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WIRETAP ACT PROSECUTIONS OF DEFENSE ATTORNEYS: THE  
SERIOUS LEGAL AND ETHICAL CONCERNS ARISING FROM THE USE  
OF RECORDED CONVERSATIONS AS EVIDENCE

THOMAS G. WILKINSON, JR.\* & JOSHUA N. RUBY\*\*

I. INTRODUCTION

Two criminal defense lawyers in Western Pennsylvania are facing criminal charges under the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Pennsylvania Wiretap Act) for disclosing to a court the contents of telephone conversations allegedly recorded in violation of the Act. The Pennsylvania Wiretap Act criminalizes certain interceptions and use of recorded conversations.<sup>1</sup> These prosecutions raise difficult questions for lawyers confronted with potentially exculpatory evidence in the form of recorded conversations, particularly in the face of the rapidly advancing technology of handheld devices that can both communicate and record.

On the other side of the country, a software developer appeals his federal wiretapping convictions, arguing that his convictions can only stand if a jury finds that he knew his software code, which is designed to record telephone calls, was being used illegally. And state and federal courts nationwide continue to interpret the scope of wiretapping statutes, many of which have not been updated or amended in decades.

Taken together, these cases raise difficult and unsettled questions about criminal liability under the federal and state wiretapping statutes, especially for lawyers confronted with potentially exculpatory evidence in the form of recorded conversations. These same cases—and, in particular, the criminal charges filed in Pennsylvania—also highlight the stiff penalties that can be imposed on lawyers who answer those questions incorrectly in the eyes of law enforcement.

II. THE PENNSYLVANIA PROSECUTIONS

On July 27, 2015, the Pennsylvania Office of the Attorney General (OAG) announced that charges had been filed against Gerald V. Benyo Jr. and Stanley

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1. See 18 PA. CONS. STAT. § 5703 (2015). Pennsylvania and ten other states require “two-party consent” to legally record a conversation in at least some circumstances. See *id.* § 5704.

T. Booker. Both were charged with violations of the Pennsylvania Wiretap Act on the theory they had disclosed the contents of an illegally recorded conversation—not that they had made an illegal recording themselves.

Attorney Benyo represented a woman charged with cocaine distribution.<sup>2</sup> In February 2015, Mr. Benyo filed a motion for an evidentiary hearing regarding alleged prosecutorial misconduct by a Beaver County assistant district attorney in connection with the charges against his client. The motion included transcribed excerpts of telephone conversations and text messages between Benyo’s client and an employee of the Beaver County Public Defender’s Office that the client allegedly made without the other party’s consent.<sup>3</sup> In those conversations, the employee of the public defender discussed enlisting Benyo’s client to “set up” Benyo at the direction of a prosecutor; in return, Benyo’s client would receive favorable treatment in her criminal prosecution.<sup>4</sup>

Attorney Booker represented a defendant charged with robbery in Mercer County. According to an OAG press release, a woman named Tamara Lynn Buchar illegally recorded a conversation with the victim of the alleged robbery and turned the recording over to Booker. The recording included statements by a woman Booker identified as the victim. Booker initially played the allegedly illegal recording in a conference room in front of a prosecutor and state police officer and suggested that the recording exonerated his client, making further prosecution unwarranted. Booker later played the recording in open court, without objection during the preliminary hearing, while cross-examining the same state police officer. Buchar was also charged with violations of the Pennsylvania Wiretap Act, but the prosecution’s avowed focus was on securing Booker’s conviction.<sup>5</sup>

### III. LESSONS FOR LAWYERS REGARDING POTENTIAL WIRETAP ACT LIABILITY

Viewed through the lens of defense counsel, the prosecutions of Attorneys Booker and Benyo bear troubling signs of retribution and overreach. Neither Benyo nor Booker is alleged to have participated in, facilitated, or encouraged making the audio recordings at issue. Both lawyers disclosed the potentially exculpatory evidence contained in those recordings to the court in the course of advocating for their clients. The evidence offered was not known to be false or

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2. See Press Release, Pa. Office of Att’y Gen., Four Charged After Investigation of Phone Call, Incident at Beaver County Courthouse (July 27, 2015), *available at* [https://www.attorneygeneral.gov/Media\\_and\\_Resources/Press\\_Releases/Press\\_Release/?pid=1996](https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=1996) [<https://perma.cc/Y3JE-P3Y6>].

3. See Press Release, Pa. Office of Att’y Gen., Western Pa. Attorney, Mercer County Woman Charged in Connection with Alleged Illegal Recording (July 27, 2015) [hereinafter Mercer County Press Release], *available at* [https://www.attorneygeneral.gov/Media\\_and\\_Resources/Press\\_Releases/Press\\_Release/?pid=1997](https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=1997) [<https://perma.cc/64JB-2TGV>].

4. John Paul, *Defense Attorney Seeks Hearing to Determine If Assistant DA Frank Martocci Committed Misconduct*, BEAVER COUNTIAN (Feb. 26, 2015), <https://beavercountian.com/content/daily/defense-attorney-seeks-hearing-to-determine-if-assistant-da-frank-martocci-committed-misconduct> [<https://perma.cc/WN9X-SS3P>].

5. See Mercer County Press Release, *supra* note 3.

unreliable.<sup>6</sup> And several of the key players in the prosecutions—including the complaining witnesses against both Benyo and Booker—are directly involved in prosecuting the underlying actions against their respective clients.

Whatever the specific motivations and merits of the prosecutions of Booker and Benyo, the charges highlight the difficult questions the Pennsylvania Wiretap Act poses for lawyers who receive evidence in the form of audio recordings. For one, in an era of rapidly advancing technology, the precise boundaries of the Pennsylvania Wiretap Act's proscriptions remain ill-defined. For another, an attorney may face difficult ethical questions when confronted with a non-consensual recording helpful to a client's case.<sup>7</sup>

A. *How Hard Is It to Determine If a Recording Violates the Pennsylvania Wiretap Act?*

Although the cases against Booker and Benyo are in the early stages, the publicly available materials do not suggest that either of the lawyers carefully examined whether the recording they received had been made with the consent of all parties or violated the Pennsylvania Wiretap Act. As with other physical evidence in criminal cases, it is important for lawyers to investigate the circumstances in which the evidence was obtained. In some cases, the evidence itself will be unlawful to possess, for example, illicit drugs or a sawed off shotgun,<sup>8</sup> and lawyers should generally decline to take custody. In others, such as in the case of an audio recording, the lawyer should thoroughly investigate the circumstances of its creation to assess whether those circumstances may

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6. See PA. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (prohibiting lawyer from offering evidence lawyer knows to be false). Knowledge in this context refers to actual knowledge of falsity, but the requisite knowledge may be inferred from the circumstances. See *id.* 1.0(f).

7. See ABA Comm. on Prof'l Ethics & Responsibility, Formal Op. 01-422 (2001).

A lawyer who electronically records a conversation without the knowledge of the party or parties to the conversation does not necessarily violate the Model Rules. . . . A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded.

*Id.*

8. See, e.g., *In re Ryder*, 381 F.2d 713 (4th Cir. 1967) (affirming suspension of lawyer who took possession of sawed-off shotgun and cash stolen by his client from bank and placed items in safe deposit box with intention to turn property over to authorities); *In re Original Grand Jury Investigation*, 733 N.E.2d 1135, 1139 (Ohio 2000) (“[T]he rule has emerged that, despite any confidentiality concerns, a criminal defense attorney must produce real evidence obtained from his or her client or from a third-party source, regardless of whether the evidence is mere evidence of a client’s crime, or is a fruit or instrumentality of a crime.” (citation omitted)). PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) directs that a lawyer cannot “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act . . . .” PA. RULES OF PROF'L CONDUCT R. 3.4(a). However, a failure to take possession of the instrumentality of a crime may preclude an opportunity for the defense to examine or test the evidence. See *id.* R. 3.4 cmt. 2 (noting that applicable laws “may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence” and may also “require the lawyer to turn the evidence over” to authorities).

have violated the Wiretap Act before attempting to introduce it as evidence or otherwise disclosing its contents to anyone.

Advancing technology has made nonconsensual audio and video recordings easier. The ubiquitous use of cellphones to record events necessarily means the number of Pennsylvania Wiretap Act violations is on the rise.<sup>9</sup> Lawyers faced with evidence in the form of recorded conversations need to tread carefully to avoid running afoul of the Pennsylvania Wiretap Act's proscriptions against disclosure of illegally recorded conversations.<sup>10</sup>

But given the unsettled state of the law on many elements of state and federal wiretapping liability, even a thorough investigation of the circumstances surrounding a recording may not yield a clear answer about its legality. Courts around the country continue to interpret the scope of wiretapping statutes that, notwithstanding the radical changes in "wire" communications over the last four decades, have not been updated in that period. Some state courts have only recently held that their state wiretapping statutes extend to cellular telephone calls and text messages at all.<sup>11</sup> These courts have typically reasoned that a call between mobile phones must, during its electronic life, pass through at least some "wire" and therefore fall within the scope of the older statutory language. As the Massachusetts Supreme Judicial Court explained:

We have no doubt that, in enacting the Massachusetts wiretap statute,

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9. One subset of cases concerning state wiretap statutes that has generated substantial media and public attention are those involving arrests and prosecutions based on the audio or video recording of police officers. Many of the federal courts of appeals have concluded that recording police officers constitutes activity protected by the First Amendment. *See, e.g.*, *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). There remains a circuit conflict about whether and to what extent such a right is "clearly established" such that an arrest or prosecution based on a recording of a police officer may give rise to civil liability under 42 U.S.C. § 1983, notwithstanding the defense of qualified immunity. *Compare Kelly v. Borough of Carlisle*, 622 F.3d 248, 262–63 (3d Cir. 2010) (holding that right to record police officers during traffic stops was "not clearly established" at time facts in case played out), *with Glik*, 655 F.3d at 84–85 (holding that right to record police officers is "clearly established").

10. The Pennsylvania Wiretap Act provides that criminal liability attaches to anyone who

- (1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;
- (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
- (3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

18 PA. CONS. STAT. § 5703 (2015). The Act further defines *intercept* to mean "[a]ural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device." *Id.* § 5702.

11. *See, e.g.*, *Sharpe v. State*, 350 P.3d 388, 392 (Nev. 2015); *Commonwealth v. Moody*, 993 N.E.2d 715, 723 (Mass. 2013); *State v. Serrato*, 176 P.3d 356, 360 (Okla. 2007).

the Legislature intended to protect all calls that to any extent or degree traveled “by the aid of wire, cable, or other like connection.” The reality that cellular telephone technology has drastically reduced the need for such connections does not alter the “intrinsic intended scope” that we read the statute to preserve. In sum, we conclude that the existing language of the Massachusetts wiretap statute is broad enough to protect all forms of cellular telephone calls that utilize wire, cable, or other like connections, even if the use of such connections is only in switching stations.<sup>12</sup>

Pennsylvania courts are grappling with the question of what qualifies as a “device” used to intercept such communications, though it is clear that the Pennsylvania Wiretap Act extends to cellular telephone calls and text messages.<sup>13</sup> In *Commonwealth v. Spence*,<sup>14</sup> the Pennsylvania Supreme Court addressed whether a state trooper violated the Pennsylvania Wiretap Act by listening to a conversation between a confidential informant and the defendant using the speaker function of the informant’s cellular phone. Noting that the Pennsylvania Wiretap Act exempts “[a]ny telephone . . . furnished to the subscriber or user” from the definition of “[a]ny device,” the court concluded that the informant’s cellular phone plainly fell within the statutory term *any telephone*.<sup>15</sup> This meant that the phone was not a “device” within the meaning of the Pennsylvania Wiretap Act, and the state trooper acted lawfully in listening to the conversation between the informant and the defendant.<sup>16</sup>

The scope of the *Spence* decision is still being defined. In *Commonwealth v. Diego*,<sup>17</sup> the Pennsylvania Superior Court recently confronted the question of whether law enforcement officers acted lawfully in observing the text messages a confidential informant exchanged with the defendant using the informant’s iPad.<sup>18</sup> The Commonwealth, citing *Spence*, argued that the informant’s iPad was the “functional equivalent” of a telephone, thus making the iPad exempt from the terms of the Pennsylvania Wiretap Act.<sup>19</sup> The superior court disagreed, holding that “[a]n iPad is not a telephone or telegraph instrument under a common understanding of the relevant terms, and no reasonable person familiar with the now ubiquitous technology of tablet computers would misidentify an iPad as a mere telephone.”<sup>20</sup>

Difficult questions exist in the space between *Spence* and *Diego* for an attorney attempting to discern whether a recording has been made with a

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12. *Moody*, 993 N.E.2d at 723.

13. *See* 18 PA. CONS. STAT. § 5703 (describing application to “any wire, electronic or oral communication” rather than only to “wire” communications, so cellular telephone calls and text messages plainly fall within its scope).

14. 91 A.3d 44 (Pa. 2014).

15. *See id.* at 87–88 (discussing definitional issue).

16. *See id.* (citing 18 PA. CONS. STAT. § 5702).

17. 119 A.3d 370 (Pa. Super. Ct. 2015).

18. *See id.* at 372.

19. *See id.* at 374.

20. *See id.* at 375.

“telephone”—meaning it falls outside the Pennsylvania Wiretap Act and is lawful—or has been made with another “device” within the terms of the Pennsylvania Wiretap Act and is unlawful. A recording may be made using the non-telephone functions of a smartphone, such as “voice memo” or dictation applications. A federal court recently declined to rule whether civil claims under the Pennsylvania Wiretap Act could proceed in just such a scenario, deferring the decision given the uncertainty of the law on this question.<sup>21</sup> Criminal charges arising out of the same incident were recently dismissed,<sup>22</sup> and the Commonwealth has appealed the dismissal.<sup>23</sup>

Similarly, an iPad, other tablet, or other computer may be used to make telephone calls or video calls through applications like FaceTime and Google Voice. Neither *Spence* nor *Diego* addressed how the Pennsylvania Wiretap Act’s exemption of telephones, but not iPads or other computers, might apply to the recording of a conversation through such channels. This question becomes only more difficult given that one may buy an iPad or other tablet and pay for ongoing cellular service for it from a “telephone company.”<sup>24</sup> The more functions that smartphones and tablet computers (or even smartwatches) share, the less tenable the bright-line rules set down in *Spence* and *Diego* will be.

Moreover, courts in Pennsylvania and elsewhere are confronting the question of when the participants in a recorded conversation may lack a reasonable expectation of privacy such that interception does not violate the Pennsylvania Wiretap Act. In *Diego*, the superior court also concluded that the defendant lacked an expectation of privacy in his text messages to the confidential informant. Likening a text message to an email or a letter, the court concluded that “[w]hen an individual sends a text message, he or she should know that the recipient, and not the sender, controls the destiny of the content of that message once it is received.”<sup>25</sup> The defendant, having sent the text messages to the informant, therefore lacked a reasonable expectation of privacy in their contents.<sup>26</sup>

A recent decision by the United States Court of Appeals for the Sixth Circuit concluded that certain civil claims under the similar federal wiretapping statute could not proceed based on a “pocket dial.”<sup>27</sup> In that case, an official of the board that oversees the Cincinnati/Northern Kentucky International Airport

21. *Smith v. Unilife Corp.*, 72 F. Supp. 3d 568, 572 (E.D. Pa. 2014).

22. See Rick Lee, *Judge Orders Wiretapping Charge Dismissed Against Unilife Whistle-Blower*, WITF (July 9, 2015), <http://www.witf.org/news/2015/07/judge-orders-wiretapping-charge-dismissed-against-unilife-whistle-blower.php> [https://perma.cc/7MP5-UUCV].

23. See *Commonwealth v. Smith*, No. 1200 MDA 2015 (Pa. Super. Ct. argued Dec. 2, 2015). Oral argument was held on December 2, 2015. See *id.*

24. See *iPad*, VERIZON WIRELESS, <http://www.verizonwireless.com/landingpages/ipad/?cmp=KNC-C-HQ-NON-R-AC-NONE-NONE-BIN-672716&gclid=CPGinf6g1scCFdBLNwod4LkJXg&gclsrc=ds> [https://perma.cc/76WD-CEA5] (last visited Feb. 14, 2016).

25. See *Diego*, 119 A.3d at 378.

26. See *id.* at 378–79. The court noted that “[e]vidence may be suppressed for violations of the Wiretap Act even if the interception does not violate a reasonable expectation of privacy.” *Id.* at 378.

27. See *Huff v. Spaw*, 794 F.3d 543, 545 (6th Cir. 2015).

inadvertently “pocket” dialed the airport CEO’s assistant while the official was traveling in Italy. The assistant was able to hear over ninety minutes of the board official’s conversations with various people, including his wife, and recorded the last four minutes of the call. The board official and his wife brought federal civil claims against the assistant. The Sixth Circuit concluded that the board official could not pursue civil claims under the federal wiretapping statute because he lacked a reasonable expectation of privacy in his conversations; he knew of the possibility of “pocket dial” calls and failed to take reasonable steps to prevent them.<sup>28</sup> His wife, on the other hand, had such a reasonable expectation and could pursue such civil claims; any other holding “would logically result in the loss of a reasonable expectation of privacy in face-to-face conversations where one party is aware that a participant in the conversation may have a modern cellphone.”<sup>29</sup>

Finally, the question of whether a wiretapping prosecution requires not only intent to record or intercept a communication but also intent to do so unlawfully remains open. The United States Court of Appeals for the Ninth Circuit recently affirmed the convictions of a software developer who wrote software that enabled high profile Los Angeles private investigator Anthony Pellicano to record telephone conversations.<sup>30</sup> Following his federal conviction of conspiracy to intercept wire communications, the developer argued on appeal that “the word ‘intentionally’ in the [federal wiretapping] statutes must be read to require a defendant to know that his conduct is unlawful.”<sup>31</sup> The Ninth Circuit sidestepped a decision on that issue, instead holding that, even if the federal wiretapping statutes require not just intent to intercept communications but also the intent to do so *unlawfully*, the district judge’s jury instructions on conspiracy adequately conveyed such an intent requirement to the jury. The viability of a “mistake of law” defense to a federal wiretapping charge therefore remains unsettled.

#### B. *Is the Wiretap Act Constitutional as Applied to Criminal Defense Lawyers?*

The same legal, factual, and technological questions that make it hard to determine whether a recording violates the Pennsylvania Wiretap Act also implicate constitutional limitations on the criminal prosecution of lawyers who use such recordings on their clients’ behalf. In *Commonwealth v. Stenhach*,<sup>32</sup> the Pennsylvania Superior Court held that “the statutes against hindering prosecution and tampering with evidence are unconstitutionally vague or overbroad as applied to attorneys engaged in the representation of criminal defendants, and hence their enforcement against appellants was a denial of due process.”<sup>33</sup> Should they proceed, the prosecutions of Attorneys Benyo and Booker will test the limits of these constitutional principles in prosecutions for

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28. *See id.* at 550–52.

29. *See id.* at 552–53.

30. *See United States v. Christensen*, 801 F.3d 971, 982 (9th Cir. 2015).

31. *See id.* at 996.

32. 514 A.2d 114 (Pa Super. Ct. 1986)

33. *See id.* at 123–24.



the Pennsylvania Wiretap Act violations.

In *Stenhach*, two young public defenders recovered key pieces of physical evidence but failed to turn them over to prosecutors in advance of their client's trial.<sup>34</sup> After a jury convicted the client, the Commonwealth charged the two lawyers with hindering the prosecution and tampering with evidence. The lawyers were convicted and appealed.<sup>35</sup> The superior court reversed the convictions, holding that, although the lawyers were not privileged to withhold the evidence from prosecutors, the criminal statutes were overbroad and vague as applied to them. As the court explained:

In opposing unreasonable searches and seizures, in preventing self-incrimination and in rendering effective assistance of counsel, the defense attorney is charged with the protection of fourth, fifth and sixth amendment rights. In performing these functions, the defense attorney might run afoul of the statutes against hindering prosecution and tampering with evidence; thus he may not have adequate notice of what conduct might be a crime, and he is subject to the threat of arbitrary and discriminatory prosecution.

Beyond the obvious example stated above, there is little or no guidance for an attorney to know when he has crossed the invisible line into an area of criminal behavior.<sup>36</sup>

The breadth of the reasoning in *Stenhach* plainly covers the prosecutions against Attorneys Benyo and Booker as well: they, too, have “little or no guidance . . . to know when [they have] crossed the invisible line into an area of criminal behavior” in this area.<sup>37</sup> But the lawyers in *Stenhach* also did not seek to use the evidence they uncovered offensively on their client's behalf. As the prosecutions of Attorneys Benyo and Booker proceed, the scope of the protection the Due Process Clause affords will be tested.

### C. *Can Illegally Recorded Conversations Be Admissible in Court?*

Finally, the prosecutions of Attorneys Benyo and Booker illustrate both a long-running tension between Pennsylvania state law and the Federal Rules of Evidence and the difficult ethical questions that result from such tension. It is well established that even recorded conversations that violate the Pennsylvania Wiretap Act may be admitted as evidence in federal court.<sup>38</sup> But the lawyer who seeks to admit such evidence could well face prosecution or other

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34. *See id.* at 116–19.

35. *See id.*

36. *Id.* at 125.

37. *See id.*

38. Where a recording violates the federal wiretapping statute's one-party consent rule, federal law prohibits any federal or state court from admitting the recording itself or any evidence derived from it into evidence. *See* 18 U.S.C. § 2515 (2012). However, Section 2515 does not forbid using a recording made by a party to the conversation or with one party's consent that passes muster under the federal wiretapping statute as evidence, regardless of whether such a recording violates the relevant state wiretapping statute. *See id.*

sanctions for unlawful “disclosure” of a recorded conversation. Although some authority suggests that such disclosure may violate the Rules of Professional Conduct, criminal prosecution of the lawyer who discloses the contents of a recorded conversation as evidence on his or her client’s behalf appears to be new territory.

In a Pennsylvania state court, the contents of a recording made in violation of the Pennsylvania Wiretap Act are generally inadmissible. The Act prohibits disclosure of the contents of an unlawfully recorded conversation “in any proceeding in any court, board or agency of this Commonwealth” and permits “[a]ny aggrieved person” to exclude such contents from the proceeding.<sup>39</sup>

But the exclusion procedure does not apply to cases pending in federal court. Instead, the Federal Rules of Evidence govern the admission of evidence in federal court, and state law is “completely irrelevant.”<sup>40</sup> Federal judges in Pennsylvania have consistently held that the contents of a conversation recorded in violation of the Pennsylvania Wiretap Act may nevertheless be admissible under the Federal Rules of Evidence.<sup>41</sup>

The federal cases admitting such evidence do not discuss the potential for criminal prosecution of the lawyer for disclosing the recorded conversation to the factfinder as evidence on behalf of a client. At least one published advisory ethics opinion—from the North Carolina State Bar—concludes that using such evidence in court for purposes of impeachment or as part of an investigation on behalf of a client violates the Rules of Professional Conduct.<sup>42</sup> But the criminal prosecution of a lawyer for disclosing the contents of an unlawfully recorded conversation used as evidence on behalf of a client does not appear to have been previously addressed by an appellate court in Pennsylvania. The ultimate outcome of the prosecutions of Booker and Benyo for attempting to use exculpatory audio recordings obtained from their clients may provide greater guidance to lawyers who receive such evidence in connection with either criminal or civil actions.

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39. 18 PA. CONS. STAT. § 5721.1(a), (b) (2015).

40. *E.g.*, *Salas v. Wang*, 846 F.2d 897, 905–06 (3d Cir. 1988) (internal quotation marks omitted) (“We are thus bound to apply the [F]ederal [R]ules [of Evidence] so long as they can rationally be viewed as procedural.”); *cf.* *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (“This Court’s decisions counsel against changing the [Fourth Amendment reasonableness] calculus when a State chooses to protect privacy beyond the level required by the Fourth Amendment.”).

41. *See* *Collins v. Jones*, No. 2:13-cv-07613-DS, 2015 WL 790055, at \*2 n.6 (E.D. Pa. Feb. 24, 2015) (considering contents of recorded phone conversation made without one party’s consent on summary judgment); *Montone v. Radio Shack*, 698 F. Supp. 92, 95 (E.D. Pa. 1988) (denying motion to exclude contents of telephone conversation recorded in violation of Pennsylvania Wiretap Act); *Tarnoff v. Wellington Fin. Corp.*, 696 F. Supp. 151, 152–53 (E.D. Pa. 1988) (same).

42. N.C. State Bar Ass’n, Op. 192 (1995), available at <http://www.ncbar.gov/ethics/ethics.asp?page=218> [<https://perma.cc/T2H3-GCKN>]. This guidance reminds us that a lawyer’s duty to advocate on behalf of a client has its limits. As noted in the Pennsylvania Rules of Professional Conduct, “[t]he advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. . . . However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.” *See* PA. RULES OF PROF’L CONDUCT R. 3.1 cmt. 1.

#### IV. CONCLUSION

The technology of mobile communications has been advancing rapidly for years, and, with it, the meaning of familiar terms like *telephone* and *reasonable expectation of privacy* has evolved. As those trends continue, courts in Pennsylvania and elsewhere will be called upon to apply the Pennsylvania Wiretap Act to new and unfamiliar settings. Given the potential for virtually any client to walk into a law office with evidence in the form of a recorded conversation, lawyers would do well to pay attention to the outcome of such cases—and to the ethical guidance that will follow in their wake—to avoid becoming the possible target of a Wiretap Act prosecution and to provide appropriate counsel to clients in this unsettled area of the law.