson view remains, it appears that the trend strongly favors the view advanced in Jones.

1. Simpson progeny

On facts similar to Simpson, federal court opinions follow that case as authority in both the Second and Ninth Circuits.⁷¹

Lizza v. Lizza, in the Second Circuit, is representative of this view.⁷² In Lizza, Nona Lizza sued her husband for recording her telephone conversations during the pendency of their divorce case.⁷³ The husband recorded the telephone conversations believing that he would uncover evidence of a possible conspiracy to fraudulently transfer certain of the wife's stock holdings outside the marital estate.⁷⁴ The husband transcribed the recorded telephone conversations⁷⁵ and attached the transcripts to a motion which he filed in the divorce proceeding in state court. Although he obtained the relief he sought in the divorce case, he became the defendant in a lawsuit filed by Nona under the Act.⁷⁶

After considering the Simpson case, the Lizza court found the Act to be "a far reaching one which, if read to cover circumstances such as that presented by the instant case, would have serious ramifications as to the degree of federal control over actions by family members within their own homes."⁷⁷

Nona Lizza was not the only plaintiff whose cause of action was dismissed by the court in the Lizza case. The other plaintiff was Nona's sister-in-law, who was a party to the intercepted

telephone conversations. The court said it did not matter whether the plaintiff was a family member who used the telephones in the home, or a third party who had conversations with a person using such telephone lines. The court found it would be incongruous to deny a cause of action to the family member, yet allow one to the third party caller. ⁷⁸

In the Ninth Circuit, Simpson has been followed in the case of Perfit v. Perfit.⁷⁹ Under facts similar to Simpson, the Perfit court compared the Simpson/Jones line of cases, acknowledging that "the Ninth Circuit has rendered no opinion on the issue."⁸⁰ The court was persuaded by the Simpson rationale, finding that although the legislative history of [the Act] addresses the the use of such surveillance in domestic disputes, "it is unlikely that Congress intended its regulations to extend to . . . personal acts conducted within the home."⁸¹

Simpson has also been relied upon in state courts interpreting the Act when construed with the issue of admissibility of the evidence obtained by the interception. Baumrind v. Ewing⁸² was a South Carolina alienation of affections and criminal conversation case. The plaintiff husband recorded conversations between his wife and her paramour, and sought to use the tapes as evidence in his suit against the paramour.⁸³ Before trial, the defendant paramour sought to suppress the recordings pursuant to the Act.⁸⁴ The trial judge held that recordings made by the husband in the parties' residence did not violate the Act and consequently did not entitle the defendant to suppress the

evidence obtained.⁸⁵ The South Carolina Supreme Court upheld the trial judge's ruling, relying entirely upon Simpson: "Domestic conflicts are traditionally and properly matters of state interest. We cannot believe Congress intended this legislation to intrude as far as this case would take it."⁸⁶

In Baeber v. Baeber,⁸⁷ an Ohio court admitted tapes of conversations between the wife and her lover for purposes of impeachment. Relying upon Simpson, the court was "convinced that . . . the marital home is and should be the private concern of the two parties of the marriage" and held that the Act did not prevent admission of the tapes.⁸⁸

2. Jones progeny

The Jones view that no interspousal exception exists appears to prevail in the Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits. A particularly harsh view of Simpson is held in the Third Circuit, where under similar facts, the court in Kratz v. Kratz⁸⁹ stated "it is difficult to imagine a statutory prohibition more definite and specific than that of §2511 (1)(a) . . .".⁹⁰ The Kratz court wrote that the Simpson view was the product of a "most unusual and improper method of statutory analysis."⁹¹ The Kratz court determined the implied interspousal exception (in Simpson) was created in "flagrant" disregard of the terms of the Act.⁹² After an extensive analysis of the Act, the Kratz court found no interspousal exception to its application, and denied a motion to dismiss a civil suit between spouses which was brought

under the Act.⁹³ The trend in the later cases is clearly toward the Jones view that no interspousal exception exists.⁹⁴

IV. APPLICATION OF THE ACT TO SPECIFIC CIRCUMSTANCES

a. Parental Interceptions.

Exceptions to the applicability of the Act have been allowed where the questioned interception involves communications between the spouse and the children of the marriage. In Anonymous v. Anonymous,⁹⁵ a divorced wife brought an action under the Act against her former husband to recover damages on the basis of his recording her telephone conversations with their eight-year old daughter.⁹⁶ The child was in the custody of the former husband when the interceptions took place.⁹⁷

In its analysis, the Anonymous court noted the husband's activity clearly would not be prohibited if it had consisted merely of listening in on an extension phone to his wife's conversations with their daughter, Congress having explicitly exempted such activity from coverage by the Act.⁹⁸ The court further relied upon pre-enactment hearing testimony as demonstrating a congressional intent to exclude such interceptions from the prohibitions of the Act.⁹⁹ The court concluded the facts did not give rise to a cause of action under the Act.¹⁰⁰

Anonymous was followed in the Seventh Circuit in the 1993 case of Scheib v. Grant.¹⁰¹ The Tenth Circuit, in Newcombe v. Ingle¹⁰² held that there was no cause of action against a parent under the Act when a child's communications were intercepted. Parental interceptions have, however, been held actionable under

the terms of the Act.¹⁰³

b. Interception of Cellular and Cordless Communications.

As previously noted, the Act governs interceptions of wire, oral, and electronic communications. Cordless and cellular telephonic communications are transmitted partly by radio, rather than the wire technology originally contemplated when the Act was passed.¹⁰⁴ The Act was amended by the Electronic Communications Privacy Act of 1986, to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies . . ."¹⁰⁵ The 1986 amendment, therefore, exempted "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit" from the definition of wire communications protected by the Act.¹⁰⁶

In Tyler v. Berodt,¹⁰⁷ the Eighth Circuit Court of Appeals was confronted with a cordless interception as the basis for a lawsuit under the Act. The plaintiff's cordless telephone conversations were intercepted inadvertently by his neighbors' cordless telephone more than four blocks away. The neighbors suspected criminal activity based upon the content of the conversations, and notified the authorities, who suggested the conversations be taped. The tapes were used in a criminal trial involving the plaintiff, who later sued the neighbors under the Act.¹⁰⁸ The interceptions preceded the 1986 amendments to the Act, and the cordless communications therefore were not explicitly excepted from the definition of "wire communication." However,

the Act provides that "oral" communications are protected only if accompanied by a justifiable expectation of privacy.¹⁰⁹ The Tyler court found that those using cordless telephones were entitled to no such justifiable expectation.¹¹⁰

The Act may not be the last word on civil or criminal liability, however. State law may exist which regulates the interception of such communications, and such laws may be more restrictive than the federal Act.¹¹¹ For example, in the New York case of People v. Fata,¹¹² an off-duty police officer overheard the conversations of third-parties over his personal cordless telephone. The content of the conversations was indicative of illegal narcotics-related activity, and the officer tape-recorded portions of four conversations and gave the tapes to authorities.¹¹³ The court determined that while the interceptions were not barred by the Act, "a different result is required under New York law. The Federal Statute represents the minimum constitutional criteria for electronic surveillance and does not preclude the states from enacting more stringent standards."¹¹⁴ The court determined the New York Penal Law makes such eavesdropping a felony.¹¹⁵

c. Liability of Matrimonial Counsel.

Attorneys are frequently joined in actions brought under the Act. The basis for liability of counsel arises most often from the prohibition against intentional disclosure or the use of the contents of intercepted communications ("use and disclosure liability").¹¹⁶ For liability to arise, it must be established

that the defendant attorney not only intentionally used or disclosed the intercepted communication, but also that the defendant attorney knows or has reason to know that the information was obtained in violation of §2511.¹¹⁷ Therefore, a plaintiff must demonstrate the defendant knew the information used or disclosed came from an intercepted communication, and must prove sufficient facts concerning the circumstances of the interception that the lawyer/defendant could, with presumed knowledge of the law, determine the interception was prohibited by the Act.¹¹⁸ In essence, the defendant must have been aware of the factual circumstances that would violate the statute.¹¹⁹

In United States v. Wuliger,¹²⁰ the Sixth Circuit Court of Appeals reversed a criminal conviction of an attorney who relied upon his client's false representation that certain tapes of his wife's third-party telephone conversations were made with her knowledge and consent.¹²¹ The attorney used the tapes against the wife in evidence in depositions and at the trial of the divorce case.¹²² The Court of Appeals found that while there was proof at trial that the attorneys' use of the tapes was intentional, there had been no proof the defendant attorney had reason to know that the tapes were unconsented to, and therefore illegal:

Under §2511(1)(d), the government 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. The District Court's failure to instruct the jury properly on the requisite mental element of §2511(1)(d) amounted to plain error...¹²³

Proof of a justifiable reliance upon the case law of the

attorney's jurisdiction may also provide a defense to liability under the Act. In the Eighth Circuit case of Rice v. Rice,¹²⁴ the co-defendant attorney had advised his co-defendant client to install a recording device to record the childrens' conversations with their father.¹²⁵ The lawyer relied upon the Eighth Circuit district court case law which followed the Simpson view.¹²⁶ After giving the ill-fated advice, the Eighth Circuit Court of Appeals reversed the earlier case and held that the Act prohibited the wiretapping of telephone communications in the marital home.¹²⁷

The Rice court found that at the time the attorney gave his advice, there was no Eighth Circuit caselaw on point, and the cases relied upon by the defendant attorney represented the state of the law in the Missouri federal district courts and as followed in the Second and Fifth Circuits. The court found "it was entirely reasonable and appropriate" for the attorney to have relied upon the district court decisions issued from within the state in which he practiced law.¹²⁸ In Kratz v. Kratz,¹²⁹ a Pennsylvania court reached a similar conclusion: "Lawyers are not soothsayers, and possess no crystal balls in which to foresee changes in judicial interpretations of the law."¹³⁰

Use and disclosure liability present the most likely areas for potential attorney liability under the Act. Anytime a client mentions the word "tape," the attorney should proceed with great caution.

V. THE STATE WIRETAP AND PRIVACY ACTS

The legislative history of the Act reflects a specific

legislative intention not to preempt state law.¹³¹ "The proposed [Act] envisions that states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation."¹³² Accordingly, the Act was intended to represent the minimum standard for constitutionality of such statutes. Reference should be made not only to the Act, but to the applicable state statute, to determine the types of activity which may be criminal or actionable, the potential remedies, and the available defenses.

Legislation in the fifty states is set forth in the Appendix, which cites the relevant wiretap and/or privacy statute for each state as well as the specific provisions relating to criminal penalties and civil damages, and the availability of affirmative defenses to the application of the statute.

VI. CONCLUSION

There is a clear trend across the country toward the Jones view which should be heeded by matrimonial counsel. As the so-called "implied exception" for interspousal interceptions continues to lose favor in the courts, the possibility of civil liability or criminal penalties under the Act will be applied more frequently by litigants and counsel alike. Also, persons aggrieved by conduct which violates the Act will be more likely than ever before to obtain redress under its provisions. Attorneys whose clients have been injured by such acts should be aware that relief may be available, and should appropriately advise their clients.

Additionally, where a potential cause of action exists under the applicable laws, care should be taken before entering into any marital settlement between the parties. The client should be advised about the existence of a colorable claim, and given the opportunity to consider whether it should be pursued. Where the client desires to execute a mutual release as part of the settlement agreement, counsel should be certain to advise the client in writing that there was a possible wiretap claim and create a record that the client was so advised. The client with a potential claim should be asked to sign a written acknowledgement that the client was so advised and does not wish to pursue the claim. Finally, matrimonial attorneys relying upon the client's representation that intercepted communications were obtained in a lawful manner may do so at their own risk.

APPENDIX: SYNOPSIS OF THE GOVERNING WIRETAP STATUTES
IN EACH OF THE FIFTY STATES

APPENDIX: 18 U.S.C. §2510 et seq. (relevant provisions)

**APPENDIX - 18 U.S.C. SEC. 2510 et seq.
Relevant Provisions**

Sec.2510. DEFINITIONS

As used in this chapter-

(1) **Wire Communication**--means any 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 connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio

portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(2) **Oral Communication**--means any oral communication uttered by person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) **State**--means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) **Intercept**--means 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.

(5) **Electronic, mechanical, or other device**--means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than---

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) **Person**--means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) **Investigative or law enforcement officer**--means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) **Contents**--when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) **Judge of competent jurisdiction**--
means---

(a) a judge of a United States district court or a United States court of appeals;

and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or

electronic communications;

(10) **Communication common carrier**--shall have the same meaning which is given the term common carrier by section 153(h) of title 47 of the United States Code;

(11) **Aggrieved person**--means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) **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) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(b) any wire or oral communication;

(c) any communication made through a tone-only paging device; or

(d) any communication from a tracking device (as defined in section 3117 of this title);

(13) **User**--means any person or entity who---

(a) uses an electronic communication service; and

(b) is duly authorized by the provider of such service to engage in such use;

(14) **Electronic communication system**--means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) **Electronic communication service**--means any service which provides to users thereof the ability to send or receive wire or electronic communications;

Sec.2511. INTERCEPTION AND DISCLOSURE OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS PROHIBITED

(1) Except as otherwise specifically provided in this chapter any person who---

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication

when---

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, 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; or

(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)

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers or wire or electronic communication service, their officers, employee, and agents, and landlords, custodians, or other persons,

are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlords, custodian, or other specified person, has been provided with---

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter 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 for a person not acting under color of law to intercept a wire, oral, or electronic communication or 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.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person---

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted---

(I) by any station for the use of the general public, or that relates to ships, aircrafts, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which---

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer

electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter---

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

3(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication---

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

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

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled or encrypted, then---

(i) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio

service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, the offender shall be fined not more than \$500.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted---

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls.

--- is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

5(a) (i) If the communication is---

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an act under this subsection---

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsection offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory \$500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than \$500 for each violation of

such an injunction.

Sec. 2515. PROHIBITION OF USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS

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.

Sec.2516. AUTHORIZATION FOR INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of

Sec.2520. RECOVERY OF CIVIL DAMAGES AUTHORIZED

(a) In General-Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief-In an action under this section, appropriate relief includes---

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages-(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under

subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$50 and not more than \$500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$100 and not more than \$1,000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of---

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

(d) Defense- A good faith reliance on---

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of his title permitted the conduct complained of ;
is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation-A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Sec. 2521. INJUNCTION AGAINST ILLEGAL INTERCEPTION

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this chapter, the Attorney General may initiate a civil action in a district court of the United States to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

NOTES

1. 18 U.S.C. § 2510-2521 (1968).
2. 18 U.S.C. §§ 2511, 2512.
3. 18 U.S.C §§ 2520, 2521.
4. The relevant statutes in each of the 50 states are cited in a compilation appearing later in this article.
5. These amendments were set forth in the Electronic Communications Privacy Act of 1986, P.L. 99-508 (1986) and have been integrated into the current version of 18 U.S.C. §§ 2510-2521.
6. National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Electronic Surveillance 160 (1976), as cited in Scott J. Glick, Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance, 41 Cath. U. L. Rev. 845 (1992).
7. Glick, supra note 6, at 845 n.6.
8. Specifically, the primary subject of debate is whether an interspousal exception to the application of the federal statute exists. See, e.g., Jonathan D. Niemeyer, Note, All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act, 81 Ky. L. J. 237 (1993); Christopher J. Sternberg, Comment, Interspousal Wiretapping: Defining "Marital Home" for Purposes of Civil Recovery Under Title III, 28 J. Fam. L. 771 (1989-90); Lori D. Stephens, Note, All's Fair: No Remedy Under Title III for Interspousal Surveillance, 57 Fordham L. Rev. 1035 (1989). See also Savalle Davis, Wiretapping and the Confines of the Marital Home: What Part of "Any" Don't You Understand?, 20 J. Legis. 75 (1994).
9. Specifically, third-party interceptions, private investigators, attorney culpability, parental interception, and the like.
10. 18 U.S.C. § 2511 (1) (a) and (b); § 2520.
11. 18 U.S.C. § 2512 (a) through (c).
12. United States Code Congressional and Administrative News, 90th Congress, Second Session (1968) Volume 2, p. 2183.

13. 18 U.S.C. § 2510 (1).
14. 18 U.S.C. § 2510 (1). See infra note 49.
15. 18 U.S.C. § 2510 (2).
16. 18 U.S.C. § 2510 (12).
17. 18 U.S.C. § 2510 (12).
18. 18 U.S.C. § 2510 (2).
19. 18 U.S.C. § 2511 (2) (a) (i).
20. 18 U.S.C. § 2511 (2) (b).
21. 18 U.S.C. § 2511 (2) (c).
22. 18 U.S.C. § 2511 (2) (e).
23. 18 U.S.C. § 2510 (5) (a). Despite the usage of the term "business" in the Act, this provision has on at least one occasion been held to protect the user of an extension telephone in the home from liability under the Act. Anonymous v. Anonymous, 558 F.2d 677 (2d Cir. 1977). In Anonymous, the husband and father was accused by the mother of tape recording her telephone conversations with their eight year old daughter by using taping conversations via a loudspeaker installed on an answering machine. Id. at 678. The court found the husband's actions fell within the extension phone exemption and denied recovery of damages to the wife under the Act. Id. at 679-680. The Court found the facts presented "a purely domestic conflict . . . a matter clearly to be handled by the state courts. We do not condone the husband's activity in this case, nor do we suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute. We merely hold that the facts of this case do not rise to the level of a violation of that statute." Id. at 679.
24. 18 U.S.C. § 2511 (g) (i).
25. 18 U.S.C. § 2511 (2) (g) (ii) (I) and (II).
26. 18 U.S.C. § 2511 (2) (g) (ii), (iv), and (v).
27. 18 U.S.C. § 2511 (4) and (5).
28. 18 U.S.C. § 2512 (1) (c).

29. 18 U.S.C. § 2515.
30. 18 U.S.C. § 2518 (10) (a) (i), (ii), and (iii).
31. 18 U.S.C. § 2520 (a) through (d). See Shaver v. Shaver, 799 F. Supp. 576, 578-79 (E.D. N.C. 1992) (holding that an award of civil penalties is discretionary with the court); see contra Rodgers v. Wood, 910 F. 2d 444, 448 (7th Cir. 1990) (holding that the language of the Act allows trial courts no discretion whether or not to award civil penalties).
32. 18 U.S.C. § 2520 (b) (1), (2), and (3).
33. 18 U.S.C. § 2510 (e).
34. 1968 United States Code Congressional and Administrative News, 90th Congress, Second Session Vol 2, 2181 [hereinafter "1968 U.S.C.C.A.N."].
35. Id. at 2153.
36. 389 U.S. 347 (1967).
37. 1968 U.S.C.C.A.N., supra note 32, at 2153.
38. The two leading early cases reflecting this debate are Simpson v. Simpson, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974) (court found no explicit congressional intent to include interspousal wiretaps among the prohibitions of the Act) and United States v. Jones, 542 F.2d 661 (6th Cir. 1976) (court found Congress intended a blanket prohibition on all electronic surveillance, including that occurring in the home between spouses).
39. 490 F.2d 803 (5th Cir. 1974) *cert. denied*, 419 U.S. 897 (1974).
40. Id. at 810.
41. These hearings were as follows: 1. Hearings on Wiretapping, the Attorney General's Program before the Senate Judiciary Comm., 87th Cong., 2d Sess. (1962); 2. Hearings on Invasions of Privacy, Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm., pts. 1-6, 89th Cong. (1965-66); 3. Hearings on Criminal Laws and Procedures, Before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm., 89th Cong. 2d Sess. (1966); 4. Special Inquiry on Invasion of Privacy, Before the Special Subcomm. on Invasions of Privacy of the House Gov't. Operations Comm., 89th Cong. 1st

Sess. (1965); 5. Hearings on the Right of Privacy Act of 1967, before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm., Pts. 1 & 2, 90th Cong. 1st Sess. (1967); 6.

Hearings on the Anti-Crime Program, before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong. 1st Sess. (1967); and 7.

Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm., 90th Cong. 1st Sess. (1967), all as cited in 490 F.2d 803, 807 n.10 (1974).

42. Professor Blakey has been generally credited as being the author of the Act. See United States v. Giordano, 416 U.S. 505, 517-518, n.7 (1974) and United States v. Hall, 488 F.2d 193, 197, n.7 (9th Cir. 1973), both cited in United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

43. Simpson, 490 F.2d at 807, n.11, citing Hearings on the Anti-Crime Program, before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong. 1st Sess. 1045 (1967).

44. Id. at 808 n.13.

45. See 490 F.2d 803, 808 n.14, in which Mr. Richard Gerstein, the Dade County District Attorney is recounted as stating "it is routine procedure in marital disagreements and other civil disputes for private detective agencies, generally with full knowledge of the lawyers, to tap telephones." The note also refers to the testimony of two separate private investigators as well as a merchant who sold eavesdropping equipment, all three of whom addressed the domestic relations applications of electronic eavesdropping.

46. The pertinent senatorial commentary is painstakingly reconstructed and cited in Scott J. Glick, Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance, in 41 Cath. U. L. Rev. 845, 859-861 (1992).

47. P.L. 99-508, 1986.

48. Senate Report No. 99-541, 1986 United States Code Congressional and Administrative News 3555 [hereinafter 1986 U.S.C.C.A.N.].

49. See Id. at 3565-3568. Reference is made therein to changes in 18 U.S.C. § 2510 (definitions) which bring cellular, fiber optic, and microwave transmissions within the purview of the Act:

Thus, a wire communication encompasses the whole of a voice telephone transmission even if part of the transmission is

carried by fiber optic cable or by radio-- as in the case of cellular telephones and long distance satellite or microwave facilities. The conversion of a voice signal to digital form for purposes of transmission does not render the communication non-wire. The term "wire communication" includes existing telephone service, and digitized communications to the extent that they contain the human voice at the point of origin, reception, or some point in between... it should be noted that an improperly mechanical reading of the phrase "in whole or in part...by the aid of wire" could sweep in virtually all voice communications made with the aid of any electronic equipment, inasmuch as virtually all such equipment includes in its assembly some length of wire or the equivalent. The quoted [language] is intended to refer to wire that carries the communication to a significant extent from the point of origin to the point of reception, even in the same building. It does not refer to wire that is found inside the terminal equipment at either end of the communication.

Id. at 3566.

50. 18 U.S.C. § 2510 (1); "Because communications made on some cordless telephones can be intercepted easily with readily available technologies, such as an AM radio, it would be inappropriate to make the interception of such a communication a criminal offense. The wire portion of a cordless communication remains fully covered, however." 1986 U.S.C.C.A.N. 3566.

51. 1985 U.S.C.C.A.N. 3566; 18 U.S.C. § 2520 (1).

52. Respectively, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974) (finding an implied exception to the coverage of the statute for interspousal interceptions) and 542 F.2d 661 (6th Cir. 1976) (holding no interspousal exception exists).

53. 490 F.2d at 804.

54. Id. at 804.

55. Id. at 805.

56. Id.

57. Id. at 806.

58. Id. at 807.

59. Id. at 809, *citing* 18 U.S.C. § 2510 (5) (a) (i).

60. Id. at 809. Such a conclusion, said the court, assumes the prosecution could meet the higher standards of proof required for criminal convictions. Id.

61. Id. at 810.

62. Id. at 809.

63. United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

64. Id. at 663.

65. Id. at 663-664.

66. Id. at 667.

67. Id. at 669.

68. Id. at 670.

69. Id. The court went on to point out that it is not just the privacy of the targeted spouse which is being violated, but that of the other party to the conversation as well.

70. 542 F.2d at 673, n. 24.

71. There are many other courts following Simpson in the context of parental interceptions of conversations between other parents and children of the marriage; these cases are addressed infra in Section IV (a) of this article.

72. 631 F. Supp. 529 (E.D.N.Y. 1986).

73. Id. at 530.

74. Id.

75. Specifically, the conversations in question were between the wife and her sister-in-law. The sister-in-law was also a plaintiff in the lawsuit against the husband.

76. Id.

77. Id. at 533. The court stated: "Absent a signal, either in the statute itself or in the legislative history, that Congress intended that the Act's criminal and civil proscriptions and

liabilities extend to a decision by a spouse to record conversations on his own residence's telephone, this court must decline to impute such an intent. Id., emphasis added.

78. Id. at 534. The court said: "Having read the statute as not extending to the interception of calls by family members within the family home, it would be anomalous to conclude that although 18 U.S.C. §2520 confers no cause of action in favor of the family member, it does confer a claim on the other party to the call." Id. Of course, by this logic, no interception by a married individual which takes place in a private home and involves a spouse would ever be actionable by the third party, regardless of the degree of harm inflicted. This cannot have been the intention of the drafters.

79. 693 F. Supp. 851 (C.D. Cal. 1988).

80. Id. at 855.

81. Id. at 855-856. In reaching its decision, the Perfit court placed particular emphasis upon the extension phone exception contained in the Act at 18 U.S.C. § 2510 (5) (a) (i) as a basis for its exclusion of interceptions within the home from the pervuew of the Act.

82. 279 S.E.2d 359 (S.C. 1981).

83. Id. at 359.

84. 18 U.S.C. § 2515 provides for the use of motions to suppress evidence of any intercepted communication, or evidence derived therefrom.

85. 279 S.E.2d at 359.

86. Id. at 360. Baumrind was followed in Martin v. Floyd, 328 S.E.2d 637(S.C. 1985).

87. 322 N.E.2d 910 (Oh. Ct. App. 1974).

88. Id. at 915.

89. 477 F. Supp. 463 (E.D. Pa. 1979).

90. Id. at 468.

91. Id.

92. The Kratz opinion referred to Simpson as "Humpty-Dumpty" jurisprudence: "When I use a word," Humpty-Dumpty said, "it means just what I choose it to mean-- neither more nor less." Lewis Carroll, *Through the Looking Glass and What Alice Found There*, Ch. VI (1871), in The Annotated Alice 269 (M. Gardner ed. 1969), cited in 477 F. Supp. at 470 n.12.

93. 477 F. Supp. 463. Other citations following Jones in the listed circuits are: In the Fourth Circuit, Pritchard v. Pritchard, 732 F. 2d 372 (4th Cir. 1984) ;in the Sixth Circuit, Flynn v. Flynn, 560 F. Supp. 922 (N.D. Ohio 1983); in the Seventh Circuit by Heyman v. Heyman, 548 F. Supp. 1041 (N.D. Ill. 1982); in the Eighth Circuit by Kempf v. Kempf, 868 F. 2d 970 (8th Cir. 1989); and in the Tenth Circuit in Heggy v. Heggy, 699 F. Supp. 1514 (W.D. Okla. 1988). As can be seen from the dates of these citations, the later cases have generally followed Jones.

94. See note 91, above.

95. 558 F.2d 677 (2d Cir. 1977).

96. Id. at 677.

97. Id.

98. The court noted:

The activity made unlawful by 18 U.S.C. § 2511 is the "interception" of a wire or oral communication. "Intercept" is defined in 18 U.S.C. §2510(4) as "the aural acquisition of the contents of any wire or oral communication *through the use of any electronic, mechanical, or other device...*"

"...electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication *other than any telephone...furnished to the ...user by a communications carrier in the ordinary course of its business and being used by the...user in the ordinary course of its business.*" 18 U.S.C. § 2510(5)(a)(i) cited in Anonymous v. Anonymous, 558 F.2d 677, 678 n.4 (2d Cir. 1977).

Also, see generally David J. Anderman, Comment, Title III at

a Crossroads: The Ordinary Course of Business in the Home, the Consent of Children, and Parental Wiretapping, 141 U. Pa. L. Rev. 2261 (1993).

99. The court specifically relied upon the partial testimony of Professor Herman Schwartz of the A.C.L.U. : "Now, we can see in certain circumstances where [the extension phone exemption] makes some sense. I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. 901 (1967), cited in Anonymous v. Anonymous, 558 F. 2d 677 (2d Cir. 1977).

100. In the Second Circuit, Anonymous was followed in Janecka v. Franklin, 684 F. Supp. 24 (S.D.N.Y. 1987).

101. 814 F. Supp. 736 (N.D. Ill. 1993).

102. 944 F.2d 1534 (10th Cir. 1991).

103. In Thompson v. Dulaney, 970 F.2d 744, 746-750 (10th Cir. 1992) the Tenth Circuit distinguished Newcombe and held the Act prohibited such parental interceptions and allowed the resulting interspousal cause of action. The Eighth Circuit has not yet ruled dispositively upon the issue, although it has been addressed in Platt v. Platt, 951 F.2d 159 (8th Cir. 1989). In Platt, the court reversed the trial court's outright dismissal of such a cause of action, remanding the action for further proceedings to develop the facts. No later citations appear.

104. Senate Report No. 99-541, 1986 United States Code Congressional and Administrative News 3563.

105. Id. at 3555.

106. 18 U.S.C. § 2510 (1).

107. 877 F.2d 705 (8th Cir. 1989).

108. Id. at 705-706.

109. Id. at 706, citing 18 U.S.C. § 2510 (2).

110. Id. See Newcomb v. Ingle, 944 F. 2d 1534 (10th Cir. 1991) (holding that the extension exception in the Act permitted the interception of a family member's phone conversation through use of an extension phone); see also Scheib v. Grant, 62 U.S.L.W.

2664 (7th Cir. April 15, 1994) (approving father's use of a telephone answering machine connected to an extension phone to record the mother's discussions with their son).

111. See Louis A. Smith, II, Comment, Pennsylvania's Constitutional Right to Privacy: A Survey of its Interpretation in the Context of Search and Seizure and Electronic Surveillance, 31 Duq. L. Rev. 557 (1993).

112. 559 N.Y.S. 2d 348 (A.D. 2 Dept. 1990).

113. Id. at 349.

114. Id. at 351.

115. Id. at 351.

116. 18 U.S.C. § 2511 (1) (c) and (d).

117. Thompson v. Dulaney, 970 F.2d 744, 749 (10th Cir. 1992).

118. Id.

119. Id.

120. 981 F.2d 1497 (6th Cir. 1992); reh'g denied, 999 F.2d 1090 (1993); cert. denied, 114 S. Ct. 1293 (1994).

121. 981 F.2d 1497.

122. Id. at 1500.

123. Id. at 1509.

124. 951 F.2d 942 (8th Cir. 1991).

125. Id. at 943.

126. Kempf v. Kempf, 677 F. Supp. 618 (E. D. Mo. 1988) (also referred to as "Kempf I").

127. Kempf v. Kempf, 868 F.2d 970 (8th Cir. 1989) (Kempf II) rev'd, 677 F. Supp. 618 (E.D. Mo. 1988) (Kempf I); Platt v. Platt, 685 F. Supp. 208 (E.D. Mo 1988) (Platt I) was reversed, but without opinion, in 873 F.2d 1447 (8th Cir. 1989) (Platt II).

128. 951 F.2d 942, 945.

129. 477 F. Supp. 463 (E.D. Pa. 1979).

130. Id. at 483, cited in Rice, 951 F.2d at 946.

131. 1968 U.S.C.C.A.N. at 2181.

132. Id. at 2187.