

United States Telephone Recording Laws

Legal Aspects of Recording Telephone Conversations: A Practical Guide

The federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sec. 2510 et seq., prohibits the willful interception of telephone communication by means of any electronic, mechanical, or other device without an applicable exemption. There are two principal exceptions:

Federal Exceptions

Consent: In the absence of more restrictive state law, it is permissible to intercept and record a telephone conversation if one or both of the parties to the call consents. Consent means authorization by only one participant in the call; single-party consent is provided for by specific statutory exemption under federal law. 18 U.S.C. Sec. 2511(2)(d).

"Business telephone" exception

The "business telephone" exception, which generally allows monitoring of calls and taping over an extension phone which is both provided to a subscriber in the ordinary course of a telephone company's business and is being used by that subscriber in the ordinary course of its business. This provision generally permits businesses to monitor the conversations of their employees, including personal conversations.

Penalties: The federal statutes provide criminal penalties for unlawful interception of telephone conversations, including up to five years' imprisonment or a maximum of \$10,000 in fines. They also allow for civil remedies, by which private parties are entitled to recover actual and punitive damages, together with fees and costs.

Evidentiary Issues

Individuals and businesses that make surreptitious recordings often do so with the expectation that the recordings will be useful as evidence. Such recordings are subject to significant barriers to use as evidence. First, if made in violation of either federal or state law, the recordings will almost certainly be inadmissible. Second, even if lawfully recorded, the tapes will be exempt from the hearsay rule and will not, in most jurisdictions, be usable for impeachment. Anyone contemplating an evidentiary use of surreptitious recordings should consult with an attorney prior to making the recording.

Recording Telephone Calls with Parties in Different Jurisdictions

Federal law may apply when the conversation is between parties who are in different states, although it is unsettled whether a court will hold in a given case that federal law "pre-empts" state law, but either state may choose to enforce its own laws. Therefore it is better to err on the side of caution when recording an interstate telephone call.

The Role of FCC

The FCC's role in assisting consumers who believe their telephone conversations were unlawfully recorded is generally limited to ensuring that telephone companies enforce their tariff provisions regarding recording of telephone conversations. The only penalty that can be enforced by the local carrier is

revocation of telephone service. (In the Matter of Use of Recording Devices in Connection with Telephone Service)

The FCC protects the privacy of telephone conversations by requiring notification before a recording device is used to record interstate or foreign telephone conversations. These types of conversations may not be recorded unless the use of a recording device is:

- Preceded by verbal or written consent of all parties to the telephone conversation; or
- Preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party; or
- Accompanied by an automatic tone warning device, sometimes called a beep tone, which automatically produces a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use.
- Also, no recording device may be used unless it can be physically connected to and disconnected from the telephone line or switched on and off.

The above FCC rule requirements apply to telephone common carriers. Similar requirements are imposed on consumers through the carriers' tariffs.

State Laws (Table)

While the U.S. federal law only requires one-party consent, many states have accepted different laws. In some states **all** parties must give their consent or at least be **notified** that the call is about to be recorded (with necessary opt-out option: if you don't like them to record the call, you can ask them to stop recording). There also was a case law decision from many years ago (the 1950's) that went to the Supreme Court and affirmed that the federal law does not supersede state authority/statutes unless the call or the tap crosses state lines – that is why each state went ahead and established their own guideline/statute.

States Requiring One Party Notification

Alabama		Louisiana		Oregon	
Alaska		Maine		Ohio	
Arizona		Minnesota		Rhode	Island
Arkansas		Mississippi		South	Carolina
Colorado		Missouri		South	Dakota
District	Of	Nebraska		Tennessee	
Georgia		Nevada		Texas	
Hawaii		New		Jersey	Utah
Idaho		New		Mexico	Vermont
Illinois		New		York	Virginia
Indiana		North		Carolina	West
Iowa		North		Dakota	Wisconsin
Kansas		Oklahoma		Wyoming	
Kentucky					

States Requiring Two Party Notification

California	Massachusetts		
Connecticut	Maryland	New	Hampshire
Delaware	Michigan	Pennsylvania	
Florida	Montana	Washington	

Interesting Facts About Recording Telephone Calls In Different States

Arizona

Arizona is a "one-party" state, ARS 13-3005.A(1)(2), and also permits a telephone "subscriber" (the person who orders the phone service and whose name is on the bill) to tape (intercept) calls without being a party to the conversation and without requiring any notification to any parties to the call, ARS 13-3012(5)(c).

Illinois

Illinois is, by statute, a two-party state. However, case law from both the IL Supreme Court and various Illinois appellate courts have declared Illinois a one-party state in the case of private citizens (businesses and plain folks - NOT law enforcement). The reigning consensus is that one-party consensual recording is merely "enhanced note-taking" and since some folks have total recall without recording, how can the other party have any expectation of privacy to a conversation held with another person.

Illinois requires prior consent of all participants to monitor or record a phone conversation. Ill. Rev. Stat. Ch. 38, Sec. 14-2. There is no specific business telephone exception, but in general courts have found extension telephones do not constitute eavesdropping devices. Criminal penalties for unlawful eavesdropping include up to three years' imprisonment or \$10,000 in fines and the civil remedy provides for recovery of actual and punitive damages.

In the state of Illinois it is illegal to monitor cordless phones.

Wisconsin

Wisconsin is currently a one-party state though recent attempts in the legislature there have attempted, unsuccessfully so far, to change it to two-party. Even so, any evidence gathered by a one-party consensual recording is inadmissible except in murder or drug cases, as they say.

The Wisconsin Stats 885.365 Recorded telephone conversation (1) states "Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other number, shall be totally inadmissible in the court of this state in civil actions, except as provided by 968.28 to 968.37." Exceptions are if the party is informed before the recording is made at the time that the conversation is being recorded and that any evidence thereby obtained may be used in a court of law or such recording is made through a recorder connector provided by the telecommunications utility as defined in WI Stats 968.28 - 968.37 (which is the stat for court ordered wiretaps) which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds. Fire department or law enforcement agencies are exempt as are court ordered wire tapes.

Also a recording on the phone made from an out of state call or made to an out of state party, has to have the party informed of the recording and his consent or the tone on line, every 15 seconds, or a consent in writing before the recording is started.

Needless to say this does not allow a person not a party to the conversation to record any part of the conversation without the parties to the conversation being informed the third party is recording the conversation.

California

Although California is a two-party state, it is also legal to record a conversation if you include a beep on the recorder and for the parties to hear. This information was included with my telephone bill.

California prohibits telephone monitoring or recording, including the use of information obtained through interception unless all parties to the conversation consent (California Penal Code Sections 631 & 632). There is no statutory business telephone exception and the relevant case law all but excludes this possibility. California courts have recognized "implied" consent as being sufficient to satisfy the statute where one party has expressly agreed to the taping and the other continues the conversation after having been informed that the call is being recorded. Violation is punishable by a fine of up to \$2,500, imprisonment for not more than one year, or both. A civil plaintiff may recover the greater of \$3,000 or three times the amount of any actual damages sustained.

Washington

Washington requires the consent of all parties. Some companies manage to work around that by going to the Indian reservations or any federally owned property to make the call - Federal law is a one party consent.

Indiana

In the state of Indiana it is one party authorization. As far as what is admissible in court it is still being tested per each case individually by the prosecutors office in the county in which the investigation or case was done.

New York

New York is a one party state, however some courts will not admit an interview with a witness to an event if they were not informed they were being recorded. Apparently the judge may use his discretion.

Pennsylvania

Pennsylvania requires the consent of all parties. 18 Pa. Cons. Stat. Ann. Sec. 5704(4) with the following exception: any individual may record a phone conversation without the other party's consent if:

1. The non-consenting party threatens the life or physical well being of the consenting party, or any member of his/her family.
2. The non-consenting party commits any criminal action (the statute specifically uses the example of telling the consenting party that they have marijuana they want the consenter to buy, but does state ANY criminal act).

Felony penalties may be imposed for violation of the Pennsylvania statute

Connecticut

Connecticut joined the ranks of two-party consent about 3 years ago. The State Police there is quite diligent in enforcing the law. Ironical, since they were the ones responsible for the law going into effect by illegally recording the telephone calls of prisoners at the individual barrack when arrested.

Massachusetts

Massachusetts requires consent of all parties unless another exception applies (Massachusetts Gen. Laws Ann. ch. 272, Sec. 99). Telephone equipment, which is furnished to a phone company subscriber and used in the ordinary course of business, is excluded from the definition of unlawful interception devices (Id. at 99(B)(3)). Office intercommunication systems used in the ordinary course of business are similarly exempt (Id. at 99(D)(1)(b)). The criminal penalty is a fine of up to \$10,000, imprisonment for up to five years, or both. In civil litigation, an injured party may recover actual and punitive damages as well as costs and fees. It is a separate violation to divulge or use the information garnered through unlawful interception and an additional penalty of up to two years in prison or \$5,000 may be imposed on this count.

References

1. **Electronic Communications Privacy Act. United States Code. Title 18. Crimes And Criminal Procedure. Part I – Crimes. Chapter 119 – Wire And Electronic Communications Interception And Interception Of Oral Communications.** <http://floridalawfirm.com/privacy.html>
2. The Reporters Committee for Freedom of the Press: A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C. <http://www.rcfp.org/taping/>
3. Broadcast of Telephone Conversations, 47 C.F.R. §73.1206 (1989)
4. P.L. 99-508 ("The Electronic Communications Privacy Act of 1986"), amending 18 U.S.C. § 2510 -...
5. 18 U.S.C. § 2510 - ... (1999) (Wire and Electronic Communications Interception and Interception of Oral Communications)
6. FCC Consumer Information Bureau <http://www.fcc.gov/cib/>
7. "Recording Telephone Conversations" http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/record.html
8. "Interception And Divulgence Of Radio Communications" http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/investigation.html
9. U.S. Department of Justice <http://www.usdoj.gov/>
10. USA Bulletin, September 1997 Vol. 45, No. 5, 6. Electronic Investigative Techniques I, II: http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4505.pdf, http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4506.pdf
11. Telephone Tape Recording Law. Ralph Thomas. National Association Of Investigative Specialists. <http://www.pimall.com/nais/n.tel.tape.law.html>