



## Introduction

At first, the question of whether or not to tape record a phone call seems like a matter of personal preference. Some journalists see taping as an indispensable tool, while others don't like the formality it may impose during an interview. Some would not consider taping a call without the subject's consent, others do it routinely.

However, there are important questions of law that must be addressed first. Both federal and state statutes govern the use of electronic recording equipment. The unlawful use of such equipment can give rise not only to a civil suit by the "injured" party, but also criminal prosecution.

Accordingly, it is critical that journalists know the statutes that apply and what their rights and responsibilities are when recording and disclosing communications.

Although most of these statutes address wiretapping and eavesdropping — listening in on conversations of others without their knowledge — they usually apply to electronic recording of any conversations, including phone calls and in-person interviews. Federal law allows recording of phone calls and other electronic communications with the consent of at least one party to the call. A majority of the states and territories have adopted wiretapping statutes based on the federal law, although most also have extended the law to cover in-person conversations. Thirty-eight states and the District of Columbia permit individuals to record conversations to which they are a party without informing the other parties that they are doing so. These laws are referred to as "one-party consent" statutes, and as long as you are a party to the conversation, it is legal for you to record it. (Nevada also has a one-party consent statute, but the state Supreme Court has interpreted it as an all-party rule.)

Twelve states require, under most circumstances, the consent of all parties to a conversation. Those jurisdictions are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington. Be aware that you will sometimes hear these referred to inaccurately as "two-party consent" laws. If there are more than two people involved in the conversation, all must consent to the taping.

Regardless of the state, it is almost always illegal to record a conversation to which you are not a party, do not have consent to tape, and could not naturally overhear.

Federal law and most state laws also make it illegal to disclose the contents of an illegally intercepted call or communication.

At least 24 states have laws outlawing certain uses of hidden cameras in private places, although many of the laws are specifically limited to attempts to record nudity. Also,

many of the statutes concern *unattended* hidden cameras, not cameras hidden on a person engaged in a conversation. Journalists should be aware, however, that the audio portion of a videotape will be treated under the regular wiretapping laws in any state. And regardless of whether a state has a criminal law regarding cameras, undercover recording in a private place can prompt civil lawsuits for invasion of privacy.

This guide provides a quick reference to the specific provisions of each jurisdiction's wiretap law. It outlines whether one-party or all-party consent is required to permit recording of a conversation, and provides the legal citations for wiretap statutes. Some references to case law have been provided in instances where courts have provided further guidance on the law. Penalties for violations of the law are described, including criminal penalties (jail and fines) and civil damages (money that a court may order the violator to pay to the subject of the taping). Instances where the law specifically includes cellular calls and the wireless portion of cordless phone calls also are noted, but many laws are purposely broad enough to encompass such calls without specifically mentioning them.

Sidebar articles throughout the guide address specific issues related to taping. Note that these are general discussions, and you will have to consult the state entries to see how these issues apply in particular states.

#### **Important notice**

This guide is meant as a general introduction for journalists to the state of the law concerning electronic recording and its implications. It does not take the place of legal advice from a lawyer in your state when you are confronted with a legal problem. Journalists who have additional questions or who need to find a lawyer can contact the Reporters Committee at (800) 336-4243.

Because this guide was written with the needs of journalists in mind, it does not address all aspects of electronic recording laws, especially the issues of using a tape recording as evidence in a lawsuit or prosecution. Others who have questions about taping should contact a local attorney directly.



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## Tape-recording laws at a glance

	Is consent of all parties required?	Are there criminal penalties?	Does the statute allow for civil suits?	Is there a specific hidden camera law?	Are there additional penalties for disclosing or publishing information?
<i>Federal</i>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
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Iowa		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
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Montana	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
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Nevada	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
New Hampshire	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
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New York		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
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Pennsylvania	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
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Tennessee		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Texas		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
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Washington	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
West Virginia		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
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## Consent and its limits

Generally, you may record, film, broadcast or amplify any conversation where all the parties to it consent. It is always legal to tape or film a face-to-face interview when your recorder or camera is in plain view. The consent of all parties is presumed in these instances.

The use of hidden cameras is covered only by the wiretap and eavesdropping laws if the camera also records an audio track. However, a number of states have adopted laws specifically banning the use of video and still cameras where the subject has an expectation of privacy, although some of the laws are much more specific. Maryland's law, for example, bans the use of hidden cameras in bathrooms and dressing rooms. Whether using an audiotape recorder or a hidden camera, journalists need to know about the limits to their use.

**Criminal purpose.** Federal law requires only one-party consent to the recording and disclosure of a telephone conversation, but explicitly does not protect the taping if it is done for a criminal or tortious purpose. Many states have similar exceptions. Employees of a "psychic hotline" who were secretly recorded by an undercover reporter working for "Primetime Live" sued ABC for violation of the federal wiretapping statute, arguing that the taping was done for the illegal purposes of invading the employees' privacy. The federal appellate court in Pasadena (9th Cir.) affirmed the dismissal of the employees' claim in September 1999. According to the court, an otherwise legal taping that is done to achieve a "further impropriety, such as blackmail," becomes a violation of the law. But even if ABC's means of taping were illegal because the act violated the employees' privacy, that does not make the taping illegal under the wiretap act, the court held. Because the employees "produced no probative evidence that ABC had an illegal or tortious purpose" when it made the tape, the reporter did not violate the federal statute. (*Sussman v. American Broadcasting Co.*)

In another case, an ophthalmologist who agreed to be interviewed for "Primetime Live" sued ABC under the federal wiretapping statute for videotaping consultations between the doctor and individuals posing as patients who were equipped with hidden cameras. The U.S. Court of Appeals in Chicago (7th Cir.) rejected the doctor's wiretapping claim because the federal statute requires only one-party consent, and the undercover patients had consented to the taping. The court further held that the network did not send the testers to the doctor for the purpose of defaming the doctor, and that therefore ABC did not engage in the taping for a criminal or tortious purpose. (*Desnick v. ABC*) These cases make two points journalists should remember when they think about taping a conversation: consent requirements under state and federal laws must always be met, and even then taping can be illegal if it is done in furtherance of a crime.

**Trespass.** A party whose conversation is surreptitiously recorded, whether with a tape recorder or a hidden camera, may also raise such newsgathering claims as trespass and

intrusion, examining the issue of the scope of a party's consent. For example, in *Desnick*, the doctor sued the network for trespass because he did not know of the taping. But the court stated that consent to an entry is "often given legal effect" even though the entrant "has intentions that if known to the owner of the property would cause him . . . to revoke his consent."

On the other hand, the U.S. Court of Appeals in Richmond (4th Cir.) ruled in October 1999 that ABC reporters — again with "Primetime Live" — who obtained jobs with a Food Lion grocery store and therefore had legal permission to be in nonpublic areas of the store nonetheless exceeded the scope of that permission by using hidden cameras on the job. Food Lion had not consented to their presence for the purpose of recording footage that would be televised, the court held, and therefore the reporters' presence in the nonpublic areas constituted trespass.

However, Food Lion could not prove it was damaged by the trespass, the court found. Damage to its reputation caused by the resulting story was due to the facts reported in the story that alarmed consumers, not due to the trespass, the court held. As a result, Food Lion was only able to recover nominal damages of one dollar for the trespass claim. (*Food Lion Inc. v. Capital Cities/ABC Inc.*)

**Expectations of privacy.** The other issue that courts address in evaluating these cases is whether or not the plaintiffs had a reasonable expectation of privacy in the area where the filming took place. In *Desnick*, the court held that the doctor did not have such an expectation of privacy in an area where he brought his patients.

A medical testing lab in Arizona sued ABC over another "Primetime Live" segment, which focused on error rates among laboratories that analyze women's Pap smears for cancer. Producers from ABC posed as lab technicians and filmed the inside of the lab with a hidden camera. The U.S. Court of Appeals in San Francisco (9th Cir.) dismissed the lab's privacy claims of trespass and intrusion because the public importance of the story outweighed any privacy interests the lab could claim. The undercover journalists filmed portions of the lab that were open to the public and were escorted by the lab's owners into a conference room. The court said the lab and its workers did not have a reasonable expectation of privacy, because the areas filmed were open to the journalists, and none of the discussions caught on tape were of a personal nature. (*Medical Laboratory Management Consultants v. ABC, Inc.*)

In yet another case against ABC, a court ruled that police officers who were secretly videotaped while they were searching a car did not have a claim under New Jersey's wiretapping law. The officers had no reasonable expectation of privacy in a conversation that occurred in a car on the shoulder of a busy highway, the New Jersey appeals court ruled. Moreover, police officers have a diminished expectation of privacy because they hold a position of trust. Thus, the taping, done for a show on racial profiling, was legal. (*Hornberger v. ABC, Inc.*)

A Las Vegas animal trainer was secretly videotaped while physically abusing orangutans backstage at a show. The footage was later broadcast on "Entertainment Tonight," and the trainer sued for defamation, invasion of privacy and intrusion. The Nevada Supreme Court reversed a \$3.1 million judgment awarded by the state district court, in part because the trainer did not have a reasonable expectation of privacy in the curtained-off area next to the stage. Furthermore, the court held that even if the trainer did have such

an expectation, the invasion of his privacy was not "highly offensive." (*PETA v. Bobby Berosini, Ltd.*)

Filming individuals in their home is always a more risky venture. In a Minnesota case, a veterinarian making a house call obtained permission to bring a student with him, but failed to inform the homeowners that the student was an employee of a television station. The student surreptitiously videotaped the doctor's treatment of the family cat in their home. The state Court of Appeals upheld the trespass claim because, unlike cases where the taping took place in an office, the family had a reasonable expectation of privacy in their home. (*Copeland v. Hubbard Broadcasting, Inc.*)

**Other consent issues.** The question of whether a recording device is in plain view is not always straightforward. Five minutes into an in-person interview between a reporter and a deputy sheriff in Oregon, the deputy asked whether the object protruding from the reporter's pocket was a tape recorder. The reporter stated that it was and that it was on, and the interview continued for another 10 to 15 minutes. The reporter was later convicted under a state statute making it a crime to record a face-to-face conversation without informing all of the parties.

On appeal, the Oregon Supreme Court held that a judge could have reasonably found that the recorder was concealed, despite the fact that the sheriff continued to participate in the interview after the reporter told him that he possessed a tape recorder and that it was on. On retrial, the reporter was acquitted on the illegal recording charge. (*Oregon v. Knobel*)

The validity of consent has also been upheld where the party was mistaken about the terms. In a California case, a woman sued CBS for trespass and intrusion when a camera crew accompanied a crisis intervention team into her home in response to a domestic violence call. The woman conceded that she had consented to the videotaping, but stated that she was led to believe that the camera crew was affiliated with the District Attorney's office. The court held that the state statutes governing trespass and intrusion did not require that the individual's consent be "knowing or meaningful," even if the consent was "fraudulently induced," and that the camera crew had acted within the scope of the woman's consent. (*Baugh v. CBS*)



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## Interstate phone calls

In light of the differing state laws governing electronic recording of conversations between private parties, journalists are advised to err on the side of caution when recording or disclosing an interstate telephone call. The safest strategy is to assume that the stricter state law will apply.

For example, a reporter located in the District of Columbia who records a telephone conversation without the consent of a party located in Maryland would not violate District of Columbia law, but could be liable under Maryland law. A court located in the District of Columbia may apply Maryland law, depending on its "conflict of laws" rules. Therefore, an aggrieved party may choose to file suit in either jurisdiction, depending on which law is more favorable to the party's claim.

In one case, a New York trial court was asked to apply the Pennsylvania wiretap law — which requires consent of all parties — to a call placed by a prostitute in Pennsylvania to a man in New York. Unlike the Pennsylvania wiretap statute, the New York and federal statutes require the consent of only one party. The call was recorded with the woman's consent by reporters for *The Globe*, a national tabloid newspaper. The court ruled that the law of the state where the injury occurred, New York, should apply. (*Krauss v. Globe International*)

In another case involving Pennsylvania law, four employees of the *Times Leader*, a newspaper in Wilkes-Barre, were arrested after they printed a transcript of a telephone conversation between a columnist in Pennsylvania and a murder suspect living in Virginia that was recorded without the suspect's permission. The Virginia and federal statutes allow one party to record a conversation, while Pennsylvania, as discussed above, requires the consent of all parties. The man asked prosecutors to charge the journalists under the Pennsylvania law. The court eventually dismissed the charges against the newspaper staff — but on the unrelated ground that the suspect had no expectation of privacy during his telephone interview with the columnist. (*Pennsylvania v. Duncan*)

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. In *Duncan*, the newspaper argued that the federal law should preempt the state statutes, because the telephone call crossed state lines, placing it under federal jurisdiction. However, in that case, the court did not address the pre-emption issue. Moreover, as noted above, either state may choose to enforce its own laws.



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## Possession and publication

Journalists should be aware that wiretap laws raise issues beyond just whether they have met consent requirements. The federal law and many state laws explicitly make it illegal to possess — and particularly to publish — the contents of an illegal wiretap, even if it is made by someone else. Some states that allow recordings make the distribution or publication of those otherwise legal recordings a crime.

The 1986 Electronic Communications Privacy Act (amending the federal wiretap law) makes it illegal to possess or divulge the contents of any illegally intercepted communication.

The U.S. Supreme Court ruled in May 2001 that several media defendants could not be held liable for damages under the federal statute for publishing and broadcasting information obtained through an illegal interception of a private conversation. The case arose from a cell-phone conversation in Pennsylvania about contract negotiations for local school teachers. During the conversation, Anthony Kane Jr., president of the local teachers union, told Gloria Bartnicki, a union negotiator, that if teachers demands were not met, "we re gonna have to go to their, their homes . . . to blow off their front porches, we ll have to do some work on some of those guys." While Bartnicki and Kane spoke, an unknown person illegally intercepted the call, and a tape recording was left in the mailbox of a local association leader. The association leader gave a copy of the tape to two radio talk show hosts, who broadcast the tape as a part of a news show. Local television stations also aired the tape, and newspapers published transcripts of the conversation.

Bartnicki and Kane sued some of the stations and newspapers that had disclosed the contents of the tape. The case made its way to the Supreme Court, which found that First Amendment principles trumped the privacy concerns of the union leaders. In ruling that disclosure of a matter in the public interest outweighed claims of privacy, the majority of the Court supported "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." The majority explained that those who participate in public affairs have a diminished expectation of privacy, especially when they propose to carry out wrongful conduct.

The case was a significant win for the media, but its implications for news gatherers are not yet entirely clear. The Court's decision was premised on three factors: the media did not engage in or encourage the illegal recording, the topic of the intercepted conversation was of public concern, and the conversation involved proposed criminal acts. The Court did not indicate whether disclosure by the media under different circumstances would be considered legal. (*Bartnicki v. Vopper*)

A case pending in federal court in D.C. involving two U.S. Congressmen may shed some light on this question. In 1996, Rep. James McDermott (D-Wash.) leaked to the media a recording of a phone call between Rep. John Boehner (R-Ohio) and other House Republicans about the ethics problems facing then-House Speaker Newt Gingrich. The

tape was given to McDermott by a Florida couple who illegally taped the conversation. The couple pleaded guilty to wiretap charges and paid a fine. Boehner sued McDermott, alleging the leak violated the federal wiretap law because McDermott disclosed information he knew was obtained unlawfully.

The lawsuit went to the Supreme Court at the same time as the Bartnicki case. Rather than resolve the case, the Court ordered that the U.S. Court of Appeals in Washington (D.C. Cir.) re-evaluate Boehner's case in light of its Bartnicki decision. The Court of Appeals allowed Boehner to amend his lawsuit and argue it again. The case was still pending as of January 2003.

Although Boehner did not sue any member of the media, a decision in the case may shed light on the legality of disclosing the contents of an illegally taped conversation where the conversation does not involve threats of violence. (*Boehner v. McDermott*)



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## The FCC's role

In addition to state and federal laws governing the taping of phone calls, the Federal Communications Commission has its own requirements concerning such taping. The FCC requires that an individual notify other parties to a call before using a tape recorder in an interstate call. The rule requires that the individual either get consent from all parties before making the call, notify the participants at the beginning of the recording, or use a "beep tone" that is repeated regularly throughout the call.

The FCC rule only applies directly to local telephone companies, but those companies are required to impose similar rules on the public through their customer agreements. 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*)

**Broadcasters and the Phone Rule.** Broadcasting a telephone conversation without notifying the other party involved in the conversation is subject to monetary fines or an admonition under an FCC regulation.

The "Phone Rule" states that a person who intends to broadcast a conversation or record a conversation for later broadcast with another party on the telephone must, at the beginning of the telephone call, inform the party that the conversation will be broadcast. No consent from the party is required.

The Phone Rule is enforced primarily against radio "shock jocks," especially those who call people while on the air as part of a practical joke, but the rule has been applied to all kinds of broadcasters, including news gatherers.

FCC rulings make clear that when a person originates a call to a "call-in" talk show, it is presumed the person knows of the possibility of his or her voice being aired. (*In the matter of Entercom New Orleans License, LLC*)

The FCC is authorized by Congress to issue fines up to \$27,500 for a single offense and no more than \$300,000 for continuing violations, but may issue only admonitions on a first offense. (*Broadcast of Telephone Conversations*)



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## Cellular & cordless calls

The federal wiretap law was amended in 1986 and 1994 to expand the definition of electronic communications to include cellular and cordless phone conversations. Under the statute, cellular and cordless phone conversations can be recorded with the consent of one party.

The federal law was changed to accommodate the differences between the cordless telephone system and the traditional telephone system, which transmits communications by wire or cable.

In addition to the federal law, the Federal Communications Commission implemented a rule that prohibits eavesdropping on private cordless telephone conversations. The rule states that a person who is not a party to the conversation shall not use a device to overhear or record the private conversations of others unless such use is authorized by all of the parties engaged in the conversation.

Many of the state laws also specifically apply to cellular and cordless calls, and others are broad enough — by covering all "electronic" communications — to cover these methods of communication.



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## State-by-State Guide (selected states)

### California

Cal. Penal Code §§ 631, 632: It is a crime in California to intercept or eavesdrop upon any confidential communication, including a telephone call or wire communication, without the consent of all parties.

It is also a crime to disclose information obtained from such an interception. A first offense is punishable by a fine of up to \$2,500 and imprisonment for no more than one year. Subsequent offenses carry a maximum fine of \$10,000 and jail sentence of up to one year.

Eavesdropping upon or recording a conversation, whether by telephone (including cordless or cellular telephone) or in person, that a person would reasonably expect to be confined to the parties present, carries the same penalty as intercepting telephone or wire communications.

Conversations occurring at any public gathering that one should expect to be overheard, including any legislative, judicial or executive proceeding open to the public, are not covered by the law.

An appellate court has ruled that using a hidden video camera violates the statute. *California v. Gibbons*, 215 Cal. App. 3d 1204 (1989). However, a television network that used a hidden camera to videotape a conversation that took place at a business lunch meeting on a crowded outdoor patio of a public restaurant that did not include "secret" information did not violate the Penal Code's prohibition against eavesdropping because it was not a "confidential communication." *Wilkins v. NBC, Inc.*, 71 Cal. App. 4th 1066 (1999).

Anyone injured by a violation of the wiretapping laws can recover civil damages of \$5,000 or three times actual damages, whichever is greater. Cal. Penal Code § 637.2(a). A civil action for invasion of privacy also may be brought against the person who committed the violation. Cal. Penal Code § 637.2.



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### Colorado

Colo. Rev. Stat. § 18-9-303: Recording or overhearing a telephone conversation, or any electronic communication, without the consent of a party to the conversation is a felony punishable by a fine of between \$1,000 and \$100,000 and one year to 18 months in jail.

Recording of a communication from a cordless telephone, however, is a misdemeanor. Colo. Rev. Stat. § 18-1.3-401.

Using or disclosing information obtained through illegal wiretapping is prohibited if there is reason to know the information was obtained illegally. Anyone who is not "visibly present" during a conversation who overhears or records the conversation without the consent of at least one of the parties commits a felony carrying the same punishment as a telephone interception, as does anyone who discloses the contents of such a conversation. Colo. Rev. Stat § 18-9-304.

However, nothing in these statutes "shall be interpreted to prevent a news agency, or an employee thereof, from using the accepted tools and equipment of that news medium in the course of reporting or investigating a public and newsworthy event." Colo. Rev. Stat. § 18-9-305.



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## District of Columbia

D.C. Code Ann. § 23-542: It is legal to record or disclose the contents of a wire or oral communication where the person recording is a party to the communication, or where one of the parties has given prior consent, unless the recording is done with criminal or injurious intent. A recording made without proper consent can be punished criminally by a fine of no more than \$10,000 or imprisonment for no more than five years. However, disclosure of the contents of an illegally recorded communication cannot be punished criminally if the contents of the communication have "become common knowledge or public information."

Anyone who illegally records or discloses the contents of a communication is subject to civil liability for the greater of actual damages, damages in the amount of \$100 per day for each day of violation, or \$1,000, along with punitive damages, attorney fees and litigation costs. D.C. Code Ann. § 23-554.



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## Maryland

Md. Code Ann., Courts and Judicial Proceedings § 10-402: It is a felony to intercept a wire, oral or electronic communication unless all parties to the communication have consented. But all-party consent will not make the recording legal if there is a criminal or tortious purpose behind it.

Disclosing the contents of intercepted communications with reason to know they were obtained unlawfully is a crime as well.

Violations of the law are felonies punishable by imprisonment for not more than five years and a fine of not more than \$10,000. Civil liability for violations can include the greater of actual damages, \$100 a day for each day of violation or \$1,000, along with punitive damages, attorney fees and litigation costs. To recover civil damages, however, a plaintiff must prove that the defendant knew it was illegal to tape the communication without consent from all participants. Md. Code Ann., Courts and Judicial Proceedings § 10-410.

State courts have interpreted the laws to protect communications only when the parties have a reasonable expectation of privacy, and thus, where a person in a private apartment was speaking so loudly that residents of an adjoining apartment could hear without any sound enhancing device, recording without the speaker's consent did not violate the wiretapping law. *Malpas v. Maryland*, 695 A.2d 588 (Md. Ct. Spec. App. 1997); see also *Benford v. American Broadcasting Co.*, 649 F. Supp. 9 (D. Md. 1986) (salesman's presentation in stranger's home not assumed to carry expectation of privacy).

It is a misdemeanor to use a hidden camera in a bathroom or dressing room. It is also a misdemeanor to use a hidden camera on private property "for purposes of conducting deliberate, surreptitious observation of a person inside the private residence," or in a private place with "prurient intent." Md. Crim. Law §§ 3-901, -902, -903. A person who is viewed in violation of these statutes has a civil cause of action.



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## Massachusetts

Mass. Ann. Laws ch. 272 , § 99: It is a crime to record any conversation, whether oral or wire, without the consent of all parties in Massachusetts. The penalty for violating the law is a fine of up to \$10,000 and a jail sentence of up to five years.

Disclosure of the contents of an illegally recorded conversation, when accompanied by the knowledge that it was obtained illegally, is a misdemeanor that can be punished with a fine of up to \$5,000 and imprisonment for up to two years. Civil damages are expressly



authorized for the greater of actual damages, \$100 for each day of violation or \$1,000. Punitive damages and attorney fees also are recoverable.



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## Michigan

Mich. Comp. Laws § 750.539c: A private conversation legally cannot be overheard or recorded without the consent of all participants. Illegal eavesdropping can be punished as a felony carrying a jail term of up to two years and a fine of up to \$2,000.

In addition, any individual who divulges information he knows, or reasonably should know, was obtained through illegal eavesdropping is guilty of a felony punishable by imprisonment for up to two years and a fine of up to \$2,000. Mich. Comp. Laws § 750.539e. Civil liability for actual and punitive damages also are sanctioned. Mich. Comp. Laws § 750.539h.

The eavesdropping statute has been interpreted by one court as applying only to situations in which a third party has intercepted a communication, an interpretation that makes it legal for a participant in a conversation to record that conversation without the permission of other parties. *Sullivan v. Gray*, 324 N.W.2d 58 (Mich. Ct. App. 1982).

The state supreme court stated in a July 1999 ruling that a participant in a conversation "may not unilaterally nullify other participants' expectations of privacy by secretly broadcasting the conversation" and that the overriding inquiry should be whether the parties "intended and reasonably expected that the conversation was private." Therefore, it is likely that a recording party may not broadcast a recorded conversation without the consent of all parties. *Dickerson v. Raphael*, 601 N.W.2d 108 (Mich. 1999).

Under the Michigan statute, a parent may not vicariously consent to a recording for a minor child. *Williams v. Williams*, 603 N.W. 2d 114 (Mich. Ct. App. 1999).

It is a felony to observe, photograph or eavesdrop on a person in a private place without the person's consent. Mich. Comp. Laws § 750.539d. A private place is a place where one may reasonably expect to be safe from intrusion or surveillance, but not a place where the public has access. Mich. Comp. Laws § 750.539a.



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## New York

N.Y. Penal Law §§ 250.00, 250.05: It is a Class E felony to overhear or record a telephonic or telegraphic communication if one is not the sender or receiver, or does not have the consent of either the sender or receiver. It also is a crime for someone not present to overhear or record any conversation or discussion without the consent of at least one party to that conversation.

Cordless telephone conversations that are partially broadcast over ordinary radio waves are protected by the wiretapping and eavesdropping laws and require the same consent for recording as any other communication. *New York v. Fata*, 559 N.Y.S.2d 348 (N.Y. App. Div. 1990).

State courts have held that newspapers that published transcripts of an illegally recorded telephone conversation were subject to civil liability when "the newspapers knew they were dealing with recorded conversations between unconsenting parties." *Natoli v. Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. Oswego County 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994).



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## Oklahoma

Okla. Stat. tit. 13, § 176.4: Anyone who is a party to a wire, oral or electronic communication or who has obtained consent from a party can lawfully record or disclose the contents of that communication, so long as he does not do so in furtherance of a criminal act.

Under the statute, consent is not required for the taping of a non-electronic communication uttered by a person who does not have a reasonable expectation of privacy in that communication. See definition of "oral communication," Okla Stat. tit. 13, § 176.2.

Unlawful recording or disclosure is a felony punishable by a fine of not less than \$5,000 and jail time not to exceed five years. Okla. Stat. tit. 13, § 176.3.

Oklahoma law also makes it a misdemeanor to secretly loiter about a building with intent to hear discourse therein and repeat or publish it. Okla. Stat. tit. 21, § 1202.



## Virginia

Va. Code Ann. § 19.2-62: Despite the fact that it is generally a felony to intercept or disclose the contents of any wire, oral or electronic communication under state law, the recording or disclosing of communications by a party, or with the consent of a party, is specifically permitted.

Under the statute, consent is not required for the taping of a non-electronic communication uttered by a person who does not have a reasonable expectation of privacy in that communication. See definition of "oral communication," Va. Code Ann. § 19.2-61; *Belmer v. Commonwealth*, 553 S.E.2d 123 (Va. App. 2001).

Criminal penalties for violations of the law include imprisonment of not less than one year, but not more than five years, or imprisonment for not more than 12 months and a fine of up to \$2,500. Va. Code ann. § 18.2-10. Civil actions are authorized for recovery of actual damages, \$100 for each day of violation or \$1,000 — whichever is greater. Punitive damages, attorney fees and litigation costs can be recovered as well. Va. Code Ann. § 19.2-69.





## Citations for cases in articles:

- Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001)
- Baugh v. CBS*, 828 F. Supp. 745 (N.D. Cal. June 22, 1993)
- Boehner v. McDermott*, 22 Fed. Appx. 16 (D.C. Cir. 2001)
- Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402 (Minn. Ct. App. Jan. 24, 1995)
- Desnick v. ABC*, 44 F.3d 1345 (7th Cir. 1995)
- Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999)
- Hornberger v. American Broadcasting Company, Inc.*, 799 A.2d 566 (N.J. App. 2002)
- Krauss v. Globe International*, No. 18008-92 (N.Y. Sup. Ct. Sept. 11, 1995)
- Medical Laboratory Management Consultants v. American Broadcasting Company, Inc.*, 306 F.2d 806 (9th Cir. 2002)
- Oregon v. Knobel*, 777 P.2d 985 (Or. 1989), acquitted on retrial, No. 86-545 (Ore. Dist. Ct. Josephine Cty. Jan. 9, 1991)
- Pennsylvania v. Duncan*, CR78-92 (Pa. 11th Jud. Dist., charges dismissed, March 26, 1992)
- PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269 (Nev. 1995)
- Sussman v. American Broadcasting Cos., Inc.*, 186 F.3d 1200 (9th Cir. 1999)  
In the matter of Entercom New Orleans License, LLC, FCC File No. EB-01-IH-0099 (2002)
- In the Matter of Use of Recording Devices in Connection with Telephone Service, 2 FCC Rcd 502 (1987)
- Broadcast of Telephone Conversations, 47 C.F.R. §73.1206 (1989)
- P.L. 99-508 (The Electronic Communications Privacy Act of 1986), amending 18 U.S.C. §§ 2510 et seq.
- 18 U.S.C. §§ 2510 et seq. (1999) (Wire and Electronic Communications Interception and Interception of Oral Communications)



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