

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

GENE C. LUKEN,

Plaintiff,

vs.

TINA MARIE EDWARDS, formerly
known as TINA MARIE LUKEN,

Defendant.

No. C 10-4097-MWB

**INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

No. 1 — INTRODUCTION

Congratulations on your selection as a juror!

These Instructions are to help you better understand the trial and your role in it.

As I explained during jury selection, this is an action by plaintiff Gene C. Luken against his ex-wife, defendant Tina Marie Edwards, alleging that, during the pendency of the parties' divorce proceedings, Ms. Edwards intentionally intercepted private communications between Mr. Luken and other individuals, including his attorney in their divorce proceedings, using a digital recorder, in violation of federal law.

You have been chosen and sworn as jurors to try the issues of fact related to the plaintiff's claim. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these Instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Mr. Luken and Ms. Edwards stand equal before the law, and each is entitled to the same fair consideration.

Please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

You will indicate your verdict in a Verdict Form, a copy of which is attached to these Instructions. A Verdict Form is simply a written notice of your decision. When you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question. You will all sign that copy to indicate that you agree with the verdict and that it is unanimous. Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict.

I will explain how you are to determine whether or not Mr. Luken has proved his claim. First, however, I must explain some preliminary matters, including the burden of proof, what is evidence, and how you are to treat the testimony of witnesses.

No. 2 — BURDEN OF PROOF

Your verdict depends on what facts have been proved. Unless I tell you otherwise, facts must be proved “by the greater weight of the evidence.” This burden of proof is sometimes called “the preponderance of the evidence.”

“Proof by the greater weight of the evidence” is proof that a fact is more likely true than not true.

- It does not depend on which side presented the greater number of witnesses or exhibits
- It requires you to consider all of the evidence and decide which evidence is more convincing or believable
 - For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness’s testimony
 - You are free to disbelieve any testimony or other evidence that you do not find convincing or believable
- If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved

You may have heard that criminal charges require “proof beyond a reasonable doubt.” That is a stricter standard that does not apply in a civil case, such as this one. Remember that the burden applicable in this case is proof “by the greater weight of the evidence,” not proof “beyond a reasonable doubt.”

No. 3 — DEFINITION OF EVIDENCE

Evidence is

- Testimony. Testimony may be either “live” or “by deposition.” A deposition is testimony taken under oath before the trial and preserved in writing or on video. Consider that testimony as if it had been given in court.
- Answers to interrogatories. An interrogatory is a written question asked before trial by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.
- Exhibits admitted into evidence. Just because an exhibit may be shown to you does not mean that it is more important than any other evidence.
- Stipulations, which are agreements between the parties. If the parties stipulate that certain facts are true, then you must treat those facts as having been proved.

Evidence is not

- Testimony that I tell you to disregard
- Exhibits that are not admitted into evidence
- Statements, arguments, questions, and comments by the lawyers
- Objections and rulings on objections
- Anything that you see or hear about this case outside the courtroom

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact. An example is testimony by a witness about what that witness personally saw or heard or did.
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact. An example is testimony that a witness personally saw a broken window and a brick on the floor from which you could find that the brick broke the window.
- You should consider both kinds of evidence, because the law makes no distinction between their weight. The weight to be given any evidence, whether it is “direct” or “circumstantial,” is for you to decide.

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used

No. 4 — TESTIMONY OF WITNESSES

You may believe all of what any witness says, only part of it, or none of it.

In evaluating a witness's testimony, consider the following:

- the witness's
 - intelligence
 - memory
 - opportunity to have seen and heard what happened
 - motives for testifying
 - interest in the outcome of the case
 - manner while testifying
 - drug or alcohol use or addiction, if any
- the reasonableness of the witness's testimony
- any differences between what the witness says now and said earlier
- any inconsistencies between the witness's testimony and any other evidence that you believe
- whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes or are, instead, the result of lies or phony memory lapses, and
- any other factors that you find bear on believability or credibility

You should not give any more or less weight to a witness's testimony just because the witness is an expert.

You may give any witness's opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

It is your exclusive right to give any witness's testimony whatever weight you think it deserves.

No. 5 — INTENTIONAL INTERCEPTION OF PRIVATE COMMUNICATIONS

Mr. Luken claims that, during the pendency of the parties' divorce proceedings, Ms. Edwards intentionally intercepted private communications between Mr. Luken and other individuals, using a digital recorder, in violation of federal law. Ms. Edwards denies this claim.

To win on his claim of “intentional interception of private communications,” Mr. Luken must prove that Ms. Edwards improperly intercepted one or more communications.

Improper interception

To prove that Ms. Edwards improperly intercepted a particular communication, Mr. Luken must prove the following elements:

One, Ms. Edwards intentionally intercepted Mr. Luken's communication with another person.

Ms. Edwards “intercepted” the communication if she obtained the contents of the communication by using any electronic, mechanical, or other device. A voice-activated recorder is an “electronic, mechanical, or other device.” For the purposes of these Instructions, a “communication” is something spoken by a person.

Two, Mr. Luken had an expectation that his communication would not be intercepted.

Mr. Luken must have actually believed that his communication would not be intercepted, that is, that it was private and could not be overheard.

Three, Mr. Luken’s expectation was justified under the circumstances.

Mr. Luken must prove that a reasonable person also would have expected that his communication would not be intercepted, considering all of the circumstances in which the communication took place.

If Mr. Luken has proved all of these elements as to a particular communication, then the interception of that communication was improper, *unless* Ms. Edwards proves the following “one-party consent defense” as to that communication.

One-party consent defense

Ms. Edwards can defeat a claim of improper interception of a particular communication, if she proves one or more of the following alternatives as to that communication:

Ms. Edwards was a party to the communication in question,

OR

One of the parties to the communication gave prior consent to the interception.

If Ms. Edwards proves one or more of these alternatives as to a particular communication, her interception of that communication was not improper, *unless* Mr. Luken proves the following:

The communication was intercepted for the purpose of committing any criminal or tortious act.

“Tortious acts” include “invasion of privacy.”

“Invasion of privacy” includes the following:

- unreasonable intrusion upon Mr. Luken's private affairs, if it would be highly offensive to a reasonable person
- publication in the divorce proceedings or proceedings on other claims by Ms. Edwards against Mr. Luken that would unreasonably place Mr. Luken in a false light

If Ms. Edwards proves her "one-party consent" defense as to a particular communication, and Mr. Luken fails to prove that the purpose of the interception was to commit a criminal or tortious act, then you cannot find that the interception of that particular communication was improper.

Again, your verdict must be for Mr. Luken if he proves that the interception of one or more communications was improper. If you find in favor of Mr. Luken, you must also determine the number of days that Ms. Edwards improperly intercepted Mr. Luken's private communications.

No. 6 — OUTLINE OF TRIAL

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements. An opening statement is not evidence, but simply a summary of what the lawyer expects the evidence to be.
- Mr. Luken will present evidence and call witnesses and the lawyer for Ms. Edwards may cross-examine them.
- Ms. Edwards may present evidence and call witnesses, and the lawyer for Mr. Luken may cross-examine those witnesses.
- The parties will make their closing arguments to summarize and interpret the evidence for you. Like opening statements, closing arguments are not evidence.
- I will give you the last Instruction, on “deliberations.”
- You will retire to deliberate on your verdict.

No. 7 — OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

No. 8 — BENCH CONFERENCES

During the trial it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- These conferences are to decide how certain evidence is to be treated, to avoid confusion and error, and to save your valuable time, so please be patient
- We will do our best to keep such conferences short and infrequent

No. 9 — NOTE-TAKING

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them

If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

No. 10 — QUESTIONS BY JURORS

When the attorneys have finished questioning a witness, you may propose questions in order to clarify the testimony.

- Do not express any opinion about the testimony or argue with a witness in your questions
- Submit your questions in writing by passing them to the Court Security Officer (CSO)

I will review each question with the attorneys. You may not receive an answer to your question:

- I may decide that the question is not proper under the rules of evidence
- even if the question is proper, you may not get an immediate answer, because a witness or an exhibit you will see later in the trial may answer your question

Do not feel slighted or disappointed if your question is not asked. Remember you are not advocates for either side. You are impartial judges of the facts.

No. 11 — CONDUCT OF JURORS DURING TRIAL

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.
- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell

them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.

- Do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on “implicit biases.” As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining Instruction at the end of the evidence.

No. 12 — DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

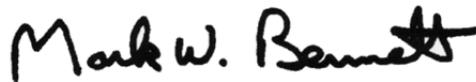
- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court.
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment. However, each of you must make your own conscientious decision, after considering all the evidence, discussing it fully with your fellow jurors, and listening to the views of your fellow jurors.
- Do not be afraid to change your opinions if the discussion with other jurors persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.
- Remember that you are not advocates, but judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.
- If you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in

writing or orally in open court. *Remember that you should not tell anyone—including me—how your votes stand numerically.*

- Base your verdict solely on the evidence and on the law as I have given it to you in my Instructions. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.
- Your verdict on each question submitted must be unanimous.
- Complete and sign one copy of the Verdict Form. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 2nd day of October, 2012.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

GENE C. LUKEN,

Plaintiff,

No. C 10-4097-MWB

vs.

TINA MARIE EDWARDS, formerly
known as TINA MARIE LUKEN,

VERDICT FORM

Defendant.

On the claim of plaintiff Gene C. Luken, we, the Jury, find as follows:

INTENTIONAL INTERCEPTION OF PRIVATE COMMUNICATIONS		
Step 1: Verdict	In whose favor do you find on Mr. Luken’s claim of “intentional interception of private communications,” as explained in Instruction No. 5? <i>(If you find in favor of Mr. Luken, please go on to answer the question in Step 2. On the other hand, if you find in favor of Ms. Edwards, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	<input type="checkbox"/> Mr. Luken <input type="checkbox"/> Ms. Edwards
Step 2: Days of Violations	If you found in favor of Mr. Luken in Step 1 , please indicate the number of days that Ms. Edwards improperly intercepted Mr. Luken’s private communications. <i>(When you have completed this Step, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict</i>	<input style="width: 50px;" type="text"/> days

_____ Date

Foreperson

Juror

Juror	Juror
Juror	Juror
Juror	Juror

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

GENE C. LUKEN,

Plaintiff,

vs.

TINA MARIE EDWARDS, formerly
known as TINA MARIE LUKEN,

Defendant.

No. C 10-4097-MWB

**COURT’S PROPOSED
INSTRUCTIONS
TO THE JURY**

(10/01/12 “FINAL” VERSION)

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VERDICT FORM

No. 13 — INTRODUCTION¹

Congratulations on your selection as a juror!

These Instructions are to help you better understand the trial and your role in it.

As I explained during jury selection, this is an action by plaintiff Gene C. Luken against his ex-wife, defendant Tina Marie Edwards, alleging that, during the pendency of the parties' divorce proceedings, Ms. Edwards intentionally intercepted private communications between Mr. Luken and other individuals, including his attorney in their divorce proceedings, using a digital recorder, in violation of federal law.²

You have been chosen and sworn as jurors to try the issues of fact related to the plaintiff's claim. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes,

¹ Judge Bennett's "plain language" stock Jury Instructions. *Compare* 8th Cir. Model 1.01 (2012); Joint Proposed Preliminary Jury Instruction Nos. 1-3.

² The claim here is premised on a violation of 18 U.S.C. § 2511(1)(a), which prohibits "intentional" interception of communications. For reasons explained in more detail in the annotations to Instruction No. 5, I conclude that only "oral communications" were allegedly "intercepted" in this case, and "oral communications" require a justified expectation of privacy. *See* 18 U.S.C. § 2510(2). "Interception" of communications in violation of Title III requires "the aural or other acquisition of the contents of any wire, electronic, or oral communication *through the use of any electronic, mechanical, or other device*. 18 U.S.C. § 2510(4) (emphasis added). Thus, the references to "intentional" interception of "private" communications using a "digital recorder" are necessary to define the claim.

generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these Instructions.³ Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Mr. Luken and Ms. Edwards stand equal before the law, and each is entitled to the same fair consideration.

Please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

You will indicate your verdict in a Verdict Form, a copy of which is attached to these Instructions. A Verdict Form is simply a written notice of your decision. When you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question. You will all sign that copy to indicate that you agree with the verdict and that it is unanimous. Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict.

³ Judge Bennett's stock first instruction on "implicit bias." *Compare* 8th Cir. Model 1.01 (2012) (unnumbered ¶¶ 4 and 7); 9th Cir. Model 1.1B, unnumbered ¶ 3.

I will explain how you are to determine whether or not Mr. Luken has proved his claim. First, however, I must explain some preliminary matters, including the burden of proof, what is evidence, and how you are to treat the testimony of witnesses.

No. 14 — BURDEN OF PROOF⁴

Your verdict depends on what facts have been proved. Unless I tell you otherwise, facts must be proved “by the greater weight of the evidence.” This burden of proof is sometimes called “the preponderance of the evidence.”

“Proof by the greater weight of the evidence” is proof that a fact is more likely true than not true.

- It does not depend on which side presented the greater number of witnesses or exhibits
- It requires you to consider all of the evidence and decide which evidence is more convincing or believable
 - For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness’s testimony
 - You are free to disbelieve any testimony or other evidence that you do not find convincing or believable
- If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved

You may have heard that criminal charges require “proof beyond a reasonable doubt.” That is a stricter standard that does not apply in a civil case, such as this one. Remember that the burden applicable in this case is proof “by the greater weight of the evidence,” not proof “beyond a reasonable doubt.”

⁴ Judge Bennett’s “plain language” stock Jury Instructions. *Compare* 8th Cir. Model 3.04 (2012); Joint Proposed Preliminary Jury Instruction No. 4; Joint Proposed Final Jury Instruction No. 2.

No. 15 — DEFINITION OF EVIDENCE⁵

Evidence is

- Testimony. Testimony may be either “live” or “by deposition.” A deposition is testimony taken under oath before the trial and preserved in writing or on video. Consider that testimony as if it had been given in court.⁶
- Answers to interrogatories. An interrogatory is a written question asked before trial by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.⁷
- Exhibits admitted into evidence. Just because an exhibit may be shown to you does not mean that it is more important than any other evidence.

⁵ Judge Bennett’s “plain language” Jury Instructions. *Compare* 8th Cir. Model 1.02 (2012); Joint Proposed Preliminary Jury Instruction No. 7.

⁶ *Compare* 8th Cir. Model 2.12 (2012); Joint Proposed Preliminary Jury Instruction No. 7.

⁷ *Compare* Iowa Civil Jury Instruction 100; Joint Proposed Preliminary Jury Instruction No. 10.

- Stipulations, which are agreements between the parties. If the parties stipulate that certain facts are true, then you must treat those facts as having been proved.⁸

Evidence is not

- Testimony that I tell you to disregard
- Exhibits that are not admitted into evidence
- Statements, arguments, questions, and comments by the lawyers
- Objections and rulings on objections
- Anything that you see or hear about this case outside the courtroom

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact. An example is testimony by a witness about what that witness personally saw or heard or did.
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact. An example is testimony that a witness personally saw a broken window and a brick on the floor from which you could find that the brick broke the window.
- You should consider both kinds of evidence, because the law makes no distinction between their weight. The weight to be given any

⁸ Compare 8th Cir. Model 2.03 (2012); Joint Proposed Preliminary Jury Instruction No. 9.

evidence, whether it is “direct” or “circumstantial,” is for you to decide.⁹

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used¹⁰

⁹ See 9th Cir. Model 1.9 (modified), *and compare* 8th Cir. Model 1.02 (2012) (last unnumbered paragraph).

¹⁰ *Compare* 8th Cir. Model 2.08B (2012).

No. 16 — TESTIMONY OF WITNESSES¹¹

You may believe all of what any witness says, only part of it, or none of it.

In evaluating a witness's testimony, consider the following:

- the witness's
 - intelligence
 - memory
 - opportunity to have seen and heard what happened
 - motives for testifying
 - interest in the outcome of the case
 - manner while testifying
 - drug or alcohol use or addiction, if any
- the reasonableness of the witness's testimony
- any differences between what the witness says now and said earlier
- any inconsistencies between the witness's testimony and any other evidence that you believe
- whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes or are, instead, the result of lies or phony memory lapses, and
- any other factors that you find bear on believability or credibility

¹¹ Judge Bennett's "stock" Jury Instructions. *Compare* 8th Cir. Models 1.01 (2012) (unnumbered ¶ 6); *id.* 3.03; *and* Joint Proposed Preliminary Jury Instruction No. 8; Joint Proposed Final Jury Instruction No. 3.

You should not give any more or less weight to a witness's testimony just because the witness is an expert.¹²

You may give any witness's opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

It is your exclusive right to give any witness's testimony whatever weight you think it deserves.

¹² Compare 9th Cir. Model 2.11

No. 17 — INTENTIONAL INTERCEPTION OF PRIVATE COMMUNICATIONS

Mr. Luken claims that, during the pendency of the parties' divorce proceedings, Ms. Edwards intentionally intercepted private communications between Mr. Luken and other individuals, using a digital recorder, in violation of federal law. Ms. Edwards denies this claim.

To win on his claim of "intentional interception of private communications," Mr. Luken must prove that Ms. Edwards improperly intercepted one or more communications.

Improper interception

To prove that Ms. Edwards improperly intercepted a particular communication, Mr. Luken must prove the following elements:¹³

¹³ Neither of the parties' formulations of the elements of this claim in Joint Proposed Jury Instruction No. 5 is adequate. The parties are both correct that, because this claim is premised on a violation of § 2511(1)(a), the plaintiff must prove that the defendant's interception of the communications was "intentional." *See Deal v. Spears*, 980 F.2d 1153, 1156 (8th Cir. 1992) ("The elements of a violation of the wire and electronic communications interception provisions (Title III) of the Omnibus Crime Control and Safe Streets Act of 1968 are set forth in the section that makes such interceptions a criminal offense. 18 U.S.C. § 2511 (1988). Under the relevant provisions of the statute, criminal liability attaches and a federal civil cause of action arises when a person intentionally intercepts a wire or electronic communication or intentionally discloses the contents of the interception. *Id.* §§ 2511(1)(a), (c), 2520(a) (1988)."). However, the plaintiff assumes that the "communications" are "cell phone calls," *i.e.*, electronic (or wire) communications, while the defendant assumes that they are "oral communications," which require proof of a justified expectation of privacy, which the plaintiff does not include as an element of the claim.

As I understand the case, the evidence will show that the defendant used voice-activated recorders in one or more rooms to capture the plaintiff's side of telephone communications. Thus, in my view, what she allegedly intercepted were "oral communications" within the meaning of Title III; she did not capture any communication that had been "transferred" by wire or electronic means, only the side of the conversation that was audible in the room where the recorder was placed. *See* 18 U.S.C. §§ 2510(2) & 2510(12); *see also Siripongs v. Calderon*, 35 F.3d 1308, 1320 (9th Cir. 1994) (holding that, where police recorded only what the plaintiff was saying into the mouthpiece of a telephone, not what was transmitted over a wire, they did not intercept a wire communication, but only an "oral" communication, citing as consistent with this conclusion *United States v. McLeod*, 493 F.2d 1186, 1188 (7th Cir. 1974), which concluded that a person who overhears one side of a telephone conversation by standing next to the speaker has not intercepted a wire communication merely because the person was speaking into a telephone at the time of the interception). Again, the definition of an "oral communication" includes an expectation of privacy. 18 U.S.C. § 2510(2).

Thus, I conclude that the elements of this claim are properly formulated in *Cross v. State of Ala., State Dept. of Mental Health & Mental Retardation*, 49 F.3d 1490, 1508-09 (11th Cir. 1995) ("Three elements are necessary for York to prevail on her section 2520 wiretap claim. She must prove that (1) Stricklin intercepted her oral communications, (2) York had an expectation that her oral communications were not subject to interception, and (3) York's expectation was justified under the circumstances. *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir.1990)."), although I have added the "intentional" requirement from § 2511(1)(a) to element *one*. *Compare United States v. Hollern*, 366 Fed. Appx. 609, 613 (6th Cir. 2010) ("To establish Hollern's guilt of intercepting oral communications, the government was required to prove beyond a reasonable doubt: 1) that Hollern intentionally intercepted or procured another to intercept an oral communication; 2) made by a person exhibiting an expectation that the communication would not be subject to interception under circumstances justifying such expectation; and 3) that the interception was not otherwise permitted by the statute. *See* 18 U.S.C. §§ 2511(1)(a) & (2); 2510(2)."). I do not find it necessary to treat use of an "electronic, mechanical, or other device" as a separate element, because the definition of "intercepted" includes that requirement. *Compare In re Pharmatrak, Inc.*, 329 F.3d 9, 18 (1st Cir. 2003) (treating use of a device as a separate element).

One, Ms. Edwards intentionally intercepted Mr. Luken’s communication with another person.

Ms. Edwards “intercepted” the communication if she obtained the contents of the communication by using any electronic, mechanical, or other device.¹⁴ A voice-activated recorder is an “electronic, mechanical, or other device.”¹⁵ For the purposes of these Instructions, a “communication” is something spoken by a person.¹⁶

Two, Mr. Luken had an expectation that his communication would not be intercepted.¹⁷

Mr. Luken must have actually believed that his communication would not be intercepted, that is, that it was private and could not be overheard.¹⁸

¹⁴ See 18 U.S.C. § 2510(4), but substituting “obtained” for “aural or other acquisition of.”

¹⁵ See 18 U.S.C. § 2510(5). Defining an “electronic, mechanical, or other device” as a “device or apparatus which can be used to intercept a[n] oral . . . communication” seems confusingly circular, and the devices specifically excluded under the statute are not at issue here. I believe that, as a matter of law, however, a “voice-activated recorder,” as was allegedly used here, is an “device or apparatus which can be used to intercept a[n] oral . . . communication.”

¹⁶ Compare 18 U.S.C. § 2510(2) (defining “oral communication” in part as “any oral communication uttered by a person”); see also dictionary definitions of “uttered” defining it as “spoken.” Because no other kinds of “communications” are at issue, I find it unnecessary to identify the “communications” at issue as “oral” ones.

¹⁷ See *Cross*, 49 F.3d at 1508-09 (second element), paraphrased.

¹⁸ See *United States v. Peoples*, 250 F.3d 630, 637 (8th Cir. 2001) (defining the subjective and objective requirements of the expectation of privacy, citing, *inter alia*, *Smith v. Maryland*, 442 U.S. 735, 740 (1979), and *Katz v. United States*, 389 U.S.

Three, Mr. Luken’s expectation was justified under the circumstances.¹⁹

Mr. Luken must prove that a reasonable person also would have expected that his communication would not be intercepted,²⁰ considering all of the circumstances in which the communication took place.²¹

If Mr. Luken has proved all of these elements as to a particular communication, then the interception of that communication was improper, *unless* Ms. Edwards proves the following “one-party consent defense” as to that communication.

One-party consent defense

Ms. Edwards can defeat a claim of improper interception of a particular communication, if she proves one or more of the following alternatives as to that communication:²²

347, 353 (1967), and noting that the subjective expectation was based on the defendants’ belief that their conversations “were private and could not be overheard”); *Angel v. Williams*, 12 F.3d 786, 789-90 (8th Cir. 1993) (same); *accord United States v. Larios*, 593 F.3d 82, 92 (1st Cir. 2010) (also defining the subjective and objective requirements of the expectation of privacy and equating them with the *Katz* standard).

¹⁹ *See Cross*, 49 F.3d at 1508-09 (third element).

²⁰ *See Peoples*, 250 F.3d at 637.

²¹ *See Angel*, 12 F.3d at 790.

²² *See* 18 U.S.C. § 2511(2)(d); *see also In re Pharmatrak, Inc.*, 329 F.3d 9, 19 (1st Cir. 2003) (holding that, in a civil case, “it makes more sense to place the burden

Ms. Edwards was a party to the communication in question,²³

OR

One of the parties to the communication gave prior consent to the interception.²⁴

If Ms. Edwards proves one or more of these alternatives as to a particular communication, her interception of that communication was not improper, *unless* Mr. Luken proves the following:²⁵

The communication was intercepted for the purpose of committing any criminal or tortious act.

“Tortious acts” include “invasion of privacy.”²⁶

“Invasion of privacy” includes the following:

of showing consent [under 18 U.S.C. § 2511(2)(d)] on the party seeking the benefit of the exception”).

²³ In Proposed Jury Instruction No. 5, Ms. Edwards has formulated the defense, first, in terms of proof that she “was a party to any of the conversations.” The defense would not apply to all communications if Ms. Edwards were a party to only one communication; it would only apply to the communication to which she was a party. *See* 18 U.S.C. § 2511(2)(d).

²⁴ Ms. Edwards has also included as an alternative basis for the defense that “one of the parties to the communication, including Gene Luken or Tina Luken/Edwards, has given prior consent to the interception.” *See* 18 U.S.C. § 2511(2)(d).

²⁵ The burden shifts back to Mr. Luken to prove the exception to the one-person consent defense. *See United States v. Zarnes*, 33 F.3d 1454, 1469 (7th Cir. 1994) (concluding, in a criminal case, that the burden was on the party asserting the exception to one-party consent—that the recording was made for the purpose of committing a criminal or tortious act, in that case, to blackmail another participant in the communication—to prove the exception).

- unreasonable intrusion upon Mr. Luken’s private affairs, if it would be highly offensive to a reasonable person²⁷
- publication in the divorce proceedings or proceedings on other claims by Ms. Edwards against Mr. Luken that would unreasonably place Mr. Luken in a false light²⁸

If Ms. Edwards proves her “one-party consent” defense as to a particular communication, and Mr. Luken fails to prove that the purpose of the interception was to commit a criminal or tortious act, then you cannot find that the interception of that particular communication was improper.

Again, your verdict must be for Mr. Luken if he proves that the interception of one or more communications was improper. If you find in favor of Mr. Luken, you must also determine the number of days that Ms. Edwards improperly intercepted Mr. Luken’s private communications.

²⁶ The only non-statutory claim of tortious conduct alleged by Mr. Luken was his claim of invasion of privacy.

²⁷ RESTATEMENT (SECOND) OF TORTS § 652B.

²⁸ RESTATEMENT (SECOND) OF TORTS § 652E.

No. 18 — OUTLINE OF TRIAL²⁹

I will now explain how the trial will proceed.

After I have read all but the last Instruction,

- The lawyers may make opening statements. An opening statement is not evidence, but simply a summary of what the lawyer expects the evidence to be.
- Mr. Luken will present evidence and call witnesses and the lawyer for Ms. Edwards may cross-examine them.
- Ms. Edwards may present evidence and call witnesses, and the lawyer for Mr. Luken may cross-examine those witnesses.
- The parties will make their closing arguments to summarize and interpret the evidence for you. Like opening statements, closing arguments are not evidence.
- I will give you the last Instruction, on “deliberations.”
- You will retire to deliberate on your verdict.

²⁹ Judge Bennett’s “stock” Jury Instructions. *Compare* 8th Cir. Model 1.06 (2012); Joint Proposed Preliminary Jury Instruction No. 6.

No. 19 — OBJECTIONS³⁰

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

³⁰Judge Bennett’s “stock” Jury Instructions. *Compare* 8th Cir. Model 1.02 (2012) (numbered ¶ 3); Joint Proposed Preliminary Jury Instruction No. 7.

No. 20 — BENCH CONFERENCES³¹

During the trial it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- These conferences are to decide how certain evidence is to be treated, to avoid confusion and error, and to save your valuable time, so please be patient
- We will do our best to keep such conferences short and infrequent

³¹ Judge Bennett's "stock" Jury Instructions. *Compare* 8th Cir. Model 1.03 (2012); Joint Proposed Preliminary Jury Instruction No. 11.

No. 21 — NOTE-TAKING³²

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them

If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations.

³² Judge Bennett's "stock" Jury Instructions. *Compare* 8th Cir. Model 1.04 (2012); Joint Proposed Preliminary Jury Instruction No. 12.

No. 22 — QUESTIONS BY JURORS³³

When the attorneys have finished questioning a witness, you may propose questions in order to clarify the testimony.

- Do not express any opinion about the testimony or argue with a witness in your questions
- Submit your questions in writing by passing them to the Court Security Officer (CSO)

I will review each question with the attorneys. You may not receive an answer to your question:

- I may decide that the question is not proper under the rules of evidence
- even if the question is proper, you may not get an immediate answer, because a witness or an exhibit you will see later in the trial may answer your question

Do not feel slighted or disappointed if your question is not asked. Remember you are not advocates for either side. You are impartial judges of the facts.

³³ Compare 8th Cir. Model 1.04A (2012); Joint Proposed Preliminary Jury Instruction No. 13.

No. 23 — CONDUCT OF JURORS DURING TRIAL³⁴

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

³⁴ Judge Bennett’s “stock” Jury Instructions. *Compare* 8th Cir. Model 1.05 (2012); Joint Proposed Preliminary Jury Instruction No. 14.

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.
- Do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you

will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on “implicit biases.” As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.³⁵
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the

³⁵ Judge Bennett’s stock second instruction on “implicit bias.” *Compare* 8th Cir. Model 1.01 (2012) (unnumbered ¶¶ 4 and 7); 9th Cir. Model 1.1B, unnumbered ¶ 3.

restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining Instruction at the end of the evidence.

No. 24 — DELIBERATIONS³⁶

In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

- When you go to the jury room, select one of your members as your foreperson to preside over your discussions and to speak for you here in court.
- Discuss this case with one another in the jury room to try to reach agreement on the verdict, if you can do so consistent with individual judgment. However, each of you must make your own conscientious decision, after considering all the evidence, discussing it fully with your fellow jurors, and listening to the views of your fellow jurors.
- Do not be afraid to change your opinions if the discussion with other jurors persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.
- Remember that you are not advocates, but judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.
- If you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by

³⁶ Judge Bennett’s “stock” Jury Instructions. *Compare* 8th Cir. Model 3.06 (2012) & 3.07 (2012); Joint Proposed Final Jury Instruction No. 8.

one or more jurors. I will respond as soon as possible either in writing or orally in open court. *Remember that you should not tell anyone—including me—how your votes stand numerically.*

- Base your verdict solely on the evidence and on the law as I have given it to you in my Instructions. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.
- Your verdict on each question submitted must be unanimous.
- Complete and sign one copy of the Verdict Form. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 2nd day of October, 2012.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

GENE C. LUKEN,

Plaintiff,

vs.

TINA MARIE EDWARDS, formerly
known as TINA MARIE LUKEN,

Defendant.

No. C 10-4097-MWB

**COURT’S PROPOSED
VERDICT FORM**
(10/01/12 “FINAL” VERSION)

On the claim of plaintiff Gene C. Luken, we, the Jury, find as follows:

INTENTIONAL INTERCEPTION OF PRIVATE COMMUNICATIONS		
Step 1: Verdict	In whose favor do you find on Mr. Luken’s claim of “intentional interception of private communications,” as explained in Instruction No. 5? <i>(If you find in favor of Mr. Luken, please go on to answer the question in Step 2. On the other hand, if you find in favor of Ms. Edwards, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	<input type="checkbox"/> Mr. Luken <input type="checkbox"/> Ms. Edwards
Step 2: Days of Violations	<i>If you found in favor of Mr. Luken in Step 1, please indicate the number of days that Ms. Edwards improperly intercepted Mr. Luken’s private communications. (When you have completed this Step, please sign the Verdict Form and notify the Court Security Officer (CSO) that you have reached a verdict</i>	_____ days

Date

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror

