

**REVENGE PORN AND OTHER NEW CAUSES OF ACTION  
FOR FAMILY LAW**

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State Bar of Texas  
**FAMILY LAW & TECHNOLOGY:**  
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December 8-9, 2016  
Austin

**CHAPTER 3**

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Board Certified, Family Law — Texas Board of Legal Specialization

Super Lawyers Rising Star, 2012, 2013, 2014, 2015

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Young Lawyer of the Year, 2010-2011, Collin County Young Lawyers Association

## PROFESSIONAL AFFILIATIONS

Henderson Inn of Court, Barrister

Texas Academy of Family Law Specialists, Member

Harvard Club of Dallas, Vice President—Law School, Centennial Committee Member

Stanford Club of Dallas Fort Worth, Member

Collaborative Law: Basic Training, 2009; Interdisciplinary Training, 2013

Mediation: Mediator Training, 2009; Family Law Mediator Training, 2010

## SPEECHES AND PUBLICATIONS

Author of the book *INTERCEPTION: A PRACTICAL GUIDE TO WIRETAPPING AND INTERCEPTION LAWS FOR CIVIL AND FAMILY LAW ATTORNEYS* (Amazon 2014, Barnes & Noble 2015).

### **2016**

*Effectively Presenting Your Case in Court*, Frisco Bar Association (2016).

*Working With Courts to Make Practice Management Easier*, Law Practice Management Section, Collin County Bar Association (2016).

*Presentation of Electronic Evidence*, Collin County Bench Bar Conference (2016).

*Everything You Always Wanted to Ask a Judge but Were Afraid They Would Know It Was Me*, Family

Law Section, Collin County Bar Association (2016).

*SAPCR Overview – Presumptions, Burdens, Statutes, and Case Law*, Family Law Section, Collin County Bar Association (2016).

*Wiretapping & Data Interception in Civil and Family Law Cases*, Circuits newsletter, Computer & Technology Section, State Bar of Texas (2016).

*A New Judge's Lessons from the Bench: What I Wish I Knew While Practicing*, Civil Litigation/Appellate

Section, Collin County Bar Association (2016).

## **2015**

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*Wiretapping and Data Interception in Civil and Family Law Cases*, Dallas Bar Association Headnotes (2015).

*Inside the Justice System*, Harvard Club of Dallas (2015).

*Wiretapping*, Collin County Criminal Defense Lawyers Association (2015).

*Admissibility of Electronic Evidence: Present and Future Considerations*, 2015 Annual Judicial Education Conference, Texas Center for the Judiciary (2015).

*Electronically Stored Information A-Z: Acquire, Evaluate, Admit*, Advanced Family Law Course, State Bar of Texas (2015), co-author.

*Illegal Evidence*, Plano Bar Association (2015).

*Electronic Eavesdropping and Interception*, Collin County Bench Bar Conference (2015).

*Interception*, Texas Association of Family Law Specialists Newsletter, Vol. 31, Issue 1, Winter 2015.

*Admissibility of Digital Evidence in a Family Case*, Family Justice Conference, Texas Center for the Judiciary (2015).

## **2014**

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*Don't Hack Me Bro: Social Media, Wiretapping, and Intercepted Evidence in Family Law Situations (Federal & State)*, Family Law Technology 360 Course, State Bar of Texas (2014).

*Representing the Growing Family-Owned Business*, Advanced Business Law Course, State Bar of Texas (2014), co-author.

*SAPCR Overview – Presumptions, Burdens, Statutes, and Case Law*, Advanced Family Law Course, State Bar of Texas (2014).

*The Trial of a Family Law Jury Case*, Advanced Family Law Course, State Bar of Texas (2014) (with John Nichols).

*Social Media, Wiretapping, and Intercepted Evidence*, Advanced Criminal Law Course, State Bar of Texas (2014).

*Pro Bono Divorce Clinic*, Dallas Volunteer Attorney Program (2014).

*Real-World Evidence Traps*, Texas A&M Law Clinic (2014).

*Authenticating Social Media – Admissibility*, 2014 Spring Judicial Education Session, Texas Assoc. of Counties (2014).

*Handling Special Property Division Issues*, Advanced Family Law Practice for Paralegals: Handling Financial Issues at a Higher Level, HalfMoon

Education (2014).

*Financial Issues and Same-Sex Marriage after U.S. v. Windsor*, Advanced Family Law Practice for Paralegals: Handling Financial Issues at a Higher Level, HalfMoon Education (2014).

*Illegal Evidence: Wiretapping, Hacking, and Data Interception Laws, Sex, Drugs & Surveillance Course*, State Bar of Texas (2014).

## **2013**

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Planning Committee, Sex, Drugs & Surveillance Course, State Bar of Texas (2013-2014).

*Authenticating Social Media – Admissibility*, Fall Judicial Education Session, Texas Judicial Academy (2013).

*Property Issues in Divorce*, How to do a Pro Bono Divorce, Texas Young Lawyers Association (2013).

*The Mental Health Privilege in Divorce and Custody Cases*, Journal of the American Academy of Matrimonial Lawyers, Vol. 25, No. 2 (2013), co-author.

*What Every Business Attorney Needs to Know About Family Law*, Essentials of Business Law, State Bar of Texas (2013), co-author.

*Representing Yourself in a Divorce, a Guide from the Dallas Bar Association*, Dallas Volunteer Attorney Program (2013), co-author.

*Electronic Evidence Cases Every Family Lawyer Should Know*, Dallas County Bar Association, Dallas County Family Law Bench Bar (2013), co-author.

*Social Media Evidentiary Issues*, 2013 Winter Regional Conferences, Texas Center for the Judiciary (2013).

## **2012**

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*Non-Parent Custody*, Dallas Volunteer Attorney Program, Dallas Bar Association, (2012).

*Preparing Marital Settlement Agreements*, Texas Family Law Practice for Paralegals, (2012).

*Evidence Traps - Recordings, Intercepted Communications, and Other Illegal Evidence*, Arlington Bar Association (2012).

*Inventories and Internet Resources*, Advanced Family Law Course, State Bar of Texas (2012) (with Rick Robertson and Reggie Hirsch).

*Electronic Evidence*, Texas Bar College Summer School, State Bar of Texas (2012).

*Family Law Legislative and Case Update*, Collin County Bench Bar Conference (2012), co-author.

**More publications are available at [emilymiskel.com](http://emilymiskel.com)**

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## REVENGE PORN AND OTHER NEW CAUSES OF ACTION FOR FAMILY LAW.

This paper covers claims that may be relevant in family law cases, including crimes in the Penal Code and causes of action in the Civil Practice and Remedies Code. Many of these claims are connected with electronic misbehavior that is becoming more and more common in family law cases.

### I. TRACKING DEVICE

#### A. Crime – Tex. Pen. Code §16.06

A person commits an offense if the person knowingly installs an electronic or mechanical tracking device on a motor vehicle owned or leased by another person.

An offense under this section is a Class A misdemeanor.

Commonly, this crime is restated among family lawyers as “you can’t install a tracking device on a car you don’t own.” This phrasing implies that a person may lawfully install a tracking device on a vehicle that is in joint names. However, the actual offense states that it is an offense to install a tracking device on a vehicle owned or leased by another person. A strict reading of this would indicate that installing a tracking device on a jointly-owned vehicle may still be an offense, since that vehicle is owned/leased in part by another person. There is no case law interpreting this.

#### B. Civil Causes of Action

There is no specific civil cause of action for this criminal statute. Persons who are harmed by the installation of a tracking device would have to look at general civil tort claims, such as invasion of privacy, trespass, etc.

#### C. Cases

*Ex parte Dupuy*, Nos. 14-15-00677-CR, 14-15-00678-CR (Tex.App.—Houston [14<sup>th</sup> Dist.] 2016). In this criminal case, the opinion refers to the defendant’s behavior in connection with his divorce case. The defendant was accused of sending numerous anonymous text messages to the attorney ad litem representing his children in the divorce. He also placed a GPS tracking device on a car belonging to his ex-wife’s attorney in their divorce. The court stated that that act may lead to a criminal charge as well.

*Werner v. State*, Nos. 01-11-00464-CR, 01-11-00465-CR (Tex.App.—Houston [1<sup>st</sup> Dist.] 2014). Criminal charges resulted from a man placing multiple tracking devices on his ex-girlfriend’s vehicle and stalking her. Admissibility of (1) statements by persons who found tracking devices, (2) the tracking devices themselves, and (3) the website printouts logging the location and speed of the tracking devices are all separate and independent issues. Unlawful installation of a tracking device is not a lesser included offense of stalking.

### II. PEEPING

#### A. Crime – Tex. Pen. Code §42.01(a)(11)

A person commits a Class C misdemeanor criminal offense if that person, for a lewd or unlawful purpose:

- (A) enters on the property of another and looks into a dwelling on the property through any window or other opening in the dwelling;
- (B) while on the premises of a hotel or comparable establishment, looks into a guest room not the person's own through a window or other opening in the room; or
- (C) while on the premises of a public place, looks into an area such as a restroom or shower stall or changing or dressing room that is designed to provide privacy to a person using the area.

This crime may very well apply in family law cases where one party monitors the other party inside the other party’s dwelling. While the statute implies that the purpose must be sexual, the offense itself refers to *unlawful* purposes. It is unlawful to violate injunctions, so monitoring a party in violation of an injunction giving that party exclusive and private possession of his/her residence could be a crime as well.

#### B. Civil Causes of Action

There is no specific civil cause of action for this criminal statute, but civil tort claims such as invasion of privacy or trespass may apply.

**C. Cases**

There are no reported cases on this statute.

**III. HARASSMENT****A. Crime – Tex. Pen. Code § 42.07(a)**

A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:

- (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;
- (2) threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of the person's family or household, or the person's property;
- (3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;
- (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
- (5) makes a telephone call and intentionally fails to hang up or disengage the connection;
- (6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or
- (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Offenses under this section are Class B misdemeanors, but can be Class A if the person has previous convictions.

**B. Civil Causes of Action**

If the harassing person is subject to a restraining order, a victim may bring a suit for damages under chapter 85 of the Civil Practices and Remedies Code, discussed more thoroughly below. Civil tort claims such as invasion of privacy or intentional infliction of emotional distress may also apply. A threat to inflict imminent bodily injury may support a civil cause of action for assault.

**C. Cases**

*Futerfas v. Park Towers*, 707 S.W.2d 149, 156-57 (Tex.App.—Dallas 1986, writ ref'd nre.). In this civil case between a nightclub owner and an alleged conspiracy of nearby residents, the court stated that harassing phone calls can violate both criminal law and civil law (invasion of privacy – intrusion upon seclusion).

*Household Credit Servs., Inc. v. Driscoll*, 989 S.W.2d 72, 85 (Tex.App.-El Paso 1998, pet. denied). Plaintiffs won an \$11.7 million judgment against debt collectors for invasion of privacy for harassing phone calls. The appellate court noted the harassment statute, 42.07(a)(4) in concluding that evidence supported the judgment.

*Scott v. State*, 322 S.W.3d 662 (Tex.Crim.App. 2010). The Court of Criminal Appeals held that 42.07(a)(4) (telephone harassment) is not unconstitutionally vague and does not violate the First Amendment.

**IV. STALKING, OR HARASSING IN VIOLATION OF A RESTRAINING ORDER****A. Crime – Tex. Pen. Code § 42.072**

A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:

- (1) constitutes an offense under Section 42.07 (harassment), or that the actor knows or reasonably should know the other person will regard as threatening:
  - (A) bodily injury or death for the other person;
  - (B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; **or**
  - (C) that an offense will be committed against the other person's property;
- (2) causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense

will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; **and**

- (3) would cause a reasonable person to:
- (A) fear bodily injury or death for himself or herself;
  - (B) fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship;
  - (C) fear that an offense will be committed against the person's property; **or**
  - (D) feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

An offense under this section is a 3<sup>rd</sup> degree felony, or a 2<sup>nd</sup> degree felony if the stalker has previous convictions.

## B. Civil Cause of Action – CPRC Ch. 85

A defendant is liable to the stalking victim for damages. In the civil cause of action, a claimant proves stalking against a defendant by showing:

- (1) on more than one occasion the defendant engaged in harassing behavior;
- (2) as a result of the harassing behavior, the claimant reasonably feared for the claimant's safety or the safety of a member of the claimant's family; **and**
- (3) the defendant violated a restraining order prohibiting harassing behavior **or**:
  - (A) the defendant, while engaged in harassing behavior, by acts or words threatened to inflict bodily injury on the claimant or to commit an offense against the claimant, a member of the claimant's family, or the claimant's property;
  - (B) the defendant had the apparent ability to carry out the threat;
  - (C) the defendant's apparent ability to carry out the threat caused the claimant to reasonably fear for the claimant's safety or the safety of a family member;
  - (D) the claimant at least once clearly demanded that the defendant stop the defendant's harassing behavior;
  - (E) after the demand to stop by the claimant, the defendant continued the harassing behavior; and
  - (F) the harassing behavior has been reported to the police as a stalking offense.

The claimant must, as part of the proof of the behavior, submit evidence other than evidence based on the claimant's own perceptions and beliefs. A claimant who prevails in a suit under this chapter may recover actual damages and exemplary damages.

Although the cause of action is called “stalking,” it provides relief in broader cases. For example, if the defendant engaged in harassing behavior, the claimant feared for her safety, and the defendant violated a restraining order prohibiting harassing behavior, that may entitle the claimant to bring a suit under this chapter.

## C. Cases

*Clements v. State*, 19 S.W.3d 442 (Tex.App.-Houston [1st Dist.] 2000, no pet.). Husband was stalking and harassing wife, repeatedly calling her at work, leaving phone messages, and following her. The wife filed for divorce, and the husband answered, stating that only death or the return of Christ could end their marriage. The husband was thereafter convicted of stalking. He appealed, challenging that the statute was unconstitutionally vague and violated the First Amendment, but the court of appeals upheld the statute.

## V. ONLINE IMPERSONATION

### A. Crime – Tex. Pen. Code § 33.07

There are two types of online impersonation in the Penal Code. The first refers to online postings:

A person commits an offense if the person, without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to:

- (1) create a web page on a commercial social networking site or other Internet website; or
- (2) post or send one or more messages on or through a commercial social networking site or other Internet website, other than on or through an electronic mail program or message board program.

This type of online impersonation is a 3<sup>rd</sup> degree felony.

The second type of online impersonation refers to sending communications such as emails or texts:

A person commits an offense if the person sends an electronic mail, instant message, text message, or similar communication that references a name, domain address, phone number, or other item of identifying information belonging to any person:

- (1) without obtaining the other person's consent;
- (2) with the intent to cause a recipient of the communication to reasonably believe that the other person authorized or transmitted the communication; and
- (3) with the intent to harm or defraud any person.

This type of online impersonation is a Class A misdemeanor, or a 3<sup>rd</sup> degree felony if targeted at emergency personnel.

#### **B. Civil Cause of Action – CPRC Ch. 143**

A person injured by online impersonation can sue if the violation was knowing or intentional. The plaintiff can sue for actual damages, attorney's fees, and costs.

#### **C. Cases**

*Ex Parte Bradshaw*, No. 05-16-00570-CR (Tex.App.—Dallas Aug. 23, 2016). A man was charged with using another man's name or persona to send messages through manhunt.net. He filed a pre-trial application for a writ of habeas corpus, alleging the online impersonation statute was unconstitutionally vague and overbroad. The court held that it does not restrict protected speech, and to the extent it does, it survives intermediate scrutiny.

*Taylor v. State*, No. 02-11-00092-CR (Tex.App.—Fort Worth Mar. 22, 2012). A man was convicted of online impersonation. On appeal, he unsuccessfully alleged that he did not have an "intent to harm" the victim but was merely testing her psychic abilities.

### **VI. INVASIVE VISUAL RECORDING**

#### **A. Crime – Tex. Pen. Code § 21.15**

This offense has also been known as improper photography. In 2014, the Court of Criminal Appeals struck down the then-existing improper photography statute as unconstitutional. *Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014). That version of the statute prohibited photographs or video taken without consent and "with intent to arouse or gratify the sexual desire of any person." The court held that this was a regulation of protected thought and was outside the government's power.

The Texas Legislature immediately revised the statute in 2015. The new offense provides that a person commits an offense if, without consent and with intent to invade privacy, the person:

- (1) photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of an intimate area of another person if the other person has a reasonable expectation that the intimate area is not subject to public view;
- (2) photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another in a bathroom or changing room; **or**
- (3) knowing the character and content of the photograph, recording, broadcast, or transmission, promotes a photograph, recording, broadcast, or transmission described by Subdivision (1) or (2).

An offense under this section is a state jail felony.

#### **B. Civil Cause of Action**

There is no specific civil cause of action for this criminal statute, but civil tort claims such as invasion of privacy or intentional infliction of emotional distress may apply.

#### **C. Cases**

Because the statute has been so recently amended, appellate cases are not yet available interpreting the new law.

### **VII. VOYEURISM**

#### **A. Crime – Tex. Pen. Code § 21.16**

A person commits an offense if the person:

- with the intent to arouse or gratify sexual desire

- observes another person without consent
- while the other person is in a dwelling or structure in which the other person has a reasonable expectation of privacy.

This offense is a Class C misdemeanor. If there are previous convictions or if the victim is under 14, the penalties can be more severe.

**B. Civil Cause of Action**

There is no specific civil cause of action for this criminal statute, but civil tort claims such as invasion of privacy or trespass may apply.

**C. Cases**

There are no reported cases interpreting this provision of the Penal Code.

**VIII. REVENGE PORN**

**A. Crime – Tex. Pen. Code § 21.16**

In 2015, the Texas Legislature passed new statutes relating to revenge porn. Confusingly, there are now two sections labelled 21.16.

A person commits the offense of “unlawful disclosure or promotion of intimate visual material” by disclosing, threatening to disclose, or promoting what is commonly referred to as “revenge porn.”

A person commits an offense by disclosing revenge porn if:

- (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
- (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
- (3) the disclosure of the visual material causes harm to the depicted person; **and**
- (4) the disclosure of the visual material reveals the identity of the depicted person in any manner...

A person commits an offense by threatening to disclose revenge porn:

if the person intentionally threatens to disclose, without the consent of the depicted person, visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct and the actor makes the threat to obtain a benefit:

- (1) in return for not making the disclosure; or
- (2) in connection with the threatened disclosure.

A person can also commit an offense by promoting revenge porn:

if, knowing the character and content of the visual material, the person promotes the visual material on an Internet website or other forum for publication that is owned or operated by the person.

An offense is a Class A misdemeanor.

**B. Civil Cause of Action – CPRC Ch. 98B**

In 2015, the Texas Legislature also created a cause of action for victims of revenge porn.

A defendant is liable to a person depicted in intimate visual material for damages arising from the disclosure of the material if:

- (1) the defendant discloses the intimate visual material without the effective consent of the depicted person;
- (2) the intimate visual material was obtained by the defendant or created under circumstances in which the depicted person had a reasonable expectation that the material would remain private;
- (3) the disclosure of the intimate visual material causes harm to the depicted person; **and**
- (4) the disclosure of the intimate visual material reveals the identity of the depicted person in any manner...

A defendant is liable to a person depicted in intimate visual material for damages arising from the promotion of the material

if knowing the character and content of the material, the defendant promotes intimate visual material...on an Internet website or other forum for publication that is owned or operated by the defendant.

A plaintiff can sue for actual damages, mental anguish damages, attorney's fees, and exemplary damages. A court can also grant injunctions against the disclosure or promotion, and the code provides for statutory damages of \$500-\$1,000 for each violation of such an injunction.

### C. Cases

These new laws took effect in 2015. Because they are so new, appellate cases interpreting them are not yet available.

A Houston woman won a \$500,000 jury verdict on an intentional infliction of emotional distress claim for revenge porn in 2014, before the specific criminal offense and cause of action were created.<sup>1</sup>

## IX. TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE

### A. Crime – Tex. Pen. Code § 37.09

Family law practitioners are more familiar with addressing the destruction of relevant evidence through a spoliation claim. However, tampering with evidence is a crime under the Texas Penal Code.

A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

- (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or
- (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

An offense is a 3<sup>rd</sup> degree felony.

### B. Civil Cause of Action

The civil remedy for destruction of evidence is spoliation. Texas does not recognize an independent cause of action for evidence spoliation by persons who are parties to the underlying lawsuit. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex.1998). Civil remedies for spoliation include presumptions and sanctions within the trial process.

### C. Cases

*Williams v. State*, 270 S.W.3d 140 (Tex.Crim.App. 2008). Conviction requires knowledge of a pending proceeding and intent to impair a thing's availability as evidence. The defendant was convicted and sentenced to 25 years for destroying a crack pipe.

## X. FEDERAL CLAIMS IN STATE COURT

Many of the laws discussed below are federal laws. These federal laws are still relevant to attorneys who practice exclusively in state court because these federal claims may be brought in state court. For example, it is possible to add a federal Wiretap Act civil claim to a divorce case. State courts are courts of general jurisdiction, and they have concurrent jurisdiction to hear cases arising under federal law.

## XI. Federal Wiretap Act – 18 U.S.C. §§ 2510-2522

The Wiretap Act generally sets forth four categories of offenses that are relevant to family law practitioners: interception of communications, use of "bugs" to intercept communications, use of intercepted communications, and disclosure of intercepted communications. The Wiretap Act also contains a civil cause of action and a strict exclusionary rule.

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<sup>1</sup> Available at: <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php>

**A. Interception.**

The Wiretap Act is violated when any person intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication. The offense occurs when the communication is intercepted. A telephone conversation that is recorded, but not necessarily listened to, is still an “interception” under the Act.

**B. Definitions.**

A “wire” communication must be “aural,” or spoken by a human. Typically, “oral” communications include face-to-face communications where the participants have a reasonable expectation of noninterception. Unlike oral communications, wire communications are protected against interception regardless of the speaker’s expectation of privacy. “Electronic” communications are non-voice communications, such as e-mails or text messages. Video surveillance that does not capture audio is not an interception because no aural acquisition occurs.

**C. Use or Disclosure Violations.**

The Wiretap Act is also violated when any person “uses” or “discloses” the contents of an intercepted communication. The Wiretap Act prohibits the disclosure of “any information concerning the substance, purport, or meaning of that communication.” Therefore, even revealing the general nature of a communication may constitute an actionable disclosure. However, a person must know or have reason to know of the interception in order to commit a use or disclosure violation.

**D. Consent.**

The Wiretap Act contains an explicit exception for communications recorded with the consent of one of the parties to the communication. Under federal law and the laws of 38 states (including Texas), any person may record any conversation to which he or she is a party. Twelve states, however, require that all parties must consent to a recording. If a call is conducted across state lines, the law of the stricter state applies.

**E. Vicarious consent.**

A common fact pattern in family law involves one parent who records communications between the child and the other parent. Where the parent has a good faith, objectively reasonable belief that the recording is necessary for the welfare of the child, a vicarious consent exception to the Wiretap Act will make such recordings permissible.

**F. Civil and Criminal Penalties.**

Criminal penalties for a violation of the Wiretap Act include a fine, imprisonment up to five years, or both. The Wiretap Act also provides a civil cause of action. The Wiretap Act provides for civil remedies including equitable relief (injunctions), statutory damages of \$10,000, punitive damages, and reasonable attorney’s fees.

**G. Exclusionary Rule.**

The Wiretap Act contains a strict exclusionary rule, prohibiting intercepted wire or oral communications from being used in any proceeding. Electronic communications are not covered by the exclusionary rule.

**H. Attorney Liability.**

An attorney can have personal criminal and civil liability for using or disclosing an improper recording made by a client. For example, the following can be separate and independent wiretap violations: (1) attorney’s use of information in pleadings, (2) attorney’s use of information to form deposition questions, (3) attorney’s use of information in cross-examination, and (4) attorney turning over intercepted communications to a prosecutor. Further, the crime-fraud exception to the attorney-client privilege means that attorney-client communications about wiretapped communications are not privileged.

**XII. TEXAS WIRETAPPING LAW – TEX. PENAL CODE § 16.02, CPRC CH. 123**

Texas has its own state wiretapping law, contained in the Texas Penal Code. The offenses and definitions generally parallel the federal Wiretap Act, although Texas added an offense for effecting a covert entry for the purpose of intercepting communications.

A violation of the Texas wiretap law is a felony. The Texas Civil Practice and Remedies Code contains a civil cause of action for interception of communication. Under the Texas cause of action, a person is entitled to minimum statutory damages of \$10,000 for each interception plus punitive damages and attorney’s fees.

### **XIII. OVERLAP BETWEEN WIRETAP ACT AND STORED COMMUNICATIONS ACT**

The Wiretap Act applies only to data intercepted contemporaneously with transmission. Stored e-mail cannot be intercepted under the Wiretap Act. The Stored Communications Act applies to data in electronic storage and thus provides broader protection against data interception. However, the Stored Communications Act does not contain an exclusionary rule and does not provide for as much in statutory damages as the Wiretap Act.

### **XIV. FEDERAL STORED COMMUNICATIONS ACT – 18 U.S.C. §§ 2701-2712**

The Stored Communications Act prohibits unauthorized access to electronic communications. The Act also creates privacy protections for online users and online content by limiting the ability of service providers to disclose information. While the Wiretap Act focuses on interceptions that happen contemporaneously with transmission, the Stored Communications Act focuses on accessing communications in electronic storage.

#### **A. Electronic Storage.**

A threshold issue for the Stored Communications Act is whether a communication is in “electronic storage.” Courts have struggled to define “temporary, intermediate storage” in the context of how data is stored and transmitted over the internet. For example, it is not a violation to obtain answering machine messages located on a physical recorder, but it is a violation to access voicemail messages stored on a telecommunications system. Similarly, the Stored Communications Act is not violated when someone access emails that are stored locally on a computer, but it can be a violation to access webmail that is stored on the internet. There is some disagreement among courts about whether e-mail that is intercepted after it has been received and read is in “temporary, intermediate storage,” “backup storage,” or “post-transmission storage.” The first two categories would be protected under the Stored Communications Act, while the third would not.

#### **B. Civil and Criminal Penalties.**

The Stored Communications Act has both criminal and civil penalties. The civil cause of action allows a party to recover minimum statutory damages of \$1,000, punitive damages, and reasonable attorney’s fees and litigation costs.

#### **C. No Exception for Civil Subpoenas.**

The Stored Communications Act prohibits a public service provider from divulging the contents of user communications even in response to a civil subpoena. Therefore, an attorney cannot obtain user content by subpoenaing Facebook or text messages by subpoenaing the phone carrier.

### **XV. TEXAS STORED COMMUNICATIONS LAW – TEX. PENAL CODE § 16.04**

Texas has its own law regarding unlawful access to stored communications. The Texas law is virtually identical to the federal law. If the offense is committed to obtain a benefit or to harm another, it is a felony; otherwise, it is a misdemeanor.

### **XVI. FEDERAL COMPUTER FRAUD AND ABUSE ACT – 18 U.S.C. § 1030**

The Computer Fraud and Abuse Act prohibits unauthorized access to computers. The law contains both criminal and civil causes of action.

#### **A. Definitions.**

As used in the Computer Fraud and Abuse Act, a “computer” is broadly defined to include any data processing device, including computers, tablets, cellphones, and any other device that connects to the internet. A “protected computer” under the Act effectively includes all devices with internet access.

#### **B. Usage Violations.**

Violations of the Computer Fraud and Abuse Act are often defined in terms of accessing computer “without authorization” or by “exceeding authorized access.” There is significant disagreement among federal circuits as to what conduct constitutes access without authorization or access that exceeds authorization. Some federal courts have held that a person violates federal law when the person uses a computer or web services in violation of the provider’s usage policies. Other courts have held that such an interpretation is way too broad, and have limited the offense to situations where the person completely lacked authorization to a particular device or file. Recently, concerned about prosecutorial abuse of the Computer Fraud and Abuse Act, lawmakers have introduced bills to exclude “terms of service” violations from the Act.

**C. Forfeiture.**

The Act includes a severe forfeiture provision. If a person is convicted of a violation of the Computer Fraud and Abuse Act, the court “shall” order the forfeiture of any personal property used to commit or facilitate the violation and any property, real or personal, derived from any proceeds obtained directly or indirectly as a result of the violation.

**D. Civil Claim.**

A person who suffers damage or loss by reason of a violation of the Computer Fraud and Abuse Act may maintain a civil action to obtain: (1) compensatory damages, (2) injunctive relief, and (3) other equitable relief. Unlike the other federal statutes discussed previously, this civil action does not provide for minimum statutory damages, punitive or exemplary damages, or attorney’s fees.

**XVII. TEXAS BREACH OF COMPUTER SECURITY LAW – TEX. PENAL CODE § 33.02, CPRC CH. 143**

The Texas Penal Code contains a criminal offense for breach of computer security. A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

Texas has a civil cause of action for a person who is injured or whose property is injured by an intentional or knowing violation of Texas’s breach of computer security or online impersonation laws. The civil cause of action permits a person to recover actual damages and reasonable attorney’s fees and costs.

**XVIII. ADMISSIBILITY OF ILLEGALLY-OBTAINED EVIDENCE**

Many of these crimes do not have specific causes of action, and prosecutors are not going to prosecute every incident. However, there is one additional way that these offenses may be useful in litigating family law cases.

Texas law provides that illegally-obtained evidence is not admissible in *criminal* trials. *See* Tex. Code Crim. Proc. Art. 38.23. No law excludes illegally-obtained evidence in civil trials. *Baxter v. Tex. Dept. of Human Resources*, 678 S.W.2d 265, 267 (Tex.App.—Austin 1984, no writ); *see also In re Z.C.J.L.*, Nos. 14-13-00115-CV, 14-13-00147-CV (Tex.App.—Houston [14<sup>th</sup> Dist.] July 9, 2013).

Many courts are reluctant to admit illegally-obtained evidence. At trial, an attorney hoping to exclude evidence could argue under Tex. R. Evid. 403 that illegally-obtained evidence should be excluded and that the probative value is substantially outweighed by a danger of unfair prejudice. It is arguably unfair that the fruits of crimes could be used in litigation to damage the victim. Any probative value the evidence may have may be substantially outweighed by the danger of unfair prejudice caused by a party’s intentional law-breaking and his/her attempts to use the illegally-obtained evidence.

Lastly, an attorney opposing the admission of illegally-obtained evidence could make a public policy argument that the Court should not reward or incentivize law-breaking behavior.