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CRIMINAL LAW—IN RE MOTION TO UNSEAL ELECTRONIC SURVEILLANCE EVIDENCE: THIRD PARTY ACCESS TO GOVERNMENT-ACQUIRED WIRETAP EVIDENCE

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CRIMINAL LAW—*IN RE MOTION TO UNSEAL ELECTRONIC SURVEILLANCE EVIDENCE*: THIRD PARTY ACCESS TO GOVERNMENT-ACQUIRED WIRETAP EVIDENCE

INTRODUCTION

In 1993, the United States Court of Appeals for the Eighth Circuit considered a challenge to the policy of non-disclosure to private litigants of government-acquired electronic surveillance evidence. In *In re Motion to Unseal Electronic Surveillance Evidence*,[1] the court, in an en banc opinion, decided whether § 2517(3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"),[2] as amended in 1970, provided for the disclosure of certain sealed electronic evidence. In particular, the court focused on whether evidence acquired and employed by the Federal Bureau of Investigation ("FBI") in a criminal action against a defendant can be used by private litigants in civil actions brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO")[3] against the same defendant.[4]

Howard J. Smith was involved in several real estate development transactions with Donn H. Lipton. When the transactions failed, Smith brought a civil action against Lipton for violating RICO.[5] During discovery, Smith sought access to several of Lipton's conversations that had been recorded and sealed by the FBI pursuant to Title III as part of an electronic surveillance of a third party's office.[6]

Smith filed a motion in federal district court to unseal the tapes and corresponding transcripts because he believed that they would support his allegation of RICO violations by Lipton.[7] The district court interpreted § 2517 of Title III as prohibiting the disclosure of

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1. 990 F.2d 1015 (8th Cir. 1993) (en banc).

2. Pub. L. No. 90-351, 82 Stat. 212 (1968), *reprinted in* 1968 U.S.C.C.A.N. 254 (codified as amended at 18 U.S.C. §§ 2510-2521 (1988)).

3. 18 U.S.C. §§ 1961-1968 (1988).

4. *In re Electronic Evidence*, 990 F.2d at 1016.

5. *Id.* (citing Smith v. Lipton, No. 91-643C(1), slip op. at 1 (E.D. Mo. May 7, 1991)).

6. *Id.*

7. *Id.*

such evidence.[8] Accordingly, the court denied Smith's motion.[9] In 1992, the Court of Appeals for the Eighth Circuit held that § 2517(3) governs the disclosure of intercepted communications, and that, under limited circumstances, intercepted communications not previously made public may be made available to private litigants.[10] In April 1993, the Court of Appeals for the Eighth Circuit granted Lipton's petition for a rehearing en banc and vacated the panel opinion.[11] Thereafter, by a vote of seven to five, the Court of Appeals for the Eighth Circuit affirmed the district court's opinion and held that § 2517(3) does not authorize disclosure of previously undisclosed wiretap evidence to private civil RICO litigants.[12] Moreover, the court held that even if § 2517(3) did authorize disclosure to private civil RICO litigants, at no point did it authorize pretrial disclosure to such persons.[13]

This Note will consider the en banc decision of the Court of Appeals for the Eighth Circuit in *In re Motion to Unseal Electronic Surveillance Evidence*. Part I.A of the Note will provide the legislative history behind Title III and Congress' intent in enacting and then amending § 2517(3). Part I.B will discuss the discovery rules of the Federal Rules of Civil Procedure and their provision for broad discovery. Part I.C will examine prior case law that considers § 2517(3) in the context of civil litigation. Part II will discuss the factual setting and the procedural history of *In re Electronic Evidence* and the majority and dissenting opinions issued by the appellate court. Part III will analyze the holdings of the courts of appeals to date, including the holding of *In re Electronic Evidence*, which state that third parties (the general public and private litigants) should have access to wiretap materials that have been previously disclosed in a trial or in another courtroom proceeding. Part III will also compare the holdings of the courts of appeals with the language and legislative history of § 2517(3) and the Federal Rules of Civil Procedure's allowance for broad discovery. This comparison will illustrate that § 2517(3) should be interpreted as authorizing the disclosure of previously undisclosed surveillance evidence to

8. *In re* Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 638 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc) (citing Smith v. Lipton, No. 91-643C(1) (E.D. Mo. May 7, 1991)).

9. *Id.*

10. *Id.* at 639.

11. *In re* Motion to Unseal Electronic Surveillance Evidence, 990 F.2d 1015 (8th Cir. 1993) (en banc).

12. *Id.* at 1020.

13. *Id.*

private litigants before the civil trial commences as well as during the civil trial.[14]

I. BACKGROUND

A. *Legislative History of Title III of the Omnibus Crime Control and Safe Streets Act of 1968*

Title III was drafted as part of the Omnibus Crime Control and Safe Streets Act of 1968.[15] The purpose of the Act was: (1) "to assist State and local governments in reducing the incidence of crime;" (2) "to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government;" and (3) "for other purposes."[16] The Act was divided into five titles.[17] Title III, "Wiretapping and Electronic Surveillance," was enacted to prohibit all wiretapping and electronic surveillance by persons other than authorized law enforcement, communications, and government officials.[18] Title III had a dual purpose: (1) to "protect[ ] the privacy of wire and oral communications;" and (2) to "delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[19] To achieve these two purposes, Congress drafted Title III to conform to the constitutional standards established by

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14. For a general discussion of *In re Electronic Evidence*, see Thomas W. Jerry, Note, *The End of the Line? In re* Motion to Unseal Electronic Surveillance Evidence: *Limiting Private Civil RICO Litigants' Access to Government Wiretaps*, 38 ST. LOUIS U. L.J. 769 (1994). Noting Congress' concern with privacy in enacting Title III, the author concludes that the Court of Appeals for the Eighth Circuit properly interpreted § 2517(3) of Title III as prohibiting the disclosure of wiretap evidence acquired by the government to private civil RICO litigants. *Id.*

15. Pub. L. No. 90-351, 82 Stat. 212 (1968), *reprinted in* 1968 U.S.C.C.A.N. 254 (codified as amended at 18 U.S.C. §§ 2510-2521 (1988)).

16. S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. Other purposes include setting standards for the admissibility into trial of certain evidence and "reliev[ing] [the] overburdened Federal courts from the growing practice of convicted persons using the habeas corpus procedures as a substitute for direct appeal." *Id.* at 2113.

17. *Id.* Title I concerned "Law Enforcement Assistance." Title II concerned the "Admissibility of Confessions, Reviewability of Admission in Evidence of Confessions in State Cases, Admissibility in Evidence of Eyewitness Testimony, and Procedures in Obtaining Writs of Habeas Corpus." Title III concerned "Wiretapping and Electronic Surveillance." Title IV dealt with "State Firearms Control Assistance." Title V concerned "General Provisions" of the Act. *Id.*

18. *Id.* at 2113, 2153-54.

19. *Id.* at 2153. See also Thomas C. Banks, Note, *Use of Surveillance Evidence Under Title III: Bridging the Legislative Gap Between the Language and Purpose of the Sealing Requirement*, 36 VAND. L. REV. 325, 327-28 (1983) for a similar statement of the congressional objectives in enacting Title III.

the United States Supreme Court in the 1967 decisions of *Berger v. New York*[20] and *Katz v. United States*,[21] which held that eavesdropping on private conversations by the state is a seizure under the Fourth Amendment to the United States Constitution.[22] "Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the . . . constitutional standards [set out by the Supreme Court], the [Senate] subcommittee . . . used the

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20. 388 U.S. 41 (1967). In *Berger*, the United States Supreme Court reversed the petitioner's conviction for conspiring to bribe a public official. The conviction was achieved, in great part, by utilizing recordings of incriminating conversations. The recordings were obtained by installing a recording device in an office, pursuant to an order issued by a state supreme court justice in accordance with a New York state statute. The Court held that the New York eavesdrop statute was unconstitutional because it resulted in a trespassory intrusion into the petitioner's Fourth Amendment right to freedom from unreasonable searches and seizures. *Id.* at 44.

The *Berger* Court outlined the constitutional standards by which the New York eavesdrop statute and other similar statutes would be measured. The Court's findings are summarized as follows: (1) the application for the court-ordered eavesdrop must particularly describe the place to be searched and the person or things to be seized; (2) the application must particularly describe what specific crime has been or is being committed; (3) the application must give a particular description of the type of conversation sought; (4) certain limitations on the police officer executing the court-ordered eavesdrop are necessary, such as an inability to search unauthorized areas and an inability to use the court-order as a "passkey to a further search" once the sought after conversation or information had been found; (5) police officers must obtain a new court-order supported by probable cause when resuming a search they have previously abandoned; (6) police officers cannot execute a court-order over a "prolonged and extended period;" and (7) an executing police officer must make a return on the court-order showing how it was executed and what was seized. *Id.* at 55-57.

21. 389 U.S. 347 (1967). In *Katz*, the Supreme Court affirmed the constitutional criteria it set out in *Berger* and stressed an additional factor: a neutral and detached magistrate should preside over the application for and court-ordering of the eavesdrop. *Id.* at 356. Applying this additional factor, the Supreme Court reversed the petitioner's conviction for placing bets via telephone in violation of a federal anti-gambling statute, because the recordings of petitioner's incriminating telephone conversations admitted into trial as evidence were made with neither authorization nor supervision by a neutral magistrate. In this case, FBI agents had taken it upon themselves to attach a recording device to the public telephone booth from where the petitioner placed his betting calls in order to electronically survey the resulting conversations. Because there was no neutral magistrate to evaluate the presence or absence of probable cause in placing the recording device on the telephone booth or to evaluate the ensuing surveillance and recording, the Court held the activity to be a violation of the petitioner's Fourth Amendment right of freedom from unreasonable searches and seizures. *Id.* at 356-57, 359.

22. U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Id.

Berger and *Katz* decisions as a guide in drafting [T]itle III."[23]

1. Section 2517(3) of Title III as Enacted in 1968[24]

Paragraphs (1) and (2) of § 2517, as enacted in 1968,[25] authorized investigative or law enforcement officers, who had obtained knowledge of the contents[26] of any intercepted communication or evidence derived from that communication, to disclose such infor-

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23. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2163. *See* Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 7-32 (1983) (discussing the Supreme Court decisions that ultimately induced Congress to adopt Title III).

24. As originally enacted in 1968, § 2517, Authorization for Disclosure and Use of Intercepted Wire and Oral Communications, read as follows:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.
>
> (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. § 2517 (Supp. IV 1969).

25. See *supra* note 24 for the text of § 2517(1), (2) as originally enacted in 1968.

26. The statute defined "contents" as including "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8) (Supp. IV 1969).

mation to other officers or to use such information in the performance of their legal duties.[27] Paragraph (3) of the section provided that:

> Any person who has received, by any means authorized by th[e] chapter, any information concerning a wire or oral communication, or evidence derived therefrom . . . *may disclose the contents of that communication* or such derivative evidence *while giving testimony under oath or affirmation in any criminal proceeding in any court* of the United States or of any State *or in any* Federal or State *grand jury proceeding*.[28]

In enacting § 2517(3), Congress envisioned that such intercepted evidence would be disclosed and used at a criminal trial to "establish [a defendant's] guilt directly."[29] Congress also envisioned that intercepted evidence could be utilized to establish guilt indirectly by corroborating or impeaching a witness' testimony or by refreshing a witness' memory.[30] Congress' use of the word "guilt" rather than "liability" in the Senate Report accompanying the proposed bill,[31] coupled with the authorization for disclosure "in any *criminal* proceeding,"[32] makes it clear, however, that Congress did not contemplate disclosure of intercepted communications or derivative evidence in anything but a criminal action. Disclosure or use in a civil action was not even considered a possibility until 1970, when § 2517(3) was amended.

2. The 1970 Amendment to Section 2517(3)[33]

Congress enacted the Organized Crime Control Act of 1970[34]

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27. 18 U.S.C. § 2517(1), (2) (Supp. IV 1969).

28. 18 U.S.C. § 2517(3) (Supp. IV 1969) (emphasis added).

29. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188.

30. *Id.* at 2188-89.

31. *Id.* at 2188.

32. See *supra* note 28 and accompanying text for the text of § 2517(3) as originally enacted in 1968.

33. Section 2517(3), as amended in 1970, states:

> Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter *may disclose the contents of that communication* or such derivative evidence *while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.*

18 U.S.C. § 2517(3) (1988) (emphasis added).

34. Pub. L. No. 91-452, 84 Stat. 922, *reprinted in* 1970 U.S.C.C.A.N. 1073.

to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[35] Title IX of the Organized Crime Control Act of 1970,[36] entitled the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[37] authorized both criminal and civil penalties for engaging in racketeering activities.[38] In addition, RICO amended § 2517(3) of Title III[39] to provide for testimonial disclosure of the contents of wire, oral, or electronic communications or evidence derived from such contents in "any proceeding held under the authority of the United States or of any State or political subdivision thereof."[40]

In the House of Representatives Report accompanying the proposed bill for the Organized Crime Control Act, the House interpreted § 2517(3), as amended by RICO, as "authoriz[ing] civil treble damage suits on the part of private parties who are injured"[41] and providing for "civil investigative demands."[42] Specifically, the House Report interpreted the amended § 2517(3) as "permit[ting] evidence obtained through the interception of wire or oral communications under court order to be employed in civil actions."[43]

B. *Federal Rules of Civil Procedure's Provisions for Broad Discovery*

Title III, as originally enacted and as amended, was an attempt by Congress to balance competing interests. The discovery rules of the Federal Rules of Civil Procedure are a congressional attempt to

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35. *Id.*

36. 18 U.S.C. §§ 1961-1968 (1988).

37. The Racketeer Influenced and Corrupt Organizations Act was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

38. H.R. REP. No. 1549, 91st Cong., 2d Sess. 18 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007. Congress defined "racketeering activity" to include "murder, kidnaping [sic], gambling, arson, robbery, bribery, extortion, narcotics violations, counterfeiting, usury, mail/bankruptcy/wire/securities fraud, and obstruction of justice." *Id.* at 4032.

39. Pub. L. No. 90-351, 82 Stat. 212 (1968), *reprinted in* 1968 U.S.C.C.A.N. 254 (codified as amended at 18 U.S.C. §§ 2510-2521 (1988)).

40. 18 U.S.C. § 2517(3) (1988). See *supra* note 28 and accompanying text for the language of § 2517(3) prior to the 1970 amendment.

41. H.R. REP. No. 1549, 91st Cong., 2d Sess. 18 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4010.

42. *Id.*

43. *Id.* at 4036.

strike a similar balance. Title III attempted to balance the privacy interests of individuals engaged in wire, oral, and electronic communications with the needs of government and law enforcement personnel to obtain access to those communications. The discovery rules attempt to balance the privacy interests of individuals possessing certain information with the needs of civil litigants in obtaining access to that information.

The stated purpose of discovery is to "aid [civil litigants] in the preparation or presentation of [their] case[s]"[44] by granting them access to pertinent facts, names of witnesses, specific documents, or "any other matters which may aid"[45] them. Congress authorized civil litigants to obtain such information by several methods,[46] including written and oral depositions,[47] written interrogatories,[48] and production of documents or objects for inspection.[49] Depositions are out-of-court proceedings conducted under oath before a judicial officer in answer to questions or interrogatories.[50] Interrogatories are questions about the litigation at issue submitted before trial by one party to the other party, witness, or other person having information of interest in the case, the answers to which are usually given under oath.[51]

In order to aid civil litigants in the preparation of their actions, Congress enacted broad discovery rules containing general language. Rule 26(b)(1), delineating the scope and limits of discovery, states that "[p]arties may obtain discovery regarding *any matter*, not privileged, which is *relevant to the subject matter* involved in the pending action."[52] Congress also instructed the courts to interpret the discovery rules broadly. For example, the Advisory Committee's explanatory statement regarding the 1970 amendments to the discovery rules stated that the amendments were "designed to encourage extrajudicial discovery with a minimum of court intervention."[53]

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44. FED. R. CIV. P. 26(b) advisory committee's note.

45. *Id.* The United States Supreme Court has stated that access to and knowledge of such information is necessary for a civil action to be properly adjudicated. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

46. FED. R. CIV. P. 26(a).

47. FED. R. CIV. P. 27-32 govern the taking and use of depositions.

48. FED. R. CIV. P. 33 governs the taking and use of interrogatories.

49. FED. R. CIV. P. 34 and 45 govern the production of documents and things in response to requests and subpoenas, respectively.

50. BLACK'S LAW DICTIONARY 440 (6th ed. 1990). *See also* FED. R. CIV. P. 27-32.

51. BLACK'S LAW DICTIONARY 819 (6th ed. 1990). *See also* FED. R. CIV. P. 33.

52. FED. R. CIV. P. 26(b)(1) (emphasis added).

53. FED. R. CIV. P. 26-37 advisory committee's explanatory statement. On April

Despite the discovery rules' stated purpose of promoting access to as much relevant information as possible, the rules contain provisions that check civil litigants' power to gain access to information when such access would overburden or infringe upon the privacy interests of another party. Specifically, Rule 26(c) provides that a protective order may be issued by a court, upon motion by a party or by the person from whom discovery is sought, when necessary to protect the party or person from "annoyance, embarrassment, oppression, or undue burden or expense."[54] Protective orders afford such protection by permitting courts to allow a discovery request to be ignored.[55] They also authorize courts to require that certain information not be requested, or if already requested, not produced.[56] Furthermore, protective orders permit courts to require parties to conduct discovery with no witnesses present other than court-designated ones.[57] Such limitations on the discovery process ensure that civil litigants gather as much information as possible while protecting the privacy interests of the persons from whom the information is sought.[58]

22, 1993, the Supreme Court submitted proposed amendments to the Federal Rules of Civil Procedure, including several changes to the discovery rules. Congress took no action against the amendments. As a result, the amendments went into effect on December 1, 1993. The changes to the discovery rules were designed to minimize court intervention in the discovery process while maximizing the opportunities of opposing litigants to work together to develop a discovery schedule for the action. See Hon. Ronald J. Hedges, *What You Should Know About the Proposed Civil Procedure Rules Amendments*, 39 PRAC. LAW. December 1993, at 33 for a brief synopsis of the major alterations to the discovery rules by the 1993 amendments.

54. FED. R. CIV. P. 26(c).

55. *Id.*

56. *Id.*

57. *Id.*

58. FED. R. CIV. P. 26(c), Protective Orders, reads as follows:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following[;] (1) that the disclosure or discovery not be had: [sic] (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade

As additional protection of the privacy interests of persons possessing discoverable information, the rules contain built-in standards by which discovery will be allowed or denied. The Advisory Committee's explanatory statement concerning the 1970 amendments to the discovery rules states that "a showing of *need* is required for discovery of 'trial preparation' materials."[59] Rule 26(b)(3) states that "a party may obtain discovery of documents and tangible things otherwise discoverable . . . only upon a showing that the party seeking discovery has *substantial need* of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[60] Rule 34 requires a special showing before the production of documents and tangible things will be allowed.[61] With respect to the production of documents prepared in anticipation of litigation or trial, a showing of "substantial need of the materials in the preparation of the case and [an] inability without undue hardship to obtain the substantial equivalent of the materials by other means is necessary."[62] With respect to the production of documents not prepared in anticipation of litigation or trial, "a showing that the documents are relevant to the subject matter of the action is necessary."[63]

The discovery rules also contain standards for denying a civil litigant's discovery request. Rule 26(b)(2) states that "[t]he frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that . . . the burden . . . of the

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secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id.

59. FED. R. CIV. P. 26-37 advisory committee's explanatory statement.

60. FED. R. CIV. P. 26(b)(3) (emphasis added).

61. FED. R. CIV. P. 26(b)(3) advisory committee's note states that "Rule 34 in terms requires a showing of 'good cause' for the production of all documents and things, whether or not trial preparation is involved." *Id.* The phrase "good cause" was eliminated from the language of Rule 34 because it "tended to encourage confusion and controversy." *Id.* However, the requirement of a "special showing" was retained. *Id.*

62. *Id.*

63. *Id.* (citing Bell v. Commercial Ins. Co., 280 F.2d 514, 517 (3d Cir. 1960); Houdry Process Corp. v. Commonwealth Oil Refining Co., 24 F.R.D. 58 (S.D.N.Y. 1959); Connecticut Mutual Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955)).

proposed discovery outweighs its likely benefit."[64] To make this determination, the court must "tak[e] into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issue."[65]

Subsequent to the enactments in 1970 of the amendments to the discovery rules and to § 2517(3) of Title III, federal district and appellate courts debated whether § 2517(3), as amended, allowed private civil litigants to obtain disclosure during discovery of surveillance material gathered by the government pursuant to Title III. These courts focused on disclosure of surveillance material that had not been exposed to the public in an earlier criminal trial and would not be revealed through testimony in the civil trial.

C. *Case Law Prior to In re* Motion to Unseal Electronic Surveillance Evidence[66]

Courts that have addressed whether § 2517(3) of Title III authorizes disclosure of wiretap evidence to the public at large or to private civil litigants have concluded that § 2517(3) allows such disclosure only after the materials have been admitted into evidence at an earlier criminal trial.[67] No court has read § 2517(3) to authorize disclosure of wiretap material to the general public or to private litigants prior to the materials' use in a criminal trial or during the discovery phase of a private litigant's civil action.[68]

1. *United States v. Dorfman*[69]

In *United States v. Dorfman*, various newspaper publishers and broadcasters moved the court to unseal evidence exhibits submitted by the government so that the exhibits could be inspected and copied.[70] All of the exhibits contained wiretap materials. The criminal

64. FED. R. CIV. P. 26(b)(2).
65. *Id.*
66. 990 F.2d 1015 (8th Cir. 1993) (en banc).
67. National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 54-55 (2d Cir. 1984); United States v. Dorfman, 690 F.2d 1230, 1233 (7th Cir. 1982); County of Oakland v. City of Detroit, 610 F. Supp. 364, 369 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985).
68. In *County of Oakland*, 610 F. Supp. at 370, the court stated that disclosing previously undisclosed surveillance materials to private litigants pursuing civil RICO claims "presents a different problem" than the one before the court. *Id.* The court declined to address the issue because the case could be resolved on other grounds. *Id.*
69. 690 F.2d 1230 (7th Cir. 1982).
70. *Id.* at 1231.

defendants argued that the court could not release any of the sealed exhibits because they had not yet been put into evidence at the criminal trial. The defendants urged that the release of the exhibits would violate Title III.[71] The Court of Appeals for the Seventh Circuit held that Title III does not create a right of public access to sealed wiretap evidence.[72] According to the court in dicta, the only way that the public would have a right of access to the sealed wiretap evidence acquired by the government would be after the sealed evidence had been admitted into evidence in a criminal trial or in "some other public proceeding within the scope of section 2517(3)."[73] The court failed, however, to specify what other types of public proceedings are within the scope of § 2517(3). The *Dorfman* court was most likely referring to a civil trial or other public proceeding conducted pursuant to a civil action. Such a proceeding is, in fact, what Congress intended when it amended § 2517(3).[74]

2. *National Broadcasting Co. v. United States Department of Justice*[75]

In *National Broadcasting Co. v. United States Department of Justice*, the National Broadcasting Company ("NBC") sought permission from the United States District Court for the District of Connecticut to inspect and copy wiretap recordings made by the government pursuant to Title III.[76] NBC wanted to use the wiretap recordings in its defense of a libel action filed against it by popular singer Wayne Newton.[77] NBC believed that the wiretap recordings would prove that NBC's television broadcasts concerning Wayne Newton and his connection to organized crime members were accurate and true.[78] The government opposed the disclosure of the

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71. *Id.*

72. *Id.* at 1233.

73. *Id.* The court stated that Title III "put no limits on the public disclosure of lawfully obtained wiretap evidence through public testimony in legal proceedings; but neither did it authorize wiretap evidence not made public in this manner to be made public another way." *Id.* at 1234.

74. The House Report accompanying the 1970 amendment to § 2517(3) stated that Congress was altering the language of the statute in order to permit wire or oral communications evidence to be employed in civil actions. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 18 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4036. See *supra* notes 33-43 and accompanying text for a discussion of the language and legislative history of § 2517(3) as amended.

75. 735 F.2d 51 (2d Cir. 1984).

76. *Id.*

77. *Id.*

78. *Id.* at 52.

recordings.[79]

NBC argued that the 1970 amendment to § 2517(3) allows the government to disclose a communication obtained by a legal wiretap "in any proceeding held under the authority of the United States."[80] NBC argued that its defense of the libel action was within the definition of "any proceeding" and that, therefore, the district court judge had erred in denying its application for disclosure by the government.[81] The Court of Appeals for the Second Circuit agreed with the district court, however, that there should be no disclosure to NBC. The *NBC* court stated that it was certain that Congress did not intend § 2517(3) "to make the fruits of wiretapping broadly available to all civil litigants who show a need for them,"[82] and that "turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard."[83]

3. *County of Oakland v. City of Detroit*[84]

Eight months after the Court of Appeals for the Second Circuit handed down its decision in *NBC*, a federal district court in Michigan also concluded that § 2517(3) did not authorize the disclosure of surveillance material gathered by the government to private civil litigants. In *County of Oakland v. City of Detroit*,[85] the County of Oakland brought an action against the Mayor of Detroit and the City of Detroit for violating the Sherman Act[86] and RICO[87] through bribery, corruption, and breach of fiduciary duty.[88] The County of Oakland had entered into several contracts with the City of Detroit in which the city was to transport, treat, and dispose of the county's waste to the city's facilities. The contract price was based on the city's actual cost in providing the specified services.[89] In its action, the county contended that the city inflated its costs in providing the services, which inflated the amount that the city

79. *Id.*
80. 18 U.S.C. § 2517(3) (1988).
81. *NBC*, 735 F.2d at 54.
82. *Id.*
83. *Id.*
84. 610 F. Supp. 364 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985).
85. *Id.*
86. 15 U.S.C. §§ 4, 15 (1988).
87. 18 U.S.C. § 1964(a), (c) (1988).
88. *County of Oakland*, 610 F. Supp. at 365.
89. *Id.*

charged the county, thereby violating the Sherman Act and RICO.[90]

As part of its action, the county subpoenaed the Assistant United States Attorney for release of wiretaps the United States Attorney's Office had obtained pursuant to Title III as part of a criminal investigation of the Detroit Water and Sewage Department ("DWSD").[91] Some of the wiretaps sought by the county had been previously disclosed at the criminal trials of DWSD officials.[92] The court held that it would honor the subpoenas seeking surveillance material disclosed during the criminal trials, because once material has been disclosed, it becomes a question of the public's right to access to evidence admitted in open court versus a defendant's privacy interests.[93] The court stated that, in this situation, the public's right to access prevailed.[94]

The county also sought surveillance material that had not previously been disclosed by the government in any of the earlier criminal trials of DWSD officials.[95] The court found no authority for such disclosure of materials in the 1970 amendment to § 2517(3). Although "the 1970 amendment to § 2517(3) clearly indicates that Congress intended that surveillance material gathered pursuant to Title III could be used in some civil proceedings,"[96] the court reasoned that "it is not clear that Congress intended *private* litigants pursuing civil RICO claims could gain access to such surveillance materials."[97] In addition to § 2517(3)'s lack of clarity as to whom previously undisclosed surveillance materials could be disclosed, the court observed that § 2517(3) is also unclear as to the manner in which the materials can be disclosed. The court noted that the 1970 amendment to § 2517(3) did not change the section's language regarding the method of disclosure. The court reasoned that Congress therefore intended the same method of disclosure that had been permitted in the 1968 version of § 2517(3) to apply.[98] The

90. *Id.*
91. *Id.*
92. *Id.* at 366.
93. *Id.* at 369.
94. *Id.* The court held that the public's right to access prevails because once surveillance material has been disclosed, "the purpose of Section 2517(3) ceases and the requirements of that section no longer govern" so that "the privacy interests of the defendants cannot stand as an obstacle to the public's access to evidence admitted in open court." *Id.*
95. *Id.* at 370.
96. *Id.*
97. *Id.*
98. *Id.* The court also pointed to a federal district court case concluding that

1968 version allowed disclosure "*while giving testimony under oath or affirmation* in any criminal proceeding in any" federal or state court or grand jury.[99] The court concluded that "it appears that disclosure of the wiretap material not presented during the criminal trials [for use in the county's civil action against the city] cannot be required pursuant to pre-trial or discovery subpoenas absent some further showing," without elaborating as to what such "further showing" would be.[100]

4. *United States v. Rosenthal*[101]

In *United States v. Rosenthal*, the Court of Appeals for the Eleventh Circuit relied on dicta in *United States v. Dorfman*[102] to hold that Title III creates no independent bar to the public's right of access to wiretap materials legally intercepted and previously admitted into evidence at a criminal trial pursuant to Title III. In *Rosenthal*, a television station filed a motion to review all documentary and physical evidence, which included wiretap materials obtained by the government that had been or was going to be admitted as evidence in a criminal trial. The Court of Appeals for the Eleventh Circuit ruled that, once the materials have been admitted into evidence in a court proceeding, "there is no indication either in Title III or its legislative history to support [a] court's conclusion that Title III material may not be further disclosed."[103] The court stated that once "the audiotapes were played in open court [in a criminal trial] and admitted into evidence, [it could] perceive of no legitimate reason to create an absolute bar of further dissemination of these materials"[104] to a public entity — in this case a television station.

In none of the aforementioned cases did a court interpret § 2517(3) to authorize disclosure of government-acquired wiretap

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disclosure pursuant to § 2517(3) could only be made through the trial testimony of a government agent. *Id.* (citing Dowd v. Calabrese, 101 F.R.D. 427 (D.D.C. 1984)).

99. 18 U.S.C. § 2517(3) (Supp. IV 1969) (emphasis added).

100. *County of Oakland*, 610 F. Supp. at 371. The court's language left the door open for the second prong of the *In re Electronic Evidence* panel opinion's balancing test, which required that disclosure to private litigants be denied absent a showing by the private litigant of a compelling need that cannot be met any other way. *In re* Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 642 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc). See *infra* note 129 and accompanying text for the panel opinion's five-part balancing test.

101. 763 F.2d 1291 (11th Cir. 1985).

102. 690 F.2d 1230 (7th Cir. 1982).

103. *Rosenthal*, 763 F.2d at 1293.

104. *Id.*

materials to the public or to a private litigant before the materials were disclosed in a criminal trial. Recently, the Court of Appeals for the Eighth Circuit directly addressed and then readdressed the issue of pre-trial disclosure in *In re Motion to Unseal Electronic Surveillance Evidence*.[105]

II. *IN RE MOTION TO UNSEAL ELECTRONIC SURVEILLANCE EVIDENCE*[106]

A. *Facts and Procedural History*

Donn H. Lipton was involved in real estate development transactions with several business associates in St. Louis, Missouri. Two of Lipton's business associates, Sorkis Webbe, Sr. and Sorkis Webbe, Jr., were under criminal investigation by the Federal Bureau of Investigation ("FBI").[107] Pursuant to the investigation, the FBI conducted an electronic surveillance of the Webbes' offices, intercepting and taping many conversations that took place in those locations.[108] Among the intercepted and taped conversations were conversations that the Webbes had with Donn Lipton.[109]

The government prosecuted the Webbes in 1985 in the United States District Court for the Eastern District of Missouri.[110] During the course of Sorkis Webbe, Jr.'s criminal trial, the FBI introduced some of the taped conversations between Lipton and Webbe, Jr. as evidence.[111] The remainder of the taped conversations were not admitted into Webbe Jr.'s criminal trial. Instead, the tapes were placed under seal by the trial court.[112]

Howard J. Smith was also involved in real estate transactions with Donn Lipton. In 1990, when several of the transactions proved unsuccessful, Smith filed a civil suit against Lipton in the Circuit Court of St. Louis City on theories of fraud, tortious inter-

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105. 965 F.2d 637 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc).

106. 990 F.2d 1015 (8th Cir. 1993) (en banc).

107. *Id.* at 1016.

108. *Id.*

109. *Id.*

110. *Id.* (citing United States v. Webbe, 652 F. Supp. 20 (E.D. Mo. 1985)). Ultimately, only Sorkis Webbe, Jr. was brought to trial. Prior to trial, Sorkis Webbe, Sr. died. *Webbe*, 652 F. Supp. at 22.

111. *In re Electronic Evidence*, 990 F.2d at 1016 (citing United States v. Webbe, 791 F.2d 103, 104 (8th Cir. 1986)). *See also Webbe*, 652 F. Supp. at 22 (denying Sorkis Webbe, Jr.'s motion to suppress the taped conversations and other electronic surveillance evidence).

112. *In re Electronic Evidence*, 990 F.2d at 1016.

ference, breach of fiduciary duty, and violations of RICO.[113] During the discovery phase of the civil suit, Smith filed a motion in federal district court for the Eastern District of Missouri to unseal the tapes of conversations between Lipton and the Webbes.[114] Smith believed that the taped conversations contained information that would support his allegation of RICO violations by Lipton.[115]

The district court held that its authority, if any, to provide Smith with access to the taped conversations could come only from § 2517(3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[116] However, the district court interpreted § 2517(3) as prohibiting such access.[117] Smith then appealed the district court's interpretation to the Court of Appeals for the Eighth Circuit.[118]

B. *Panel Opinion*[119]

1. Majority Opinion of Judge Beam

For guidance in determining whether § 2517(3), as amended in 1970,[120] authorizes disclosure of intercepted communications not previously made public in a prior criminal or civil trial to private civil litigants, the panel opinion looked first to the purpose and intent of Congress in enacting Title III. The court stated that the purpose of Title III was to "balance the needs of criminal-law enforcement with the privacy interest of individuals engaged in wire, oral, or electronic communications."[121] The court noted that Congress balanced these two competing interests by allowing the government to intercept such communications but with certain limitations.[122] However, the court was not as certain about Congress' intent in amending § 2517(3) of Title III within RICO. According

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113. *Id.*

114. *Id.* (citing Smith v. Lipton, No. 91-643C(1), slip. op. at 1 (E.D. Mo. May 7, 1991)).

115. *Id.*

116. *In re Electronic Evidence*, 965 F.2d at 638.

117. *Id.*

118. *In re* Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc).

119. *Id.*

120. See *supra* note 33 for the text of § 2517(3) as amended.

121. *In re Electronic Evidence*, 965 F.2d at 640 (citing *Title III - Wiretapping & Electronic Surveillance: Findings*, Pub. L. No. 90-351, § 801, 82 Stat. 211, 211 (1968), *reprinted in* 1968 U.S.C.C.A.N. 237). For a list of the purposes of Title III, see *supra* notes 18-19 and accompanying text.

122. *In re Electronic Evidence*, 965 F.2d at 640. The limitations include authorizing interception only for specifically enumerated offenses. *Id.* (citing 18 U.S.C.

to the court, it was "not at all clear" that, when Congress "included the amendment to section 2517(3) within . . . RICO," it intended to grant private civil litigants access to previously undisclosed intercepted communications.[123] It was "not at all clear" to the court because no commentary in the congressional report on RICO addressed that particular question.[124] The court refused to "speculate" about Congress' intent. Rather, it looked elsewhere in order to resolve the issue.[125]

The court compared communications intercepted pursuant to Title III to "any other evidence seized"[126] and concluded that both types of evidence should be subject to the policy and evidentiary concerns of the discovery rules of the Federal Rules of Civil Procedure.[127] Since the discovery rules carefully balance the confidentiality and privacy interests of litigants with the "compelling need for discovery,"[128] the court in *In re Electronic Evidence* fashioned a five-part test that also balanced these competing interests in order to determine when intercepted communications evidence may be disclosed to private civil litigants. The five-part test developed by the court was as follows:

> [A]ny government objection to disclosure should be afforded great weight. Additionally, disclosure is never proper unless the party seeking disclosure has shown a compelling need that cannot be accommodated by any other means. Thus, the court should conduct an in camera inspection of the intercepted communications to evaluate whether a compelling need exists. Furthermore, if the confidentiality or privacy interests of a nonparty appear to be substantially compromised by disclosure, the party seeking disclosure has an affirmative duty to notify the nonparty. . . . Finally, . . . [t]he party requesting access must particularize his or her request and the district court should issue protective orders as it deems appropriate.[129]

The court held that wiretap evidence not previously made public

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§ 2516(1) (1988)). Limitations also include interception only with prior court approval. *Id.* (citing 18 U.S.C. §§ 2516(2), 2518 (1988)).

123. *Id.*

124. *Id.* (citing S. REP. NO. 617, 91st Cong., 1st Sess. 24 (1969) and H.R. REP. NO. 1549, 91st Cong., 2d Sess. 18, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034).

125. *Id.*

126. *Id.* at 641.

127. *Id.* The discovery rules are contained in Rules 26-37 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 26-37.

128. *In re Electronic Evidence*, 965 F.2d at 641.

129. *Id.* at 642 (citation omitted).

may be disclosed to private civil litigants pursuant to § 2517(3) if this five-part test is met.[130] Thereafter, the court reversed the decision of the district court prohibiting disclosure of the sealed wiretap evidence to Smith as a civil litigant and remanded the case "for findings consistent with [its] opinion."[131]

2. Dissenting Opinion of Judge Heaney[132]

Judge Heaney, in his dissent, agreed with the district court that § 2517 did not authorize the disclosure of electronically intercepted conversations to private litigants where that information has not been disclosed previously in a trial.[133] Judge Heaney stated that the majority's five-part test[134] was contrary to the plain meaning of § 2517(3) and Congress' intent in enacting and amending § 2517(3).[135] He also stated that "parts of the test [were] vague, providing little guidance to district courts that must apply it."[136] To support his position of nondisclosure, Judge Heaney looked first to the plain meaning of § 2517 and stated that he could see "no words in section 2517 that permit law enforcement officers to disclose to private litigants information obtained for law enforcement purposes unless that information has first been disclosed in a public trial."[137] Judge Heaney then cited to "Congress's [sic] clear intent to protect the privacy of oral and written communications to the greatest extent possible" as further support for his position of nondisclosure.[138]

Lipton petitioned for a rehearing en banc. The Court of Appeals for the Eighth Circuit granted the petition and vacated the panel opinion.[139] Thereafter, by a vote of seven to five, the Court of Appeals for the Eighth Circuit affirmed the order of the district

130. *Id.* at 641.

131. *Id.* at 642.

132. *Id.* at 642-43 (Heaney, J., dissenting). Judge Heaney wrote for the majority in the *en banc* opinion of *In re* Motion to Unseal Electronic Surveillance Evidence, 990 F.2d 1015, 1016-20 (8th Cir. 1993) (en banc). See *infra* part II.C for a discussion of Judge Heaney's majority opinion.

133. *In re Electronic Evidence*, 965 F.2d at 642 (Heaney, J., dissenting).

134. See *supra* note 129 and accompanying text for the majority opinion's five-part test.

135. *In re Electronic Evidence*, 965 F.2d at 642-43 (Heaney, J., dissenting) (citing Gelbard v. United States, 408 U.S. 41, 48 (1972)).

136. *Id.* at 643.

137. *Id.* at 642.

138. *Id.*

139. *In re* Motion to Unseal Electronic Surveillance Evidence, 990 F.2d 1015 (8th Cir. 1993) (en banc).

court.[140]

C. *En Banc Opinion of Judge Heaney*[141]

Judge Heaney, this time writing for the majority,[142] held that there was no authority in § 2517(3) of Title III for sealed electronic surveillance evidence, not previously made public, to be disclosed to a private civil RICO litigant.[143] Judge Heaney stated that, when addressing disclosure of the contents of a wiretap, the question the court must ask is "whether Title III specifically *authorizes* such disclosure, not whether Title III specifically prohibits the disclosure," because Title III prohibits all disclosures that are not specifically authorized.[144] Noting the drafters' concern for conversational privacy when originally enacting § 2517(3) and the legislative history of the 1970 amendment to § 2517(3), the judge failed to find any evidence that the subsection authorizes such disclosure.[145] Judge Heaney stated that a civil litigant's need is an irrelevant consideration, absent language in § 2517(3) to that effect.[146] Finally, he stated that, if § 2517(3) does authorize disclosure to a private civil litigant such as Smith, "[a]t no point does section 2517(3) authorize *pretrial* disclosure."[147]

1. Drafters' Concern for Conversational Privacy

Judge Heaney noted that Title III was enacted in response to two 1967 Supreme Court decisions that held eavesdropping by the government on private conversations to be a violation of the petitioners' Fourth Amendment right to freedom from unreasonable searches and seizures.[148] Judge Heaney noted that one of the two stated purposes of Title III was to "protect[ ] the privacy of wire

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140. *Id.* at 1020.

141. *Id.* at 1015.

142. Judge Heaney wrote the dissenting opinion of the panel decision of *In re* Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 642-43 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc). See *supra* notes 132-39 and accompanying text for a discussion of Judge Heaney's dissenting opinion.

143. *In re Electronic Evidence*, 990 F.2d at 1020.

144. *Id.* at 1018 (citing United States v. Underhill, 813 F.2d 105, 110 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987); United States v. Dorfman, 690 F.2d 1230, 1232 (7th Cir. 1982)).

145. *Id.* at 1018-20.

146. *Id.* at 1020.

147. *Id.* (emphasis added).

148. *In re Electronic Evidence*, 990 F.2d at 1017 (citing Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967)). See *supra* notes 20-21 for a discussion of *Katz* and *Berger*.

and oral communications."[149] Judge Heaney also noted that the congressional drafters' concern for conversational privacy was evidenced by Congress' provision for very limited disclosure. He pointed specifically to § 2518(8)(a), which requires that recordings made under Title III be sealed by the authorizing judge, and § 2517, which allows disclosure under only very specific circumstances.[150]

2. Legislative History of the 1970 Amendment to Section 2517(3)

Judge Heaney next considered what effect the 1970 amendment to § 2517(3) had on the ability of the court to interpret the subsection as authorizing disclosure of electronic surveillance evidence. Prior to the 1970 amendment, § 2517(3) provided for courtroom testimonial disclosure in criminal proceedings only.[151] With the passage of RICO in 1970, however, the subsection was amended by Congress to allow for testimonial disclosure of electronic surveillance evidence in civil proceedings as well as criminal proceedings.[152] Despite this alteration to the language of § 2517(3), Judge Heaney found that the legislative history of the 1970 amendment did not support Smith's argument that, as amended, § 2517(3) authorizes disclosure of such evidence not previously made public to private civil RICO litigants, both before the civil trial has commenced and during the trial.[153] In fact, Judge Heaney stated that the legislative history provides "*no* assistance" to the court's analysis.[154] Quoting the district court opinion, the judge noted that the House of Representatives Report regarding the 1970 amendment made little comment on the amendment except to state what had linguistically changed in the subsection.[155] Judge Heaney adopted the reasoning of the district court, which held that, if the 1970 amendment "had been intended to open the door to private civil

149. *Id.* at 1018 (quoting S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153). The other purpose was to "delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

150. *In re Electronic Evidence*, 990 F.2d at 1018.

151. *Id.* See *supra* note 28 and accompanying text for the text of § 2517(3) as originally enacted.

152. See *supra* note 33 for the text of § 2517(3) as amended.

153. *In re Electronic Evidence*, 990 F.2d at 1018.

154. *Id.* at 1018 n.4 (emphasis added).

155. *Id.* at 1019 (quoting Smith v. Lipton, No. 91-643C(1), slip op. at 5-6 (E.D. Mo. May 7, 1991)).

RICO litigants, further comment would have been warranted."[156] Therefore, the brief explanation in the House Report suggests that Congress intended only that the "gatherer" of electronic surveillance evidence — the government — would use it in a civil case.[157]

3. Secondary Factors Affecting Disclosure

Smith argued that the failure of the Department of Justice to oppose disclosure of the taped conversations upon his motion in federal district court should have been persuasive to the court in its determination of the issue.[158] To support his argument, Smith contrasted the position of the Department of Justice in *NBC* to oppose disclosure of wiretap evidence to NBC, a private civil litigant.[159] The government's opposition to disclosure to NBC was a significant factor in the *NBC* court's determination that § 2517(3) did not authorize such disclosure.[160] Smith cited *County of Oakland v. City of Detroit*[161] for the proposition that "the Government is apparently given authority under § 2517(3) to determine whether release of the material would be in the overall public interest."[162] Judge Heaney disagreed with Smith's contention that the government's deliberate decision in this case not to oppose disclosure to Smith was relevant. Judge Heaney held that § 2517(3) does not grant the government authority to determine when private litigants may make use of previously undisclosed wiretap information.[163] Judge Heaney based this conclusion on a "careful reading of . . . the statute itself,"[164]

156. *Id.* (quoting *Smith*, No. 91-643C(1) at 5-6). Judge Heaney stated that he and the other members of Court of Appeals for the Eighth Circuit "would need greater evidence of Congress's [sic] intent to read the 1970 amendment as setting [congressional] concerns [for conversational privacy] aside when dealing with private civil RICO litigants." *Id.*

157. *Id.* (quoting *Smith*, No. 91-643C(1) at 5-6).

158. *Id.*

159. *Id.* (citing National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 54 (2d Cir. 1984)).

160. *NBC*, 735 F.2d at 54.

161. 610 F. Supp. 364 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985).

162. *In re Electronic Evidence*, 990 F.2d at 1019 (quoting *County of Oakland*, 610 F. Supp. at 370 (citing National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51 (2d Cir. 1984))). See *supra* part I.C.3 for a discussion of *County of Oakland*.

163. *Id.* at 1019-20. The court refused to decide whether Title III allows "purely voluntary testimonial disclosure by the government during the course of private civil RICO litigation." *Id.* at 1020 n.5. However, the court stated that voluntary disclosure by the government "would appear to require court approval under §§ 2517(3) and (5)." *Id.*

164. *Id.* at 1019.

noting that, simply because the government is able to decide whether it will utilize wiretap information in a trial in which it is a party, it does not automatically follow that the government has the power to decide whether private litigants are able to utilize that same information in civil trials.[165]

Finally, Smith argued that a private litigant's need for disclosure of electronic surveillance evidence should be another factor in the court's determination as to whether § 2517(3) authorizes disclosure of electronic surveillance evidence not previously made public to private civil RICO litigants. Judge Heaney disagreed, characterizing a private litigant's need for such evidence as "irrelevant."[166] For this proposition, Judge Heaney referred to the decision in *NBC*, in which the Court of Appeals for the Second Circuit looked to Congress' intent in enacting the Organized Crime Control and Safe Streets Act.[167] The Second Circuit stated that, as contemplated by the Supreme Court in *Katz v. United States*,[168] the purpose of the Act was to make the fruits of wiretapping available to the government for the enforcement of *criminal* law.[169] Despite the alteration of the language in § 2517(3), removing the specific reference to *criminal* proceedings, the court was "sure" that Congress did not pass the Act to "make the fruits of wiretapping broadly available to all civil litigants who show a need for them."[170]

4. Section 2517(3) Does Not Authorize Disclosure to Private Civil Litigants Other Than During Testimony at Trial

Judge Heaney concluded that Title III did not authorize disclosure of electronic surveillance evidence previously undisclosed in an earlier criminal trial to private civil litigants such as Howard Smith. Further, even if it did, Title III would only authorize disclosure through the testimony of a witness during a subsequent civil trial, because "[a]t no point does section 2517 authorize *pretrial* disclosure."[171] The courts that had previously addressed the issue had reached an identical conclusion when they held that civil litigants

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165. *Id.*

166. *Id.* at 1020.

167. *Id.* (quoting National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 54 (2d Cir. 1984)).

168. 389 U.S. 347 (1967). See *supra* note 21 for a discussion of *Katz*.

169. *In re Electronic Evidence*, 990 F.2d at 1020 (quoting *NBC*, 735 F.2d at 54).

170. *Id.* (quoting *NBC*, 735 F.2d at 54).

171. *Id.* at 1020 (emphasis added). By "pre-trial disclosure," the court meant disclosure before the commencement of the private litigant's civil trial. *See id.* at 1020 n.5.

could obtain electronic surveillance material only through testimony during their civil trials.[172] In *County of Oakland*[173] and *Dowd v. Calabrese*,[174] the courts reasoned that their holdings comported with the plain language of § 2517(3),[175] which provides for disclosure of electronic communications or evidence derived from such communications "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State."[176] In citing to these earlier decisions, Judge Heaney agreed that the language of § 2517(3) unambiguously fails to provide for an alternative method of disclosure, such as prior to the commencement of a private civil litigant's trial.[177]

D. *Dissenting Opinion of Judge Beam*[178]

In his dissent, Judge Beam began by criticizing the majority's approach of "look[ing] not to the statutory language, [but] look[ing] instead to the rest of the title into which the words are placed and . . . look[ing] to 'the legislative struggle leading to its enactment.'"[179] Judge Beam criticized the court for using public policy in its analysis of the issue rather than analyzing the issue based upon either the "language of the law" or "commonly accepted principles

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172. *Id.* at 1020 (citing Dowd v. Calabrese, 101 F.R.D. 427, 435 (D.D.C. 1984); County of Oakland v. City of Detroit, 610 F. Supp. 364, 371 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985)).

173. County of Oakland v. City of Detroit, 610 F. Supp. 364 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985). See *supra* part I.C.3 for a discussion of this case.

174. 101 F.R.D. 427 (D.D.C. 1984). In *Dowd*, two former Department of Justice attorneys brought a libel action against the Wall Street Journal and the author of an allegedly libelous article. *Id.* at 430. The article alleged that the government attorneys had acted improperly by pressuring an organized crime member to become a government witness in the prosecution of another member of organized crime. *Id.* The defendants sought disclosure of two government wiretaps in order to support their defense of truthfulness or lack of actual malice in writing and printing the article. *Id.* at 434. The court denied the defendants' request on the ground that disclosure of wiretap evidence pursuant to § 2517(3) must occur "while [the individual is] giving testimony under oath or affirmation," and the defendants' request was for non-testimonial disclosure. *Id.* at 435.

175. *County of Oakland*, 610 F. Supp. at 370 (citing *Dowd*, 101 F.R.D. at 435).

176. 18 U.S.C. § 2517(3) (1988). See *supra* note 33 for the text of § 2517(3).

177. *In re* Motion to Unseal Electronic Surveillance Evidence, 990 F.2d 1015, 1020 (8th Cir. 1993) (en banc).

178. *Id.* (Beam, J., dissenting). Judge Beam wrote for the majority in the panel opinion of *In re* Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 638-42 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc). See *supra* part II.B.1 for a discussion of Judge Beam's majority opinion.

179. *Id.* at 1020 (quoting the majority opinion at 1017 (quoting National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 53 (2d Cir. 1984))).

of statutory construction."[180]

In analyzing the issue, Judge Beam looked first to the general rules of law dealing with evidentiary exclusions. Judge Beam noted the usual axiom that evidence is available unless it is specifically protected by a rule of exclusion.[181] He criticized the majority opinion for contending that Title III changes this usual axiom to a rule that wiretap material is not available for use as evidence unless its disclosure and use is specifically authorized by § 2517.[182] Judge Beam contended that the majority's analysis offends the public policy of ascertainment of the truth,[183] stating that "any construction of section 2517(3) and Title III that serves to obscure facts or hinder their discovery is contrary to long accepted policy formulations."[184] Judge Beam also stated that the majority's analysis misreads Title III and ignores the more important policy goals underlying the Omnibus Crime Control and Safe Streets Act of 1968[185] of combatting organized crime and having access to as much evidence as possible to facilitate this.[186]

Judge Beam also criticized the majority opinion for ignoring the accepted tools for statutory construction ordinarily employed by federal courts.[187] If a statute is unambiguous, the accepted statutory construction is to look to the plain meaning in order to interpret the statute.[188] Judge Beam conceded that the terms of

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180. *Id.*

181. *Id.* at 1022. Section 2517(3) contains its own exclusionary rule. It prohibits disclosure of electronic surveillance evidence unless there has been compliance with the requirements of each section of Title III. *See* Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 40 (1983).

182. *In re Electronic Evidence*, 990 F.2d at 1022 (Beam, J., dissenting).

183. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting JOHN H. WIGMORE, EVIDENCE § 2192 (3d ed.))) ("'exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence'"); United States v. Nixon, 418 U.S. 683, 710 (1974) (limitations on evidence gathering "are in derogation of the search for truth"); Elkins v. United States, 364 U.S. 206, 234 (1960) ("normally predominant principle of utilizing all rational means for ascertaining truth").

184. *In re Electronic Evidence*, 990 F.2d at 1021 (Beam, J., dissenting).

185. *Id.* at 1022.

186. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157, 2159. *See also Title III — Wiretapping and Electronic Surveillance: Findings*, Pub. L. No. 90-351, § 801, 82 Stat. 211 (1968), *reprinted in* 1968 U.S.C.C.A.N. 253.

187. *In re Electronic Evidence*, 990 F.2d at 1021-22 (Beam, J., dissenting).

188. *Id.* at 1022. Judge Beam reminded the majority that the cases of the Court of Appeals for the Eighth Circuit require the court to concentrate on language when interpreting a statute. For example, Judge Beam noted that in the case of *In re Erick-*

§ 2517(3) may be ambiguous, requiring that the plain meaning of the statute be ascertained by looking at the specific language of the statute as well as the specific language and general design of the Omnibus Crime Control and Safe Streets Act as a whole.[189] However, Judge Beam reasoned that, even if this further analysis was conducted, the majority's interpretation of § 2517(3) as precluding discovery "still fails."[190] Judge Beam reasoned that the majority's interpretation failed because it gave too much weight to Congress' concern for privacy. According to Judge Beam, Congress did not intend to place the concern for conversational privacy above the search for truth, which § 2517 encourages by "permitt[ing] use of wiretap evidence through testimony given under oath in a 'proceeding held under the authority of the United States or of any State.'"[191]

Judge Beam also criticized Judge Heaney's holding that if § 2517(3) allows disclosure of electronic surveillance evidence to private civil litigants, it allows disclosure only through open testimony during the private civil litigant's trial and not in any type of pretrial proceeding.[192] Judge Beam found no support for this holding in either the language or the legislative history of Title III. Section 2515 of Title III refers to evidence received "'in any trial, hearing, or other proceeding *in or before* any court.'"[193] In contrast, § 2517(3), as amended in 1970, involves much broader language.[194] Section 2517(3) refers to disclosure "while giving testimony under oath or affirmation in *any proceeding* held under the authority of the United States or of any State or political subdivision thereof."[195] Judge Beam also reasoned that the Senate Report regarding the Omnibus Crime Control and Safe Streets Act, which stated that "'[t]he major purpose of Title III [was] to combat organized crime,'" further illustrates that the majority's holding, limiting the method of disclosure to private civil litigants to court-

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son Partnership', the Eighth Circuit held that "the language of the statute itself must ordinarily be regarded as conclusive . . . [and] when [the court] find[s] the terms of a statute unambiguous, judicial inquiry is complete." *Id.* at 1022 (quoting *In re* Erickson Partnership, 856 F.2d 1068, 1070 (8th Cir. 1988)).

189. *Id.*

190. *Id.*

191. *Id.* at 1023 (quoting 18 U.S.C. § 2517(3) (1988)).

192. *Id.*

193. *Id.* at 1023 n.4 (quoting 18 U.S.C. § 2515 (1988)) (alteration in original).

194. *Id.*

195. 18 U.S.C. § 2517(3) (1988) (emphasis added). See *supra* note 33 for the text of § 2517(3).

room testimonial disclosure, is incorrect.[196]

Finally, Judge Beam criticized the majority for interpreting § 2517(3) in a way that effectively restricts the use of wiretap evidence "to only those [civil] actions in which the federal government, a state, or a political subdivision of the state is a party."[197] He stated that neither the language of the statute nor its legislative history qualifies the type of civil action in which disclosure is authorized.[198] He reasoned that the words used by Congress in the text of § 2517(3) are in place to assure that all civil RICO actions are included, because "[h]ad Congress intended to limit the use [of testimonial disclosure] to a 'trial' or a 'hearing' or a 'proceeding' involving only a governmental party, it could have used such limiting words."[199] Judge Beam also reasoned that the legislative history of the statute contains no qualification of the type of civil action involved, despite the fact that Congress could easily have qualified it.[200]

In addition to Congress' failure to qualify either the language of § 2517(3) or its legislative history, Judge Beam reasoned that the majority's holding is erroneous because the Department of Justice interpreted § 2517 as permitting disclosure of wiretap tapes to private civil litigants, regardless of governmental affiliation.[201] Judge Beam interpreted a statement by the Department of Justice that it had no objection to the release of the Lipton-Webbe tapes to Smith as tantamount to giving the government's approval.[202] Judge Beam noted that the United States Supreme Court has held that the Justice Department's interpretation of its own regulations and the statutes it administers must be accepted unless such interpretation is

196. *In re Electronic Evidence*, 990 F.2d at 1024 (Beam, J., dissenting) (quoting S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157) (alteration in original).

197. Specifically, the majority interpreted § 2517 as allowing the disclosure of wiretap evidence only in circumstances involving law enforcement. *Id.* at 1016-17.

198. *Id.* at 1024 (Beam, J., dissenting).

199. *Id.*

200. *Id.*

201. *Id.* (citing Smith v. Lipton, No. 91-643C(1), slip op. at 8 (E.D. Mo. May 7, 1991)). Judge Beam stated that the Justice Department "[o]bviously . . . ha[d] interpreted section 2517 and Title III as permitting disclosure of the Lipton-Webbe tapes to private litigants" because the Justice Department had given its approval of the disclosure of the tapes to Smith. *Id.*

202. *Id.* (citing Appellant's Supp. Brief at 4, *In re Electronic Evidence* (No. 91-2385)).

"plainly unreasonable."[203]

III. ANALYSIS

Section 2517(3) of Title III of the Omnibus Crime Control and Safe Streets Act should be interpreted by courts to authorize disclosure of communications, intercepted by the government and not previously made public, to private civil litigants for use in the private civil litigants' actions, either before or during trial. The plain language of § 2517(3), as amended in 1970, by providing for disclosure "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof,"[204] supports this position. The legislative history of the statute as originally enacted in 1968 and as amended in 1970 further supports this position, because the fight to eliminate organized crime through civil as well as criminal means was an important and focused congressional objective.[205] Finally, support for the proposition that § 2517(3), as amended in 1970, authorizes disclosure of intercepted communications to private civil litigants can be found in the broad and generous discovery rules of the Federal Rules of Civil Procedure.[206]

A. *Plain Language of Section 2517(3)*

Through Title IX of the Organized Crime Control Act of 1970, Congress amended each title of the Omnibus Crime Control and Safe Streets Act of 1968 in order to "strengthen and clarify its provisions."[207] The language of § 2517(3) as "clarified" is unambiguous and plainly allows the disclosure of previously undisclosed electronic surveillance evidence to private civil litigants before and during the civil trial, so long as the disclosure occurs while a party or nonparty is giving testimony under oath.[208]

The Supreme Court has stated that when interpreting a statute, courts must focus on plain language, not on legislative history.[209]

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203. *Id.* at 1024-25 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

204. 18 U.S.C. § 2517(3) (1988).

205. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157; Pub. L. No. 91-452, 84 Stat. 922, *reprinted in* 1970 U.S.C.C.A.N. 1073, 1073.

206. FED. R. CIV. P. 26-37.

207. H.R. REP. No. 1549, 91st Cong., 2d Sess. 18 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007.

208. See *supra* note 33 for the text of § 2517(3) as amended in 1970.

209. Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (in-

For example, the Court has directed lower courts that "[w]hen confronted with a statute which is plain and unambiguous on its face, [courts] ordinarily do not look to legislative history as a guide to its meaning . . . [because] it is not *necessary* to look beyond the words of the statute."[210] In such a case, "the language of the statute itself 'must ordinarily be regarded as conclusive.'"[211]

In interpreting § 2517(3), the Courts of Appeals for both the Eighth[212] and Second[213] Circuits have disregarded the Supreme Court's directive and looked not at the language of § 2517(3), but to the "legislative struggle leading to its enactment."[214] As a result, these courts have held that § 2517(3) does not authorize pretrial disclosure to private civil litigants. In *In re Electronic Evidence*, the Court of Appeals for the Eighth Circuit recited Smith's argument that the amended language of § 2517(3) provides for pretrial disclosure of wiretap evidence, but responded with a legislative history analysis.[215] In *National Broadcasting Co. v. United States Department of Justice*, the Court of Appeals for the Second Circuit conceded that an argument for disclosure similar to Smith's argument in *In re Electronic Evidence* was plausible if it was based solely on the language of § 2517(3) but then dismissed the argument because it did not comport with the legislative history of the statute.[216] If the Courts of Appeals for the Second and Eighth Circuits had ex-

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vestigating fifteen year old legislative history of statute is "irrelevant"); United States v. James, 478 U.S. 597, 606 (1986) (legislative history of statute does not "justif[y] departure from the plain words of the statute"); Rubin v. United States, 449 U.S. 424, 430 (1981) ("when we find the terms of a statute unambiguous, judicial inquiry is complete"); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("the familiar canon of statutory construction that [is] the starting point for interpreting a statute is the language of the statute itself"); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.29 (1978) ("when confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning").

210. *Tennessee Valley Auth.*, 437 U.S. at 184 n.29.

211. *James*, 478 U.S. at 606 (quoting *Consumer Prod. Safety Comm'n*, 447 U.S. at 108).

212. *In re* Motion to Unseal Electronic Evidence, 990 F.2d 1015 (8th Cir. 1993) (en banc).

213. National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51 (2d Cir. 1984).

214. *In re Electronic Evidence*, 990 F.2d at 1017 (quoting *NBC*, 735 F.2d at 53).

215. *Id.* The court in *In re Electronic Evidence* stated that "[w]e simply allow Congress's [sic] 'overriding concern for the protection of conversational privacy' . . . to guide our determination that section 2517 does not authorize disclosure in this case." *Id.* at 1017 n.3 (quoting *In re Electronic Evidence*, 965 F.2d 637, 641 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc)).

216. *NBC*, 735 F.2d at 53-54.

amined the plain language of the amended § 2517(3)[217] more closely and compared it with the language of the subsection as originally enacted,[218] they may have held that § 2517(3) does authorize pretrial disclosure to private civil litigants.

The statute as originally enacted provided for disclosure of intercepted electronic communications "while giving testimony under oath . . . in any criminal proceeding in any court of the United States."[219] The 1968 language clearly prohibited disclosure in any proceeding conducted pursuant to a civil action. The statute as amended in 1970 provides for disclosure "while giving testimony under oath . . . in any proceeding held under the authority of the United States."[220] The current language removed the requirement of a criminal action. The language also removed the requirement of a proceeding held before a court by deleting the phrase "in any court" after the word "proceeding." This alteration makes it possible for such evidence to be disclosed in an out-of-court proceeding, such as the taking of a deposition during discovery.[221]

Despite this alteration, courts that have decided the issue have interpreted "any proceeding" to mean any proceeding that is held before a judge, such as a pretrial hearing or a trial itself.[222] It is the interpretation of the phrase "any proceeding" that will give courts the answer to the question of whether section 2517(3) authorizes disclosure to private civil RICO litigants in a pretrial, non-court proceeding.

The word "proceeding" is not defined in the earlier sections of Title III, as is other language included in § 2517(3), such as "person"[223] and "electronic communication."[224] Legal dictionaries de-

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217. See *supra* note 33 for the text of § 2517(3) as amended.

218. See *supra* note 28 and accompanying text for the text of § 2517(3) as originally enacted.

219. 18 U.S.C. § 2517(3) (Supp. IV 1969).

220. § 2517(3) (1988).

221. FED. R. CIV. P. 27-32 govern the taking and use of depositions generally. The taking of a deposition may be considered an out-of-court proceeding because it entails the giving of testimony under oath before an authorized officer of the United States, the state where the deposition is being taken, or the state where the civil action is pending. FED. R. CIV. P. 28(a).

222. *See, e.g.*, Gardner v. Newsday, Inc., 895 F.2d 74, 77 (2d Cir.) (Section 2517(3) "relates solely to use in law-enforcement activities and judicial proceedings."), *cert. denied*, 496 U.S. 931 (1990); United States v. Rosenthal, 763 F.2d 1291, 1293 (11th Cir. 1985) (Section 2517(3) "has determined that . . . disclosure in open court is appropriate.").

223. 18 U.S.C. § 2510(6) (1988).

224. § 2510(12).

fine "proceeding" as "any action, hearing, investigation, inquest, or inquiry . . . in which, pursuant to law, testimony can be compelled to be given."[225] Based on this definition, the discovery methods of deposition taking and production of documents in response to a subpoena duces tecum[226] come within the purview of "any proceeding."

B. *Legislative History of Section 2517(3)*

When statutory language is ambiguous, courts must look to the legislative history of the statute to discern its meaning. The Court of Appeals for the Eighth Circuit has stated that courts "must interpret [a] statute in light of the purposes Congress sought to serve . . . and legislative history may play an important part in discerning these purposes."[227]

The legislative history of § 2517(3) as originally enacted and as amended further supports the proposition that the statute authorizes disclosure of previously undisclosed electronic surveillance evidence to private civil litigants before the civil trial begins, especially private civil RICO litigants. Courts that have decided the issue of whether the section authorizes disclosure to private civil litigants have reasoned that, when enacting Title III, Congress' primary concern was to protect the privacy interests of those persons engaged in wire, oral, and electronic communications; therefore, Congress could only have intended disclosure of communications surveillance evidence to the government in civil actions[228] or to private litigants and the public at large after the evidence had been disclosed publicly in a trial.[229]

However, protecting the privacy interests of persons engaged in wire, oral, and electronic communications was not Congress' only

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225. BLACK'S LAW DICTIONARY 1204 (6th ed. 1990).

226. A subpoena duces tecum is a subpoena "initiated by a party in litigation, compelling production of certain specific documents and other items," to persons not a party to the action. BLACK'S LAW DICTIONARY 1426 (6th ed. 1990).

227. Sierra Club v. Clark, 755 F.2d 608, 615 (8th Cir. 1985) (citation omitted).

228. *See, e.g.*, *In re* Motion to Unseal Electronic Surveillance Evidence, 990 F.2d 1015, 1018 (8th Cir. 1993) (en banc); National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 54 (2d Cir. 1984); United States v. Dorfman, 690 F.2d 1230, 1233 (7th Cir. 1982). See *supra* notes 69-83, 140-202 and accompanying text for a discussion of these cases.

229. *See, e.g.*, United States v. Rosenthal, 763 F.2d 1291, 1293 (11th Cir. 1985); County of Oakland v. City of Detroit, 610 F. Supp. 364, 368-69 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985); Dowd v. Calabrese, 101 F.R.D. 427, 435 (D.D.C. 1984). See *supra* notes 84-104 and accompanying text for a discussion of these cases.

concern in enacting Title III. Another "major purpose of Title III [was] to combat organized crime."[230] Congress' amendment of Title III in 1970 illustrates its intention to use § 2517(3) to help eradicate organized crime. Congress amended Title III within the Organized Crime Control Act of 1970. As evidenced by its name, the Organized Crime Control Act was enacted to "seek the eradication of organized crime in the United States."[231] In passing legislation that provided for civil remedies against organized crime, such as allowing civil lawsuits for RICO violations, Congress attempted to further its stated end.

Successful civil RICO actions brought by both the government and private litigants help to ensure the furtherance of Congress' stated objective of eliminating organized crime. Granting civil RICO litigants access to as much relevant evidence as possible, as early on in the litigation as is practical, helps guarantee the litigation's success. Therefore, § 2517(3), as enacted and amended, should be interpreted by courts as authorizing the disclosure of electronic surveillance evidence to private civil RICO litigants before the trial as well as during the trial.

C. *Discovery Rules of the Federal Rules of Civil Procedure*

Additional support for interpreting § 2517(3) as authorizing disclosure of previously undisclosed government-acquired electronic surveillance material to private civil RICO litigants before the civil trial begins can be found in the discovery rules of the Federal Rules of Civil Procedure.[232] Congress stated that the purpose of the discovery rules is to grant civil litigants access to as much relevant information as possible.[233] This ensures that their claim or defense is properly adjudicated. Granting private civil RICO litigants access to electronic surveillance evidence acquired by the government corresponds to this purpose. Often, such evidence is the only substantial proof that civil RICO claimants have against an

230. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157. Congress was so concerned with combatting organized crime because "[t]hese hard-core groups ha[d] become more than just loose associations of criminals. They ha[d] developed into corporations of corruption, indeed, quasi-governments within our society . . . ." *Id.* Congress acknowledged that the only effective method of discovering the activities of organized crime was to intercept the communications of organized criminals. *Id.* at 2159.

231. Pub. L. No. 91-452, 84 Stat. 922, *reprinted in* 1970 U.S.C.C.A.N. 1073.

232. FED. R. CIV. P. 26-37.

233. FED. R. CIV. P. 26(b) advisory committee's note.

alleged RICO offender.[234] However, electronic surveillance and wiretapping can only be conducted by the government pursuant to Title III.[235] Therefore, refusing to disclose electronic surveillance evidence to the private civil RICO litigant effectively denies the litigant access to one of the more, if not the most, important pieces of evidence of a RICO violation.

Despite the discovery rules' general language and broad provisions to grant civil litigants access to relevant information,[236] the courts that have considered § 2517(3) have refused to interpret it as authorizing disclosure to private civil litigants during discovery.[237] This is because these courts were primarily concerned with protecting the privacy of persons engaged in wire, oral, or electronic communications. For example, in *In re Electronic Evidence*, the court carefully considered Congress' concern for protecting conversational privacy when Title III was originally enacted and concluded that this concern was not overridden by the language of § 2517(3) as amended.[238]

However, a civil litigant's access to relevant information pursuant to the discovery rules does not go unchecked. The discovery rules contain provisions that address the concerns for the protection of privacy that so concerned the *In re Electronic Evidence* court, while meeting the needs of civil litigants to gather all relevant information.[239] For example, pursuant to Rule 26(b), civil litigants must show that they have a substantial need for the materials and information they request from an opposing party or third person that cannot be met another way.[240] In addition, according to Rule 34, civil litigants must make a showing of good cause in order for the court to compel the person from whom discovery is sought to pro-

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234. S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2159 ("[I]ntercepting the communications of organized criminals is the only effective method of learning about their activities.").

235. 18 U.S.C. §§ 2510-2520 (1988).

236. FED. R. CIV. P. 26(b)(1).

237. United States v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985); National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51 (2d Cir. 1984); United States v. Dorfman, 690 F.2d 1230 (7th Cir. 1982); County of Oakland v. City of Detroit, 610 F. Supp. 364 (E.D. Mich. 1984), *appeal denied sub nom.* Oakland County by Kuhn v. Detroit, 762 F.2d 1010 (6th Cir. 1985). See *supra* notes I.C for a discussion of these cases.

238. *In re* Motion to Unseal Electronic Surveillance Evidence, 990 F.2d 1015, 1018 (8th Cir. 1993) (en banc). See *supra* part II.C for a discussion of the en banc opinion.

239. FED. R. CIV. P. 26(b)(3) & (c).

240. FED. R. CIV. P. 26(b)(3).

duce documents and tangible objects.[241] Though vacated by the en banc opinion one year later, the *In re Electronic Evidence* panel opinion's test for disclosing electronic surveillance evidence to private civil litigants, as articulated by Judge Beam, provides a model that balances the privacy of persons engaged in communications with a civil litigant's need for information.[242] Judge Beam's test required that a private civil RICO litigant articulate a compelling need that could not be "accommodated by any other means" before the court would order the disclosure of wiretap evidence in the possession of the government.[243] The test directed the court deciding whether to allow disclosure to "conduct an in camera inspection of the intercepted communications to evaluate whether a compelling need exists."[244]

A second provision of the discovery rules that addresses the privacy concerns of the *In re Electronic Evidence* court can be found in Rule 26(c),[245] which authorizes a court to issue a protective order when necessary to prevent a party or person from whom discovery is sought from "annoyance, embarrassment, oppression, or undue burden or expense."[246] In his test, Judge Beam similarly provided protection for privacy rights with a discretionary protective order.[247] The final portion of Judge Beam's test directed a district court deciding upon disclosure to issue protective orders "as it deems appropriate."[248] The protective order allows a court to limit discovery requests to specific information or persons or to authorize a person from whom discovery is sought to refuse to submit to the request.[249]

Such limitation on the ability of private civil RICO litigants to gain access to electronically recorded conversations and information would ensure that civil RICO litigants gain access to no more information than is necessary to properly adjudicate their claims,

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241. FED. R. CIV. P. 34.

242. See *supra* note 129 and accompanying text for Judge Beam's five-part balancing test.

243. *In re* Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 642 (8th Cir. 1992), *vacated*, 990 F.2d 1015 (8th Cir. 1993) (en banc).

244. *Id.*

245. FED. R. CIV. P. 26(c).

246. *Id.*

247. *In re Electronic Evidence*, 965 F.2d at 642. See *supra* note 129 and accompanying text for Judge Beam's five-part balancing test.

248. *Id.*

249. FED. R. CIV. P. 26(c).

while persons engaged in wire, oral, or electronic communications maintain their privacy.

CONCLUSION

The right to privacy is a basic right recognized by the judiciary and the legislature as worthy of protection. Individuals who engage in confidential communications with others are especially afforded protection of that right. However, when the communications between individuals concern illegal activity, such as violations of RICO laws, the government has the right to intercept those communications and disclose them at public criminal or civil trials.

To date, whenever private civil litigants have attempted to gain access, during the discovery phase of their litigation, to such communications obtained by the government, courts have refused to allow it, citing § 2517(3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as prohibiting such disclosure. These courts, however, have erred in their interpretation of § 2517(3). Section 2517(3)'s plain language, its legislative history, and the much embraced public policy of ascertaining the truth all interact to authorize disclosure of intercepted communications to private civil RICO litigants either before or during trial.

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