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Are You or Your Clients Violating State or Federal Wiretapping Laws?

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Anthony Pellicano, the notorious private investigator to the stars, is now serving a 15 year prison sentence in a federal penitentiary arising from his illegal wiretapping, done at the behest of his clients. Many of his employers, including powerhouse lawyer Terry Christensen, face prison time or severe civil penalties for their role in the wiretapping scheme. Undoubtedly, this scandal, which has taken a large toll on the Los Angeles legal community, represents an extreme example of illegal wiretapping conduct. Nonetheless, the general legal public has scarce knowledge of the federal and state laws relating to eavesdropping and wiretapping.

The severity of California's concern for wiretapping is illustrated by the fact that the civil and criminal penalties for wiretapping are found in the California Penal Code. Under California law, if an individual is found to have aided, agreed with, employed, or conspired with any person to permit or cause any wiretapping the individual is subject to a $2,500 criminal fine and up to one year in prison. In addition, the victim is entitled to $5,000 in civil damages for each violation of the statute. Under federal wiretapping laws, civil penalties either the damages suffered by the victim or $100 dollars per day up to $10,000, plus punitive damages and litigation costs are also available under the federal statute. Federal criminal wiretapping penalties include criminal fines and up to five years of jail time.

Under California law, all parties to a telephone conversation must provide their consent to have their conversations recorded, unless the recordation is made under circumstances where there is no expectation of privacy. This is known as the "two-party" rule. By contrast, under federal privacy law, as well as the law followed by the majority of states, civil and criminal liability hinges on the "one-party" rule. Under the "one-party" rule, if at least one party to a telephone call agrees to record the call, it is absolutely legal to record that call. California and 11 other states (Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan,

Montana, Nevada, New Hampshire, Pennsylvania and Washington) follow the “two-party” rule.

Significantly, California courts have ruled that a person or business calling from a “one-party” rule state into a “two-party” rule state must sometimes obtain the consent from all parties in order to be in compliance with the law.

For the victim of illegal wiretapping, the civil damages available under California law can result in multimillion dollar verdicts. In Penal Law section 637.2(a), the victim of illegal wiretapping is entitled to $5,000 for each violation of the statute. In other words, each time a call is wiretapped (and thereafter published), the victim is entitled to $5,000.00 in damages. For wiretaps that are left in place for days or weeks, the damages can amount to millions of dollars. Of course, the individual can alternatively seek damages for emotional distress and punitive damages.

Therefore, considering the extreme financial exposure that an individual or business faces when wiretapping calls, it is best to err on the side of caution. Many businesses engage in the common business practice of recording calls for training purposes, but this can subject businesses to severe civil and criminal penalties if the callers are not advised that the calls are being recorded. Significantly, none of the wiretapping laws require a criminal or evil intent. It should also be noted that federal laws and some state wiretapping laws have been amended to include cellular calls within the scope of protection.

Both the “one party” and the “two party” rule clearly define it inappropriate to listen in on, or record a call to which you are not a party at all. Whether wiretapping with a device physically installed on someone’s phone, on the lines outside of a residence or even more sophisticated methods such as using telephone switching equipment or in the Pellicano case – misuse of the phone companies built in recording capabilities designed for legally obtained government wiretaps – the message sent by the heavy penalties is clear: privacy violations are taken very seriously by the courts.

Recorded phone calls may be a powerful and dramatic courtroom tool used in movies and crime dramas on television, but its admissibility is severely limited by the method used by police in obtaining the recordings. Like other pieces of evidence, phone recordings are subject to exclusion, even if relevant, if they are not obtained through the proper channels and the proper warrants are not secured. Some recordings however, can be used freely. For example messages left on answering machines have the implied consent that they will be recorded and do not violate even the stricter “two party” rule. Also, the wiretapping statutes protect confidential or private communications, so calls or conversations made in a public place, like a public park or crowded restaurant might not be covered by these laws.

The California Legislature has recognized the need for law enforcement and other government organizations to surreptitiously record confidential phone conversations. While few have problems with the procedure for obtaining a warrant in order for police officers to use wiretaps in criminal investigations, the government has come under public criticism for its use of the Foreign Intelligence Surveillance Act (FISA). The practice under greatest scrutiny

is the establishment of largely unregulated, secret federal courts that issue secret warrants, that have only a few of the traditional checks and balances that exist to protect privacy rights. In fact, obtaining a FISA warrant for a wiretap is not an adversarial proceeding, meaning there is generally nobody to speak for the potential victim of the wiretap. Moreover, the proceedings are closed to the public and the transcripts are sometimes deemed confidential. Up through 2004, it has been reported that more than 18,000 of these warrants were issued with less than 10 total denials by the FISA Court. Some even suspect that FISA warrants are routinely granted retroactively well after previously unauthorized wiretapping has already taken place.

While a great deal of the publicity in the last few years regarding wiretapping has centered in the world of spies, government espionage and investigator abuse, the potential for wiretapping liability in the business world is all too real and, unfortunately, common.

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