

APPELLATE BRIEFS

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TAPING PHONE CALLS

Most Nevada attorneys are at least generally aware of the Nevada law that prohibits a person from recording a telephone call without consent of the other party to the call. In fact, many have had uncomfortable conversations with clients explaining that they weren't allowed to secretly record the telephone call that they want to use in their case. In the recent case of *Ditech Financial LLC, f/k/a Green Tree Servicing, LLC v. Sanford Buckles*, 133 Nevada Adv. Op. 64 (Sept. 14, 2017), the Nevada Supreme Court was faced with the question of whether the prohibition against recording phone calls without consent applies if the recording was made by someone outside Nevada who uses recording equipment that is also located outside of the state.

In *Ditech*, Sanford Buckles, a Nevada resident, sued Ditech in federal court in Nevada. Buckles alleged that Ditech, which was headquartered in Minnesota, with call centers in Arizona and Minnesota, recorded his phone calls without his consent. He argued that secret recording of his calls violated NRS 200.620, and sought damages under the statute's private right of action provisions. Ditech responded by filing a motion to dismiss. In its motion, Ditech argued, first, that NRS 200.620 does not apply to telephone calls recorded by persons located outside of the state on equipment that is also located outside of Nevada. Second, Ditech argued that if the statute were to apply to such situations, the statute would violate the United States Constitution's Due Process Clause and Dormant Commerce Clause. In reviewing the motion, the federal court determined that the outcome of Ditech's motion hinged upon whether or not NRS 200.620 applies to recordings made outside of the state on equipment

located outside of the state. Seeking guidance on that issue, the federal court certified the question to the Nevada Supreme Court pursuant to NRAP 5. The fundamental question presented to the Nevada Supreme Court upon certification was whether NRS 200.620 applies to recordings of telephone conversations with a person in Nevada without that person's consent, when the person recording the conversation, and the equipment recording the conversation, are not located in Nevada.

By its express terms, NRS 200.620 does not specifically prohibit the secret recording of telephone calls. Instead, it is a "wiretap" statute. Specifically, the relevant provisions of the statute provide that "it is unlawful for any person to intercept or attempt to intercept any wire communication unless the interception or attempted interception is made with the prior consent of one of the parties to the communication." NRS 600.620(1)(a). However, in prior cases, the Supreme Court determined that the tape recording of telephone conversations constitutes the "intercept" of those conversations. Therefore, the Court determined that NRS 200.620 prohibits the taping of telephone conversations with the consent of only one party. *See, e.g. Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179, 969 P.2d 938, 940 (1998).

On appeal, Ditech argued that the statute could not apply, because the allegedly prohibited conduct, the interception, took place outside of Nevada. Buckles argued, however, that because he was in Nevada, and because the harm occurred to him in Nevada, the statute did apply.

In reviewing the arguments, the court looked to the prior Supreme Court case of *Mclellan v. State*, 124 Nev. 263,

182 P.3d 106 (2008), for guidance. In that case, the Court addressed whether an out-of-state recording of a conversation with a person in Nevada made without that person's consent could be admitted as evidence at their criminal trial. There, the "interception," i.e., the recording, took place in California. In *Mclellan*, which focused solely on the issue of admissibility, the Court concluded that the recording was permissible in California. Therefore, because the recording was permissible at the location where the recording occurred, it was admissible in a Nevada criminal trial, even though the manner of interception would have violated Nevada law "had the interception taken place in Nevada." In the present case, the Supreme Court followed that line of reasoning. Citing two cases from Washington, the Court adopted a standard that "interceptions and recordings occur where made." Consistent with that reasoning, the Court concluded that the conversations were intercepted and recorded in Arizona and Minnesota, the location of Ditech's call centers, not in Nevada. Therefore, because the interceptions and recordings did not take place in Nevada, they did not violate NRS 200.620. Specifically, the Court determinatively answered the question by concluding that NRS 200.620 does not apply to recordings of telephone conversations with a person in Nevada without that person's consent, when the recordings are made by a party who is located outside of the state of Nevada and who uses recording equipment that is located outside of Nevada.

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