



Eavesdropping, Wiretapping, and Long-Lens Laws

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Audio recordings of phone calls

- Phone calls are the primary means of gathering information for many reporters.
- Recording a phone call can ensure accuracy of quotes.
- But awareness of being recorded can make sources wooden, overly formal, and less forthcoming.
- Some reporters want to make audio recordings of phone calls, some do not.
- Some choose to ask for permission first, other routinely record without notice.

Audio recordings of in-person interviews

- In-person interviews may be recorded as well, with similar advantages and disadvantages for the journalist.

Application of eavesdropping and wiretapping laws

- “Eavesdropping” laws may apply to recording in person.
- “Wiretapping” laws apply to phone recording.
- Consider:
 - Federal statute
 - State statutes
 - State common law

General contours of the law

- Surreptitiously recording a conversation without being a party to the conversation is generally illegal.
- Recording a conversation with all participants' knowledge and consent is generally legal.
- Recording with the consent of only one party (e.g., the reporter) is sometimes legal.

Federal Wiretap Act 18 U.S.C. §§ 2510-2522

- Prohibits a person from intentionally intercepting wire, oral, or electronic communications by using an electronic, mechanical, or other device, unless excepted.
- Most important exception: Consent by any party.
 - Neither consent nor notice is required of all parties.
 - The one party can be the reporter.

Federal Wiretap Act 18 U.S.C. §§ 2510-2522

- Persons covered include corporations and individuals, as well as the U.S. government.
- The conduct must be intentional.

Federal Wiretap Act 18 U.S.C. §§ 2510-2522

Prohibited interception includes:

- aural or other acquisition that is
- by means of a device

Prohibited interception does not include:

- reading or listening to previously intercepted communication

In terms of geographical scope, interception takes place where the communication begins, where it is transmitted, where it is received, and where it is captured.

Federal Wiretap Act

18 U.S.C. §§ 2510-2522

Exceptions:

- Consent by one party.
- Publicly accessible radio communications (AM, FM, CB, marine radio, aviation frequencies, etc.)
- Domestic exceptions recognized by some courts (such as parents recording children's conversations).

Federal Wiretap Act

18 U.S.C. §§ 2510-2522

Disclosure:

- The Wiretap Act separately prohibits the intentional disclosure of the contents of an unlawful interception.
- Covers a person "knowing or having reason to know" the contents were obtained in violation of the Wiretap Act.
- A First Amendment exception has been recognized for matters of public concern. (*Bartnicki v. Vopper*)

Bartnicki v. Vopper, 532 U.S. 514 (2001)

An interception and recording was made of a teachers' union negotiator and the union's president during which the possibility of using violence against school board members was mentioned. The unknown wiretapper secretly supplied the tape to a union critic, who played it for members of the school board and turned it over to Vopper, a radio talk show host. The U.S. Supreme Court sustained a First Amendment defense because content was on matter of public concern.

Federal Wiretap Act 18 U.S.C. §§ 2510-2522

Enforcement

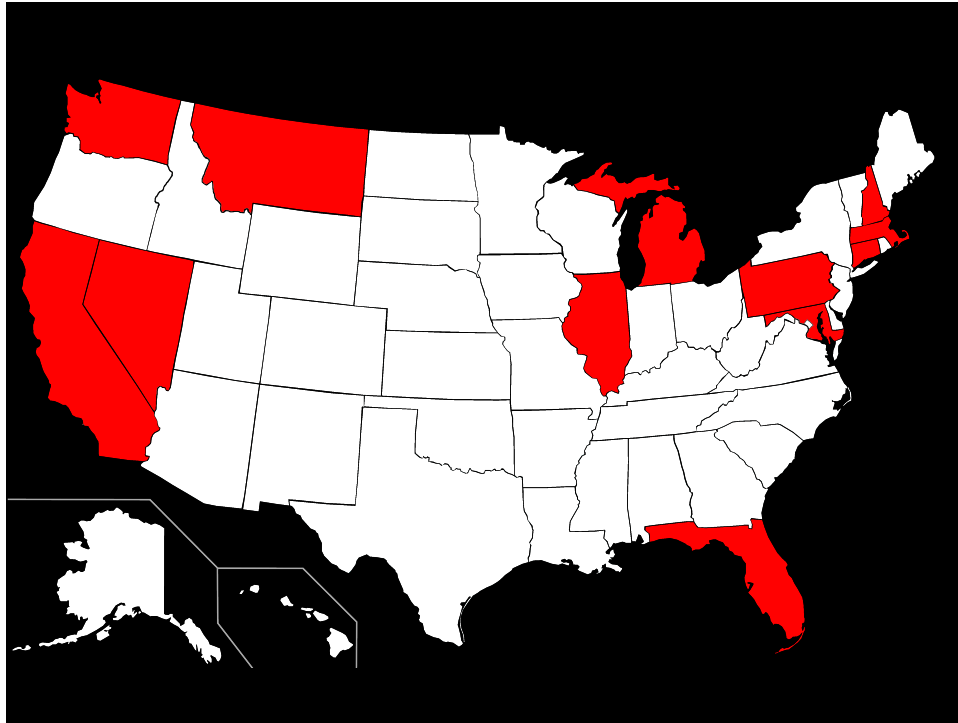
- Criminal penalties
- Civil fines
- Private civil suits
 - Equitable remedies
 - Damages
 - Punitive damages
 - Attorneys fees, costs

State statutes

- Many state statutes are modeled on the federal law.
- Some states are more restrictive, requiring consent of all parties.

States requiring consent of all parties:

- | | |
|-----------------|-----------------|
| • California | • Nevada |
| • Connecticut | • New Hampshire |
| • Florida | • Pennsylvania |
| • Illinois | • Washington |
| • Maryland | |
| • Massachusetts | |
| • Michigan | |
| • Montana | |



Interstate phone calls

- A phone call made either to or from an all-party-consent state may give rise to liability in the all-party-consent state.
- See, e.g., *Kearney v. Salomon Smith Barney Inc.*, 39 Cal. 4th 95 (2006) (California law applied to calls originating from Georgia).

California's Anti-Paparazzi Law

- Cal. Civ. Code § 1708.8
- Constructive invasion of privacy for using long lenses or parabolic microphones to capture images or sounds otherwise inaccessible without trespassing if “offensive to a reasonable person.”
- Provides for treble damages for trespass, false imprisonment, or assault undertaken with intent to capture visual images.

Carter v. Superior Court of San Diego,
No. D038091, 2002 WL 27229
(Cal. Ct. App. Jan. 10, 2002)

Plaintiff sued New York Times videographer under anti-paparazzi law for video taken in hospital. Plaintiff claimed a signed consent was fraudulently obtained under the pretense that the video was for hospital training purposes. The New York Times' anti-SLAPP motion of was denied.

Sources:

- Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping (Congressional Research Service report), Gina Stevens, Charles Doyle, October 9, 2012*
- Reporter's Recording Guide | Reporters Committee for Freedom of the Press, <http://www.rcfp.org/reporters-recording-guide>
- What Civil Practitioners Should Know About The Federal Wiretap And Stored Communications Acts, Andrew R. Schulman, Esq.

* Some material has be re-used verbatim or nearly verbatim.