The Admissibility of Illegally Obtained Evidence

in Family Law Cases and Related Ethical Issues

BY NICHOLAS G. HIMONIDIS

There is more than money at stake in most family law cases. The emotional forces at play can provide strong motivation for parties to seek out, sometimes by any means possible, evidence they believe will "vindicate" their position; prove they are "right" and the opposing party is "wrong"; or show that they are the better parent, that they have been "cheated on," or "cheated out," of their fair share of the marital assets. Aggressively seeking out evidence is one thing. But zealous (sometimes obsessive) efforts to obtain "vindicating" evidence by conduct that crosses legal boundaries is happening with alarming frequency in family law cases. There are many issues raised when this occurs, but this article will focus on the question of whether such evidence may still be admissible in the case, and what, if any, legal and/or ethical responsibility counsel bears in these situations. The answers to these questions are not as straightforward as one might expect. Like so many other questions in the law—the answer is basically "it depends." It depends to some extent on the jurisdiction you are in, but even more so on the specific type of evidence in question, what the evidence is being offered for, and in what specific type of proceeding (e.g., divorce, child custody, or child protection proceeding) it is being offered.

What Constitutes "Illegally Obtained"

While situations can and do arise involving almost any type of evidence being "illegally obtained," the most common situations of "illegally obtained" evidence in family law cases involve illegally intercepted electronic communications and illegally recorded conversations.

Matrimonial litigants often convince themselves that the key to a successful outcome is getting their hands on their spouse's data, particularly emails, texts, and other electronic communications, or secretly recording their spouse's conversations. Under federal law, and in most states, it is legal to secretly record a conversation to which one is a party; however, in roughly ten states, the consent of all parties to the conversation is required to make it legal. In all states, and under federal law, however, secretly recording a conversation without the consent of at least one party (commonly known as eavesdropping or wiretapping) is a criminal offense. Federal criminal statutes and the penal laws of most states also criminalize, in one form or another, the interception of "electronic communications" without the consent of at least one party. This includes emails, texts, and other forms of electronic messaging. Although most states, and the federal

system, still follow the common law rule that illegally obtained evidence should not be ruled inadmissible in a civil case merely because of the manner in which it was obtained, federal statutes and the statutes of many states specifically prohibit the admission as evidence of illegally recorded conversations and illegally intercepted electronic communications in both criminal and civil cases, thereby nullifying this common law rule with respect to these particular forms of evidence.

In an alarming number of cases, both reported and unreported, to which this author can attest, parties in matrimonial and custody cases engage in a wide range of unlawful conduct to obtain evidence, including hacking email accounts, setting up secret email forwarding rules, exploiting legitimate sync and backup applications to copy or access data they have no lawful right to access, installing covert recording devices in the marital home (or on the person of a common child), and the installing spyware programs on devices used by their spouse to track their location, intercept messages, and even listen in on and record phone calls. In almost every scenario, the conduct described violates state and federal criminal statutes, resulting in "illegally obtained evidence." Aside from the potential criminal charges and serious civil damages that a client may face as a result of such conduct, the lawyer in the family law matter needs to know if this evidence may be admissible and what related legal and ethical issues the attorney must consider.

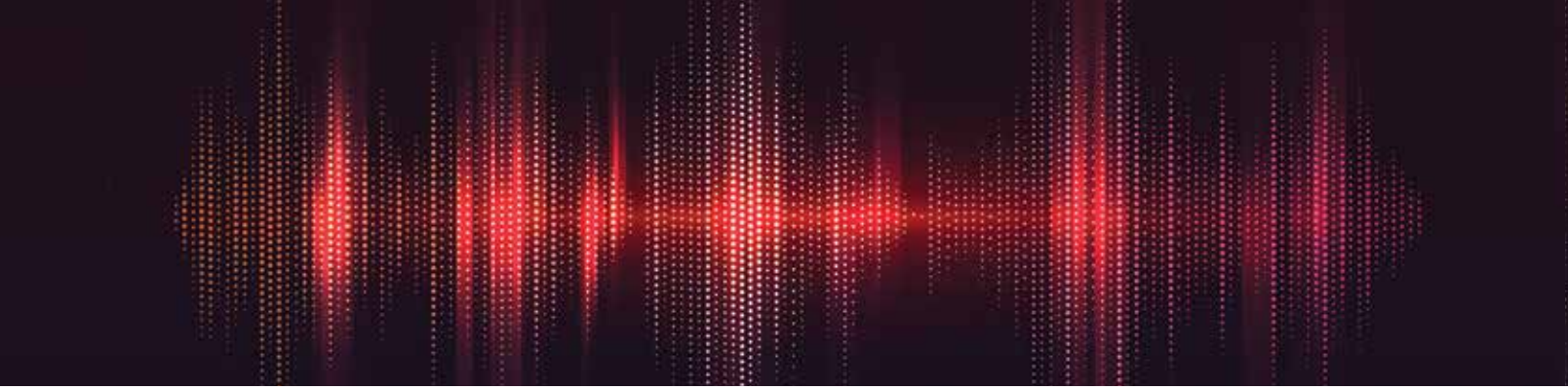
Admissibility

All lawyers (and many nonlawyers) are familiar with the principle that evidence obtained illegally, in violation of a person's constitutional rights, is not admissible against the accused in a criminal case. This "Exclusionary Rule," as it is known, is not expressly set forth in the U.S. Constitution. It is a judicially created rule dating back to the late 1800s when the U.S. Supreme Court began to apply suppression of evidence as a remedy for government overreach and violations of a citizen's constitutional rights in appeals of criminal prosecutions. In 1914 this principle was firmly established in the federal system by the U.S. Supreme Court case of *Weeks v. United States*, 232 U.S. 383 (1914). The 1961 Supreme Court case of *Mapp v. Ohio*, 367 U.S. 643 (1961) (which many of us studied in law school), made it clear that this federal "Exclusionary Rule" was equally applicable to cases in state court by virtue of the Fourteenth Amendment. The Exclusionary Rule holds that evidence obtained by government actors or at their behest in violation of a defendant's constitutional rights must be suppressed with only a few limited exceptions. The Exclusionary Rule is not commonly applied in civil cases—but cases hold that it may be where the government is a party and seeks to introduce evidence illegally obtained by government actors. It has been noted in many federal and state court decisions that the Exclusionary Rule, created as a "check" on the government's abuse of constitutional protections of the individual, actually represents a significant departure from the common law rule, which favors the admissibility of all relevant evidence, including illegally obtained evidence, absent a specific rule or law mandating its exclusion.

There are examples of noncriminal matters to which the government is a party—and the Exclusionary Rule has been held to apply in many, but not all, of those cases. One such relevant example is in "child protection" cases where a state or county agency seeks to remove a child from a parent and wishes to introduce evidence that government actors (police, child welfare officers) may have obtained "illegally" in violation of the respondent parent's Fourth, Fifth, or Sixth Amendment rights. This was precisely the case in *Matter of Diane P.*, 110 A.D.2d 354 (N.Y. 1985), a child protective proceeding under the New York Family Court Act, decided by the Appellate Division in the Second Department of New York in 1985. The case involved a thirteen-year-old girl who walked into a police station in Ossining, New York, and told officers that her mother had assaulted her with a broomstick. Police officers and agents of Child Protective Services responded to the mother's apartment, where they were alleged to have made a warrantless and nonconsensual search of the apartment, recovering a broom handle and a shoe that the child would later identify as items the mother had beaten her with. In a criminal prosecution for assault and/or child endangerment, there is almost no question that the evidence recovered at the scene would have been suppressed under the Exclusionary Rule. But this was not a criminal prosecution—it was a "civil" child protection proceeding, the purpose of which was not to "punish" the mother but to protect the minor child. In deciding that the "illegally" obtained evidence must be admitted, the court issued a decision consistent with cases in other states on similar facts and held that "upon weighing the likely deterrent effect of the exclusionary rule against its detrimental impact upon the fact-finding process *and the State's enormous interest in protecting the welfare of children*, we conclude that the rule should not be applied in [child protective proceedings]." *Id.* at 354 (emphasis added).

But what about cases where the government is not a party, when evidence is obtained illegally by everyday litigants or their agents in a matrimonial, custody, or family offense case? Is that evidence admissible? The answer will depend on the jurisdiction where the case is located, but more than likely, it will depend primarily on the type of evidence in question, and whether the evidence in question is being offered in connection with fault or a financial issue, as opposed to issues of child custody, where courts have consistently held that protecting the best interests of the child outweighs pretty much anything else.

Abundant federal and state case law makes it clear that the Exclusionary Rule does not apply to the unlawful collection of evidence by nongovernment actors. Many states, and the



federal system, continue to follow the common law rule that evidence obtained illegally by private parties is admissible if it is relevant and material and meets other evidentiary requirements. In 1964 the New York Court of Appeals decided *Sackler v. Sackler*, 15 N.Y.2d 40 (1964), a divorce case in which the husband and private detectives broke into the wife's private residence to obtain photographs of the wife engaged in adultery. The court confirmed what other courts had previously held—that in the absence of a statutory or constitutional provision to the contrary, evidence is not suppressed in a civil matter simply because the party offering the evidence committed a criminal offense in obtaining it. Many other state and federal courts have agreed, and this remains the general rule in most jurisdictions.

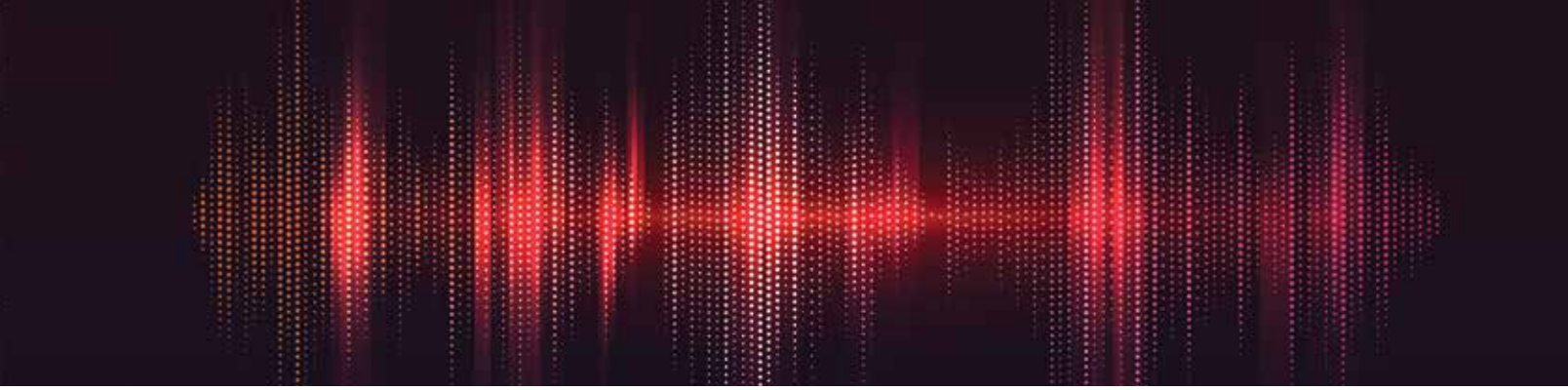
As clearly noted by the court in *Sackler*, however, this common law rule applies only in the absence of some statutory or constitutional provision to the contrary. Many states (and the federal system) do in fact have statutory provisions that specifically prohibit certain types of illegally obtained evidence from being admitted, particularly illegal recordings and unlawfully intercepted electronic communications. For example, Rule 4506 of the New York Civil Practice Law and Rules expressly prohibits the use in any civil or administrative matter of evidence obtained through unlawful eavesdropping or the interception of electronic communications in violation of the New York Penal Law. Other states, including Maryland, Kansas, Connecticut, and Pennsylvania, have similar statutory provisions barring the use of this type of illegally obtained evidence in civil cases.

The Federal Rules of Evidence provide that "[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court." While federal law mandates the exclusion of any intercepted "wire or oral communications" in any federal or state court proceedings (18 U.S.C. § 2515), this exclusionary provision does not extend to intercepted "electronic communications" (such as emails or text messages). The reasons for this are unclear, but the language of the statute is not. However, as noted above, a number of states have specific statutory provisions barring illegally intercepted electronic communications from being used as evidence in civil matters.

There are a number of (dated) state court decisions holding that intercepted electronic communications may be admissible in a matrimonial case despite the potential criminality of the conduct in obtaining them. In the case of *Beaber v. Beaber*, 41 Ohio Misc. 95 (1974), the Ohio Court of Common Pleas held that neither the Ohio statute(s), the Ohio Constitution, nor the federal Constitution, as it related to the right of privacy, prevented the admission of evidence obtained in violation of Ohio's eavesdropping and wiretapping statutes in a matrimonial action. Prior to the commencement of the matrimonial action in that case, the husband tapped his home phone and recorded conversations of his wife and a third party. Based on those recordings and other factors, the husband commenced a matrimonial action and sought to bring the tapes into evidence. Apparently finding no Ohio cases directly on point, the court ironically cited *Sackler v. Sackler*, the 1964 case from New York's highest court mentioned above, which had held in a divorce action that illegally obtained evidence was nonetheless admissible provided it was otherwise relevant and material. What the *Beaber* court failed to mention—and is critical in many family cases involving this type of evidence—is that while Sackler did arise out of a matrimonial action, and did involve illegally obtained evidence, the evidence sought to be suppressed in *Sackler* (which was ultimately ruled admissible) was evidence obtained by means of an illegal forcible entry into the wife's home—not an illegal wiretap or illegally intercepted electronic communications. In ruling that the evidence in question was not inadmissible merely because of the manner in which it was obtained, the court of appeals in *Sackler* made reference to New York Civil Practice Law and Rules § 4506 and New York Penal Law article 250, stating, "the New York Legislature, when it has found necessity for outlawing evidence because it was secured by particular unlawful means, has provided specific statutory prohibitions *such as those against the use of proof gotten by illegal eavesdropping*." 15 N.Y.2d at 44 (emphasis added.)

The *Beaber* court stated, "neither the Fourth Amendment to the United States Constitution nor the prohibition against unreasonable search and seizures in the federal and state constitutions applied to acts by nongovernmental persons—in this case the defendant—and such provisions do not apply in civil cases." 41 Ohio Misc. at 101.

While Ohio would appear to allow unlawfully recorded



conversations entered into evidence in a matrimonial action, many other states, including New York, Pennsylvania, Connecticut, Maryland, and Kansas, would not.

Despite the disparate holdings and rationales on the issue of whether to allow illegally obtained evidence on issues of fault or financial issues, depending on the type of evidence in question, one result seems to be consistent when the issue is custody of a child: The evidence will be received if it is relevant.

In 2017 the Nevada Supreme Court decision in *Abid v. Abid*, 133 Nev. 770 (2017), upheld a trial court's decision to provide to a court-appointed psychologist recordings of the mother and child made illegally by the father, and the trial court's subsequent acceptance of testimony from that psychologist based in part on those illegal recordings. The court found that its duty to determine the best interests of the "nonlitigant child" necessarily outweighed any policy interest in deterring illegal conduct between the parent litigants. This appears to be the conclusion reached most often by courts when the evidence in question is viewed as relevant to a child custody issue.

In 2011 in the *Matter of Young v. Young*, 84 A.D.3d 972 (2011), the New York Appellate Division Second Department held that excluding evidence regarding a mother's fitness as a custodial parent, although it may have been illegally obtained, would not be consistent with the court's responsibility to consider all factors relevant to a determination of custody and would have a detrimental impact on the state's enormous interest in protecting the welfare of children.

Ethical Issues

A discussion of the ethical issue(s) raised in these cases must begin with ABA Model Rule 1.2(d), which states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. . . ." So, counsel obviously cannot suggest or recommend that the client engage in any of the conduct we are discussing, nor "assist" the client in any "illegal conduct" to obtain evidence. Does this mean an attorney who has no actual knowledge of the client's intentions beforehand is in the clear? Certainly not. For starters, there are ethics opinions interpreting ABA Model Rule 1.2 that state that a lawyer has a duty to make reasonable inquiry sufficient to satisfy themselves that the client is not seeking to engage in illegal conduct (e.g., ABA Formal Ethics Op. 491). In addition, ABA Model Rule 1.1 states: "A lawyer shall provide competent representation to a client." Given the pervasiveness of this type of illegal conduct by litigants in family law cases, and the fact that many of those litigants may be unaware of the illegal nature of the conduct at issue, "competent representation" in this context should certainly include advising clients early on in the representation regarding the illegality of this type of conduct and the potential consequences of same—the least of which may be the inadmissibility of the evidence obtained.

In addition, Model Rule 8.4 expressly prohibits a lawyer from engaging in criminal conduct themselves. But if the attorney does not know about the conduct in advance, and does not participate in same, how could this be an issue? It might be surprising to learn that both federal law and the laws of at least a few states make it a criminal offense for a person to "use" or "disseminate" evidence obtained in violation of statutes prohibiting unlawful recordings and unlawful interception of electronic communications. Accordingly, a lawyer who knew nothing about a client's intended misconduct in this regard could very easily commit a criminal offense, and an ethical violation under Rule 8.4, simply by accepting and using the evidence their client illegally obtained.

Any attorney representing clients in family law matters would be well served to (1) know the laws most frequently violated by litigants attempting to gather evidence in these cases; (2) ask probing questions regarding the source of any evidence presented to the lawyer by the client, especially when the evidence consists of recordings or copies of electronic communications; and (3) counsel clients early, and often, regarding the serious liabilities that can result from this conduct, including criminal and civil sanctions, in addition to the evidence potentially being ruled inadmissible. FA

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