

**Judge Emily Miskel, 470<sup>th</sup> District Court**  
**[emilymiskel.com](http://emilymiskel.com)**

**ILLEGAL EVIDENCE:  
WIRETAPPING, HACKING,  
AND DATA INTERCEPTION**



**EMILY A. MISKEL**

**A Practical Guide to Wiretapping  
and Interception Laws for Civil  
and Family Law Attorneys**

**INTERCEPTION**

Available now on  
[Amazon.com](https://www.amazon.com)  
[Barnesandnoble.com](https://www.barnesandnoble.com)

## Wiretapping

- Federal – 18 U.S.C. 2510-2522
- Texas – Tex. Penal Code 16.02  
Tex. CPRC Ch. 123

## Stored Communications

- Federal – 18 U.S.C. 2701-2712
- Texas – Tex. Penal Code 16.04

## Unauthorized Access

- Federal – 18 U.S.C. 1030
- Texas – Tex. Penal Code 33.02  
Tex. Penal Code 33.07  
Tex. CPRC Ch. 143

# Federal Laws in State Court

- Federalism
- State courts have general jurisdiction
- State courts have inherent authority and are presumptively competent to adjudicate claims arising under federal laws

# Comparing the Acts

Wiretap Act = intercepted contemporaneously with transmission; exclusionary rule

SCA = intercepted while in electronic storage incidental to transmission

# Federal Wiretap Act

*Klumb v. Goan*, 884 F.Supp.2d 644 (E.D. Tenn. 2012):

Ex-wife placed spyware on ex-husband's computer that forwarded all of his emails to her own private account. Court held that this was a violation of the Federal Wiretap Act and that ex-husband was entitled to \$10,000 in liquidated damages.



# Federal Wiretap Act

Offense:

“intentionally intercepts...any wire, oral, or electronic communication”

“wire communication” = “aural transfer”

“oral communication” = “oral communication”

“electronic communication” = “signs, signals, writing, images, sounds, data”

# Federal Wiretap Act

## Warrants and Authorizations:

- § 2516 - Authorization for interception
- § 2517 - Authorization for disclosure and use
- § 2518 - Procedure for interception

# Federal Wiretap Act

## Cordless, Wireless, and Cellular:

- Originally considered “radio transmissions” and not protected under the Wiretap Act
- Courts held no one could have reasonable expectation of privacy in such conversations
- Act updated in 1994, Supreme Court confirmed in 2001 that the Act applies

# Federal Wiretap Act

## Offense:

- ⦿ “intentionally discloses, or endeavors to disclose, ... knowing or having reason to know that the information was obtained through interception”
- ⦿ “intentionally uses, or endeavors to use, ... knowing or having reason to know”

# Federal Wiretap Act

Attorney Personal Liability:

Using/disclosing intercepted information to:

- Create deposition questions
- Make a settlement offer
- Make a complaint to internal affairs
- Turn over intercepted recordings to DA

# Federal Wiretap Act

## Criminal Penalty:

- Fined and/or imprisoned up to 5 years

## Civil Cause of Action:

- Actual damages, or statutory damages of \$100/day or \$10,000 -- whichever is greater
- Punitive damages, equitable relief
- Attorney's fees

# Federal Wiretap Act

\$10,000:

- ⦿ Per party
- ⦿ Per violation
- ⦿ Closely-related course of conduct over relatively short time
- ⦿ Discretionary or mandatory

# Federal Wiretap Act

## Statute of Limitations:

- ⦿ Two years per offense
- ⦿ Each “use” or “disclosure” has own two-year limitations period



# Federal Wiretap Act

*Rodgers v. Wood*, 910 F.2d 444 (7<sup>th</sup> Cir. 1990):

Homeowner had recording devices installed. Police illegally made calls during search that were intercepted. Homeowner's lawyer provided tapes to DA, internal affairs, court. Officers sued lawyer, who had to pay \$20,000.

# Federal Wiretap Act

## Exceptions:

- ⦿ One-party consent
- ⦿ All-party consent
- ⦿ No spousal exception
- ⦿ Vicarious consent
- ⦿ First Amendment

# Federal Wiretap Act

## Exclusionary Rule:

“Whenever any wire or oral communication has been intercepted, no part of the contents...and no evidence derived therefrom may be received in evidence”

# Federal Wiretap Act

## Exclusionary Rule:

Applies to private conduct and gov't

Only “wire” and “oral,” not “electronic”

- Internet calls, Skype
- Text messages

# Texas Wiretap Law

Tex. Penal Code 16.02

Offense:

“intentionally intercepts...a wire, oral, or electronic communication”

“wire communication” = “aural transfer”

“oral communication” = “oral communication”

“electronic communication” = “signs, signals, writing, images, sounds, data”

# Texas Wiretap Law

## Offense:

- ⦿ Intentional disclosure, knowing or having reason to know the information was obtained through interception
- ⦿ Intentional use, if the person knows or is reckless about whether the information was obtained through interception

# Texas Wiretap Law

## Criminal Penalty:

- 2<sup>nd</sup> degree felony

# Texas Wiretap Law

Tex. Penal Code 16.02

*Elliott v. State*, 293 S.W.3d 781 (Tex.App.-Waco 2009)

Ex-wife taped conversations between her ex-husband and his adult son in which they planned to take her car keys and prevent her from using her car. She then took the recordings to the police station. No action was taken against ex-husband and son, but she was sentenced to 6 years in jail for recording a telephone conversation without consent of any of the parties to the conversation.

On appeal, she unsuccessfully made defenses of necessity and self-defense.



# Texas Wiretap Law

Tex. Penal Code 16.02

Vicarious Consent – exception for recording a child

*Alameda v. State*, 235 S.W.3d 218 (Tex.Crim.App. 2007)

Parent believed her minor child was being abused, so she recorded a telephone conversation between her minor child and the defendant/alleged abuser. Court found that the vicarious consent was proper, and it complied with case law that required that the vicariously-consenting parent have an objective, reasonable belief that consenting to the recording of the conversation on behalf of the child is in the best interest of the child.

# TX Wiretap Civil Cause of Action

TX CPRC Chapter 123

## Cause of Action:

- ⦿ Intercepts or attempts to intercept a communication
- ⦿ Uses or divulges information – knows or reasonably should know was obtained by interception

# TX Wiretap Civil Cause of Action

“Communication”:

- ⦿ Speech uttered by a person
- ⦿ Information (including speech) that is transmitted with the aid of a wire or cable

# TX Wiretap Civil Cause of Action

- Injunction,
- Statutory damages of \$10,000 per occurrence,
- Actual damages in excess of \$10,000,
- Punitive damages, AND
- Attorney's fees

# TX Wiretap Civil Cause of Action

- ⦿ Federal statute uses “may” in damages provision, damages can be discretionary
- ⦿ Texas cause of action states a person is entitled to \$10,000 for each occurrence

# Federal Stored Comm. Act

## Offense:

- Intentionally accesses
- Without authorization, or exceeds authorization
- And obtains access to a wire or electronic communication
- While it is in electronic storage

# Federal Stored Comm. Act

“Electronic storage”:

Temporary, intermediate storage of a wire or electronic communication incidental to its electronic transmission

# Federal Stored Comm. Act

## Protected:

- ⦿ “Temporary, intermediate storage”
- ⦿ “Backup storage”

## Not Protected:

- ⦿ “Post-transmission storage”



# Federal Stored Comm. Act

## Criminal Penalty:

- ⦿ 1<sup>st</sup> offense – fined, imprisoned up to 5 years
- ⦿ Subsequent – fine, imprisoned up to 10 years

## Civil Cause of Action:

- ⦿ Actual damages not less than \$1,000
- ⦿ Punitive damages, equitable relief
- ⦿ Attorney's fees

# Federal Stored Comm. Act

*Miller v. Meyers*, 766 F.Supp.2d 919, 923  
(W.D.Ar.2011)

Ex-husband placed key-logging software on ex-wife's computer during divorce. The software allowed him to discover various passwords which he then used to access her email account. He used information he found in her email account against her, and admitted all this to the court. Summary judgment as to his liability for violating the Stored Communications Act was awarded by the court, with damages to be determined at trial.

# Federal Stored Comm. Act

*Bailey v. Bailey*, 2008 WL 324156 at \*4 (E.D. Mich., Feb. 6, 2008).

H used key-logging software to acquire W's email password, accessed her email, and discovered sexual communications with various individuals. H shared emails with his attorney (co-Defendant) who sent them to W's attorney for W to admit or deny their authenticity. W then sued H and his attorney for violating the Wiretap Act and the Stored Communications Act.

# Federal Stored Comm. Act

*Bailey v. Bailey*, 2008 WL 324156 at \*4 (E.D. Mich., Feb. 6, 2008).

## Holding:

- H's MSJ granted as to Wiretap Act because the emails were not viewed by H contemporaneously with their transmission (he read them after she had already opened them).
- H's MSJ denied as to Stored Communications Act claim; Court disagreed with his interpretation of whether accessed emails were in "electronic storage."

# Texas Stored Comm. Law

Tex. Penal Code 16.04

## Criminal Penalty:

- State jail felony

# Federal Comp. Fraud & Abuse Act

- ⦿ Intentionally access a computer without authorization or exceeds authorized access and obtains information from any protected computer
- ⦿ + with intent to defraud
- ⦿ + causes damage
- ⦿ + with intent to extort

# Federal Comp. Fraud & Abuse Act

## ◎ Crime

- Penalties range from 1 year to life
- Forfeiture provision – the court “shall” order the forfeiture of any personal property used to commit the violation and any real or personal property derived as a result of the violation

# Federal Comp. Fraud & Abuse Act

## ⦿ Civil Cause of Action

- Actual damages only
- Includes response costs of employees
- No exemplary damages, minimum statutory damages, or attorney's fees



# Texas Computer Security Law

Tex. Penal Code 33.02

## Offense:

knowingly accesses a computer, network,  
or system without the effective consent  
of the owner

# Texas Computer Security Law

## Criminal Penalty:

- Amt. involved < \$20,000 – state jail felony
- < \$100,000 – 3<sup>rd</sup> degree felony
- < \$200,000 – 2<sup>nd</sup> degree felony
- > \$200,000 – 1<sup>st</sup> degree felony
  
- If not to “harm another” - misdemeanor

# Texas Computer Security Law

Tex. Penal Code 33.02

*Mitchell v. State*, 12 S.W.3d 158, 159 (Tex.App.-Dallas 2000, no pet.):

On her last day of work at the Dallas Fire Department, Defendant (a disgruntled employee) corrupted department documents on her work computer as retaliation. As a result of her actions, the department was forced to have the documents recreated at a cost of \$1,400. The court found that because she was not authorized to access these documents for the purpose of corrupting them, her conduct was in violation of Tex. Penal Code 33.02.

# TX Online Impersonation Law

Tex. Penal Code 33.07

## Offense:

- Use the name or persona of a person to create a website, post, or send messages
- With the intent to harm or defraud

# TX Online Impersonation Law

## Criminal Penalty:

- ⦿ Class A misdemeanor
- ⦿ Third-degree felony

# TX Online Impersonation Law

Tex. Penal Code 33.07

*Taylor v. State*, No. 02-11-00092-CR (Tex.App.-Fort Worth Mar. 22, 2012) (memo. op.):

Man sends creepy packages and communications to woman. When caught and charged, he said he had no intent to harm, only to test victim's professed psychic abilities.

# TX Civil Cause of Action

Tex. CPRC Ch. 143

- ⦿ Knowing or intentional violation of Ch. 33 of the Penal Code
- ⦿ Breach of computer security, online impersonation
  
- ⦿ Actual damages
- ⦿ Attorney's fees

# TX Revenge Porn Law

Tex. Penal Code 21.16

## SB 1135

### Offense:

- Discloses without effective consent visual material of intimate parts or sexual conduct
- Visual material was obtained under circumstances where depicted person had reasonable expectation of privacy
- Disclosure causes harm
- Disclosure reveals identity



# TX Revenge Porn Law

Tex. Penal Code 21.16

## SB 1135

### Criminal Penalty:

- Class A misdemeanor

# TX Revenge Porn Law

CPRC Ch. 98B

## SB 1135

### Damages:

- Actual damages, including mental anguish
- Court costs and attorney's fees
- Exemplary damages
- Injunctions