



“Can We  
Tape?”

A journalist's  
guide to  
taping  
phone calls  
and  
in-person  
conversations  
in the  
50 states  
and D.C.

THE  
**REPORTERS  
COMMITTEE**  
FOR  
**FREEDOM  
OF THE  
PRESS**

Fall  
2008

## 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, including the issues of taping family members' calls and using a tape recording as evidence in a lawsuit or prosecution. Others who have questions about taping should contact a local attorney directly.

## 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>		✓	✓		✓
Alabama		✓		✓	✓
Alaska		✓		✓	✓
Arizona		✓		✓	
Arkansas		✓		✓	
California	✓	✓	✓	✓	✓
Colorado		✓			✓
Connecticut	✓	✓	✓		
Delaware		✓	✓	✓	✓
District of Columbia		✓	✓		✓
Florida	✓	✓	✓		
Georgia		✓	✓	✓	
Hawaii		✓	✓	✓	✓
Idaho		✓	✓		✓
Illinois	✓	✓	✓	✓	✓
Indiana		✓	✓		✓
Iowa		✓			✓
Kansas		✓		✓	✓
Kentucky		✓			✓
Louisiana		✓	✓	✓	✓
Maine		✓	✓	✓	✓
Maryland	✓	✓	✓	✓	✓
Massachusetts	✓	✓	✓		✓
Michigan	✓	✓	✓	✓	✓
Minnesota		✓	✓	✓	✓
Mississippi		✓	✓		✓
Missouri		✓	✓	✓	✓
Montana	✓	✓			✓
Nebraska		✓	✓		✓
Nevada	✓	✓	✓		✓
New Hampshire	✓	✓	✓	✓	✓
New Jersey		✓	✓		✓
New Mexico		✓	✓		✓
New York		✓			✓
North Carolina		✓	✓		✓
North Dakota		✓			✓
Ohio		✓	✓	✓	✓
Oklahoma		✓			✓
Oregon		✓		✓	
Pennsylvania	✓	✓	✓	✓	✓
Rhode Island		✓	✓		✓
South Carolina		✓	✓	✓	✓
South Dakota		✓		✓	
Tennessee		✓	✓	✓	✓
Texas		✓	✓		✓
Utah		✓	✓	✓	✓
Vermont					
Virginia		✓	✓		✓
Washington	✓	✓	✓		
West Virginia		✓	✓		✓
Wisconsin		✓	✓		✓
Wyoming		✓	✓		✓

## State-by-state guide

### Alabama

Under Alabama law, unlawful eavesdropping, criminal surveillance, and divulging information obtained through these methods are misdemeanors carrying a maximum jail sentence of one year. ALA. CODE § 13A-1-2.

The eavesdropping statute criminalizes the use of “any device” to overhear or record communications, whether the eavesdropper is present or not, without the consent of at least one party engaged in the communication. ALA. CODE § 13A-11-31. A person also cannot knowingly or recklessly divulge information obtained through illegal eavesdropping. ALA. CODE § 13A-11-35.

A violation of the statute occurs when there is (1) a willful interception, (2) of oral communications uttered by a person exhibiting an expectation that the communication would be in private, (3) and communication is made under circumstances justifying an expectation of privacy. *Ages Group, L.P. v. Raytheon Aircraft Co., Inc.*, 22 F.Supp.2d 1310 (M.D. Ala. 1998).

Additionally, it is a misdemeanor to engage in “criminal surveillance,” defined as secret observation or photography while trespassing

on private property. Criminal surveillance does not include observation on a public street. ALA. CODE § 13A-11-32.

### Alaska

It is a misdemeanor in Alaska to use an eavesdropping device to hear or record a conversation without the consent of at least one party to the conversation, or to disclose or publish information that one knows, or should know, was illegally obtained. ALASKA STAT. § 42.20.310. A person who intercepts a private conversation cannot legally divulge or publish the information without consent of at least one party. ALASKA STAT. § 42.20.300. The eavesdropping statute carries a fine of up to \$1,000 and/or one year in jail, though suppression of illegally obtained information in court is the only civil penalty authorized. ALASKA STAT. § 42.20.330.

The state’s highest court has held that the eavesdropping statute was intended to prohibit only third-party interception of communications and thus does not apply to a participant in a conversation. *Palmer v. Alaska*, 604 P.2d 1106 (Alaska 1979).

The state hidden camera statute applies only to images that include

## 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 “Prime-time 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

nudity. A person who views or produces a picture of a nude or partially nude person without consent commits the crime of “indecent viewing or photography.” ALASKA STAT. § 11.61.123. The crime of indecent viewing or photography is a misdemeanor if the subject viewed is an adult, and a felony if the subject is a minor.

### Arizona

An individual must have the consent of at least one party to a conversation in order to legally intercept a wire or electronic communication, including wireless and cellular calls, in Arizona. Otherwise, this conduct is a felony. ARIZ. REV. STAT. ANN. § 13-3005. Utilizing a device to overhear a conversation while not present, without the consent of a party to that conversation, is also a felony.

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 for that communication. See definition of “oral communication,” ARIZ. REV. STAT. ANN. § 13-3001.

For example, a state appellate court has held that a criminal defendant’s contention that police officers violated this law by recording their interviews with him without his consent was meritless because the defendant had no reasonable expectation of privacy in a police interview room. *Arizona v. Hauss*, 688 P.2d 1051 (Ariz. Ct. App. 1984).

It is unlawful in Arizona for an individual to photograph or film a person without consent while the person is in a restroom, locker room,

bathroom or bedroom or is undressed or involved in sexual activity, unless the surveillance is for security purposes and notice is posted. ARIZ. REV. STAT. ANN. § 13-3019.

### Arkansas

Intercepting or recording any wire, oral, cellular or cordless phone conversation is a misdemeanor in Arkansas, unless the person recording is a party to the conversation, or one of the parties to the conversation has given prior consent. ARK. CODE § 5-60-120. However, it is not unlawful for law enforcement investigations. ARK. CODE § 5-60-120.

Arkansas law also criminalizes the “interception” of a message transmitted by telegraph or telephone in its public utility laws. ARK. CODE § 23-17-107. However, the statute does not prohibit or restrict a Federal Communications Commission licensed amateur radio operator or anyone operating a police scanner from intercepting a communication for pleasure. ARK. CODE § 5-60-120(e).

In some instances, the court may find implied consent. For example, in 1999, the United States Court of Appeals for the Eighth Circuit held that a mother of a mentally retarded son could not hold a care facility at which her son had been a patient liable for invasion of privacy under Arkansas law, since the mother knew some of her conversations with the facility’s employees were being recorded. *Alexander v. Pathfinder, Inc.*, 189 F.3d 735 (8th Cir. 1999).

State law makes it a felony to use any camera or “image recording

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 “Prime-time 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 ho-

meowners 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.*)

But in *Alvarado v. KOB-TV*, the Court of Appeals for the 10th Circuit ruled that reporters did not intrude upon the seclusion of undercover officers in filming them when they came to the doors of their residences to decline to talk to news media, because this conduct would not be “highly offensive to a reasonable person.”

**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*)

device” to secretly view or videotape a person in any place “where that person is in a private area out of public view, has a reasonable expectation of privacy, and has not consented to the observation.” ARK. CODE § 5-16-101.

### California

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. CAL. PENAL CODE §§ 631, 632. It is also a crime to disclose information obtained from eavesdropping. However, an individual can still be convicted without disclosing information. Two appellate courts have held that there is no disclosure or publication requirement for violation of the Privacy Act by recording confidential communications without consent. *Coulter v. Bank of America*, 28 Cal. App. 4th 923 (Cal. Ct. App. 1994). *Marich v. MGM/UA Telecommunications, Inc.*, 113 Cal. App. 4th 415 (Cal. Ct. App. 2003).

Eavesdropping upon or recording a conversation, whether by telephone or face-to-face, when a person would reasonably expect their conversation to be confined to the parties present, carries the same penalty as intercepting telephone or wire communications. A California appellate court ruled that a network’s broadcast of a news report that used excerpts from secret recordings during two patient examinations violated the privacy rights of the physician, who had a reasonable expectation that his communications with his patients would be private and not recorded. *Lieberman v. KCOP Television, Inc.* 110 Cal. App. 4th 156 (Cal. Ct. App. 2003).

But, conversations that occur at any public gathering where one could expect to be overheard, including any legislative, judicial or executive proceeding open to the public, are not covered by the statute. For example, when a television network 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, the conduct 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 (Cal. Ct. App. 1999).

However, an appellate court has ruled that using a hidden video camera in a private place does violate the statute. *California v. Gibbons*, 215 Cal. App. 3d 1204 (Cal. Ct. App. 1989). It is not a crime to take notes during a conversation or later summarize or disclose one’s recollection of a communication. *People v. Wyrick*, 77 Cal. App. 3d 903 (Cal. Ct. App. 1978).

A first offense of eavesdropping 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. Intercepting, recording, and disclosing information each carries a separate penalty.

Anyone injured by a violation of the laws against disclosure of telegraphic or telephonic messages 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.

### Colorado

Recording or intercepting a telephone conversation, or any electronic communication, without the consent of at least one 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. COLO. REV. STAT. § 18-9-303. Recording 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 a felony, if there is reason to know the information was obtained illegally. 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.

Additionally, a person may use wiretapping or eavesdropping

devices on his own premises for security or business purposes, if reasonable notice of the use of such devices is given to the public. COLO. REV. STAT. § 18-9-305.

### Connecticut

It is illegal to tape a telephone conversation in Connecticut without the consent of all parties. CONN. GEN. STAT. § 52-570d. Consent should be given prior to the recording, and should either be in writing or recorded verbally, or a warning that the conversation is being taped should be recorded.

Recording a telephone conversation without the consent of all the parties subjects an individual to liability for civil damages, as well as litigation costs and attorney fees. In addition, it is a felony punishable by imprisonment for one to five years for anyone who is not a party to a conversation to mechanically overhear or record that conversation, including telephonic and cellular or wireless communications and face-to-face discussions, without the consent of at least one party. CONN. GEN. STAT. §§ 53a-187, 189.

However, rerecording an illegally taped conversation by a third party may not violate the statute. *Holler v. Buckley Broadcasting Corp.*, 706 A.2d 1379 (Conn. App. Ct. 1998).

### Delaware

In Delaware, there is some conflict with regards to whether a party to a conversation can record the communication without the other party’s consent. Delaware’s wiretapping and surveillance law specifically allows an individual to “intercept” any wire, oral or electronic communication to which the individual is a party, or a communication in which at least one of the parties has given prior consent, so long as the communication is not intercepted with a criminal or tortious intent. DEL. CODE ANN. tit. 11, § 2402(c)(4).

However, a Delaware privacy law makes it illegal to intercept “without the consent of all parties thereto a message by telephone, telegraph, letter or other means of communicating privately, including private conversation.” DEL. CODE ANN. tit. 11, § 1335(a)(4).

The wiretapping law is much more recent, and at least one federal court has held that, even under the privacy law, an individual can record his own conversations. *United States v. Vespe*, 389 F. Supp. 1359 (1975).

Under the wiretapping law, communications intercepted illegally, or the disclosure of the contents of illegally recorded communications, can result in prosecution for a felony and a fine of up to \$10,000. DEL. CODE ANN. tit 11, § 2402 (b). Civil liability also can be imposed in the amount of actual damages or a fine of \$100 a day for each day of violation or \$1,000, whichever is more, along with punitive damages, attorney fees and litigation costs. DEL. CODE ANN. tit. 11, § 2409. However, a good faith reliance on a court order or legislative authorization constitutes a complete defense.

Installing a camera or other recording device “in any private place, without consent of the person or persons entitled to privacy there” is a misdemeanor, and under a 1999 amendment, the use of hidden cameras to record individuals dressing or undressing in a private place is a felony. DEL. CODE ANN. tit. 11, § 1335(2), (6).

### District of Columbia

In the District of Columbia, an individual may record or disclose the contents of a wire or oral communication if he or she is a party to the communication, or has received prior consent from one of the parties, 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, or both. D.C. CODE ANN. § 23-542.

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.” D.C. CODE ANN. § 23-542

Besides being subject to criminal liability, anyone who illegally records or discloses the contents of a communication is also 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.

The statute specifically prohibits the District of Columbia from asserting any governmental immunity to avoid liability under the wiretapping laws. However, a good faith reliance on a court order or legislative authorization shall constitute a complete defense. D.C. CODE ANN. § 23-554.

## Florida

All parties must consent to the recording or the disclosure of the contents of any wire, oral or electronic communication in Florida. Recording, disclosing, or endeavoring to disclose without the consent of all parties is a felony, unless the interception is a first offense committed without any illegal purpose, and not for commercial gain. FLA. STAT. ch. 934.03. These first offenses and the interception of cellular frequencies are misdemeanors. *State v. News-Press Pub. Co.*, 338 So. 2d 1313 (1976).

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,” FLA. STAT. ch. 934.02. See also *Stevenson v. State*, 667 So.2d 410 (Fla. Dist. Ct. App. 1996); *Paredes v. State*, 760 So.2d 167 (Fla. Dist. Ct. App. 2000).

In *Cohen Brothers, LLC v. ME Corp., S.A.*, 872 So.2d 321 (Fla. Dist. Ct. App. 2004), the District Court of Appeal for the Third District of Florida held that members of a limited liability company’s (LLC) management committee did not have a reasonable expectation of privacy with respect to participation in telephone conference calls with other committee members to discuss continued financing of the LLC, and thus could not hold the committee members liable for recording the conference calls.

A federal appellate court has held that because only interceptions made through an “electronic, mechanical or other device” are illegal under Florida law, telephones used in the ordinary course of business to record conversations do not violate the law. The court found that business telephones are not the type of devices addressed in the law and, thus, that a life insurance company did not violate the law when

it routinely recorded business-related calls on its business extensions. *Royal Health Care Servs., Inc. v. Jefferson-Pilot Life Ins. Co.*, 924 F.2d 215 (11th Cir. 1991).

Anyone whose communications have been illegally intercepted may recover actual damages or \$100 for each day of violation or \$1,000, whichever is greater, along with punitive damages, attorney fees and litigation costs. FLA. STAT. ch. 934.10.

## Georgia

Secretly recording or listening to a conversation held in a private place, without the consent of all parties, whether carried out orally or by wire or electronic means, is a felony invasion of privacy under Georgia law. GA. CODE ANN. § 16-11-62.

Violation of the statute carries a penalty of imprisonment for not less than one nor more than five years or a fine not to exceed \$10,000.00, or both. GA. CODE ANN. § 16-11-69. However, the law expressly provides that it does not prohibit a person who is a party to a conversation from recording, and allows recording if one party to the conversation has given prior consent. GA. CODE ANN. § 16-11-66. See also *Malone v. State*, 541 S.E.2d 431 (Ga. Ct. App. 2000).

It is also illegal for any person to divulge or distribute to any unauthorized person or authority the content or substance of any private message, regardless of whether it is intercepted lawfully or unlawfully.

However, the Court of Appeals of Georgia has held that the statute does not prohibit parents from monitoring or intercepting their minor children’s phone conversations for the purpose of ensuring the welfare of the minor child. *Bishop v. State*, 252 555 S.E.2d 504 (Ga. Ct. App. 2001).

Use of a hidden camera “without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view” is illegal as well. GA. CODE ANN. § 16-11-62(2).

## Hawaii

Any wire, oral or electronic communication (including cellular phone calls) can lawfully be recorded by a person who is a party to

## 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*)

The Supreme Court of California in *Kearney v. Salomon Smith Barney* applied California wiretap law to a company located in Georgia who routinely recorded business phone calls with its

clients in California. California law requires all party consent to record any telephone calls, while Georgia law requires only one party consent. The state’s high court, applying choice of law principles, reasoned that the failure to apply California law would “impair California’s interest in protecting the degree of privacy afforded to California residents by California law more severely than the application of California law would impair any interests of the State of Georgia.”

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 pre-empt 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.

the communication, or when one of the parties has consented to the recording, so long as no criminal or tortious purpose exists. HAW. REV. STAT. § 803-42. Divulging any private message or photographic image by telephone, telegraph, letter, electronic transmission, without the consent of either the sender or the receiver, is a misdemeanor if the accused knows that the message was unlawfully intercepted. Unlawful interceptions or disclosures of private communications are punishable as felonies. HAW. REV. STAT. § 803-42.

The one-party consent rule does not apply, however, to the installation of a recording device in a “private place” that will amplify or broadcast conversations outside that private place. All parties who have a reasonable expectation of privacy in that place must consent to the installation of a recording device. HAW. REV. STAT. § 711-1111.

Civil penalties for unlawful interception or disclosure include the greater of actual damages or any profits made by the violator, \$100 for each day of violation, or \$10,000, along with punitive damages, attorney fees and litigation costs. HAW. REV. STAT. § 803-48. A hotel room has been found by the Hawaii Supreme Court to be a private place where a recording device cannot legally be installed without the consent of the room’s occupants. *Hawaii v. Lo*, 675 P.2d 754 (Haw. 1983).

It is a felony to install or use a surveillance device in a private place to view a person in a “stage of undress or sexual activity” without the person’s consent. If the person is not in such a stage, it is a misdemeanor. HAW. REV. STAT. § 711-1111. It is also a misdemeanor to possess materials obtained through illegal surveillance. HAW. REV. STAT. § 711-1110.9.

## Idaho

Although legislation criminalizes the interception and disclosure of wire or oral communications, it specifically allows interception when one of the parties has given prior consent. IDAHO CODE § 18-6702. Punishment for the felony of an illegal interception or disclosure can include up to five years in prison and as much as \$5,000 in fines. Anyone whose communications are unlawfully intercepted can sue for recovery of actual damages, at \$100 a day per day of violation or \$1,000 — whichever is more. Punitive damages, litigation costs and attorney fees also can be recovered. IDAHO CODE § 18-6709.

The Supreme Court of Idaho has held that eavesdroppers violated the Communications Security Act by willfully intercepting and recording telephone users’ cordless telephone conversation using radio scanners and tape recorders, and disclosing the conversations to others. *Hoskins v. Howard*, 971 P.2d 1135 (Idaho 1998).

## Illinois

In Illinois, an eavesdropping device cannot be used to record or overhear a conversation without the consent of all parties to the conversation. 720 ILL. COMPILED STAT. ANN. 5/14-1, -2. An eavesdropping device is defined as anything used to hear or record a conversation, even if the conversation is conducted in person.

In addition, it is illegal to disclose information one knows or should have known was obtained with an eavesdropping device. Violations of the eavesdropping law are punishable as felonies, with first offenses categorized as lesser felonies than subsequent offenses. 720 ILL. COMPILED STAT. ANN. 5/14-4. Civil liability for actual and punitive damages is authorized as well. 720 ILL. COMPILED STAT. ANN. 5/14-6. However, not disclosing the contents of the illegally obtained communication is an affirmative defense to the charge.

Standard radio scanners are not eavesdropping devices, according to a 1990 decision from an intermediate appellate court. *Illinois v. Wilson*, 554 N.E.2d 545 (Ill. App. Ct. 1990). A camera is not an eavesdropping device. *Cassidy v. ABC*, 377 N.E. 2d 126 (Ill. App. Ct. 1978).

It is also illegal for any person to “videotape, photograph, or film another person without that person’s consent in a restroom, tanning bed or tanning salon, locker room, changing room or hotel bedroom,” or in their residence without their consent. 720 ILL. COMPILED STAT. ANN. 5/26-4(a).

The eavesdropping provisions do not prohibit private citizens from electronically recording the proceedings of any meeting subject to the

## Open Meetings Act.

Under Illinois law, when communications with individuals acting as agents or representatives of a company are taped in violation of the Illinois eavesdropping statute, claims under the eavesdropping statute belong to the company. *International Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672 (N.D. Ill. 2006).

## Indiana

The recording or acquiring of the contents of a telephonic or telegraphic communication by someone who is neither the sender nor the receiver is a felony and can be the basis for civil liability as well. IND. CODE ANN. § 35-33.5-1-5.

Civil liability may require the payment of actual damages, \$100 per day for each day of violation or \$1,000 — whichever is greater — and punitive damages, court costs and attorney fees. IND. CODE ANN. § 35-33.5-5-4.

In 2000, the Supreme Court of Indiana held that the Indiana Wiretap Act requires the state to prove the eavesdropper acted with intent. *State v. Lombardo*, 738 N.E.2d 653. (Ind. 2000).

The Court of Appeals of Indiana held in 2007 that the interception and recording of calls made by prisoners from a jail did not violate the Wiretap Act, since recipients of calls were informed prior to accepting collect calls that the calls might be recorded or monitored, and the recipients pressed zero, accepting the calls and indicating their consent. *Edwards v. State*, 862 N.E.2d 1254, (Ind. Ct. App. 2007).

## Iowa

It is a misdemeanor in Iowa under general criminal laws for a third party to tap into a communication of any kind, including telephone conversations. If the person listening or recording is a sender or recipient of the communication, or is openly present and participating in the conversation, the communication can be recorded without the consent of the other parties. IOWA CODE § 727.8.

Iowa also has more specific legislation regarding the interception of communications that expressly allows the interception of wire, oral or electronic communications through use of a mechanical device by a party to the communication, or with the consent of at least one party, in the absence of any criminal or tortious intent. IOWA CODE § 808B.2.

Illegal interception and disclosure of intercepted information under this legislation are felonies and anyone whose communications have been intercepted is expressly provided with injunctive relief and damages at a rate of \$100 a day or \$1,000, whichever is higher. IOWA CODE § 808B.8.

However, individuals cannot legally record conversations while not present. In 2005, the Supreme Court of Iowa upheld a conviction of a woman who set her tape recorder on voice-activation mode so that it would record conversations automatically in her absence. *State v. Philpott*, 702 N.W.2d 500 (Iowa 2005).

## Kansas

Unlawful eavesdropping consists of secretly listening to, recording, or amplifying private conversations or using any device to intercept a telephone or wire communication “without the consent of the person in possession or control of the facilities for such wire communication.” KAN. STAT. ANN. § 21-4001. Violations are misdemeanors. A criminal breach of privacy, punishable as a misdemeanor as well, occurs when any means of private communication is intercepted without the consent of the sender or receiver. Divulging the existence or contents of any type of private communication, whether carried out by telephone or even letter, is also a misdemeanor if the person knows the message was intercepted illegally. KAN. STAT. ANN. § 21-4002.

The state’s highest court has interpreted the eavesdropping and privacy statutes to allow one-party consent for taping of conversations and in interpreting both statutes has held that as long as one party consents to the conversation, the other party loses his right to challenge the eavesdropping in court. *Kansas v. Roudybush*, 686 P.2d 100 (Kan. 1984).

It is a misdemeanor to use a hidden camera to photograph a person

who is nude or in a state of undress without the person's consent in a place where the person has a reasonable expectation of privacy. KAN. STAT. ANN. § 21-4001(a)(4). For example, a stepfather was convicted of eavesdropping by videotaping his 16-year-old stepdaughter bathing by use of a hole in a bathroom wall. *State v. Liebau*, 67 P.3d 156 (Kan. Ct. App. 2003).

### Kentucky

It is a felony to overhear or record, through use of an electronic or mechanical device, a wire or oral communication without the consent of at least one party to that communication. KY. REV. STAT. ANN. § 526.010. A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time.

KY. REV. STAT. ANN. § 526.020.

Divulging information obtained through illegal eavesdropping is a separate crime, punishable as a misdemeanor. KY. REV. STAT. ANN. § 526.060.

Anyone who inadvertently hears a conversation transmitted through a wireless telephone on a radio receiver does not violate the eavesdropping statute, but if that same conversation is recorded or passed on to others without the consent of a party to the original conversation, a violation occurs. Ky. Att'y Gen. Op. 84-310 (1984). This prohibition includes recording any oral communication of others without their consent, so long as the recorder used an eavesdropping device.

## 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 newsgatherers 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 D.C. Court of Appeals case involving two U.S. Congressmen distinguished the facts in its case from those in *Bartnicki*, because

the people who recorded and disclosed the conversations in that case were private citizens. In 1996, Rep. James McDermott (D-Wash.) released 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. A Florida couple who illegally taped the conversation gave the tape to McDermott. Boehner sued McDermott, alleging the release violated the federal wiretap law because McDermott disclosed information he knew was obtained illegally.

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 court's opinion did not shed light on whether a taped conversation that does not involve violence may be disclosed — the court decided the issue based on the fact that McDermott was a member of the House Ethics Committee, and those who accept positions of trust involving a duty not to disclose information, such as judges or government officials in sensitive confidential positions, may have special duties of non-disclosure. Here, members of the Ethics Committee were forbidden to reveal information "relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media.

However, the U.S. Court of Appeals for the First Circuit in Massachusetts decided in 2007's *Jean v. Massachusetts State Police* that the First Amendment prevented Massachusetts law enforcement officials from interfering with an individual's Internet posting of an audio and video recording of an arrest and warrantless search of a private residence, even though the poster had reason to know at the time she accepted the recording that it was illegally recorded.

The Court applied *Bartnicki* and determined that the state's interest in protecting the privacy of its citizens — encouraging uninhibited exchange of ideas and information among private parties and avoiding suspicion that one's speech is being monitored by a stranger — was less compelling in this case than in *Bartnicki*, in which it was not given much weight.

The Court of Appeals said that in *Jean*, when the identity of the interceptor is known, there is even less justification for punishing a subsequent publisher than there was in *Bartnicki*, and the public interest in publication of truthful information of public concern was equally as strong. The *Jean* court also cited the concurring opinion in *Boehner*, stating that if Rep. McDermott had been a private citizen, like Jean, the court would have concluded that his disclosure of the tape was subject to First Amendment protection regardless of the fact that he received the tape directly from the Florida couple, who recorded it illegally.

A conversation which is loud enough to be heard through the wall or through the heating system without the use of any device is not protected by the statute, since a person who desires privacy can take the steps necessary to ensure that his conversation cannot be overheard by the ordinary ear. KY. REV. STAT. ANN. § 526.020.

### Louisiana

Unless a criminal or tortious purpose exists, a person can record any conversations transmitted by wire, oral or electronic means to which he is a party, or when one participating party has consented. A violation of the law, whether by recording or disclosing the contents of a communication without proper consent, carries a fine of not more than \$10,000 and jail time of not less than two and not more than 10 years at hard labor. LA. REV. STAT. § 15:1303.

Civil damages are expressly authorized as well. Actual damages can be recovered — minimum damages in any case will be the greater of \$100 a day for each day of violation or \$1,000 — along with punitive damages, litigation costs and attorney fees. LA. REV. STAT. § 15:1312.

The use of any type of hidden camera to observe or record a person where that person has not consented is illegal if the recording “is for a lewd or lascivious purpose.” LA. REV. STAT. § 14:283.

The Court of Appeal of Louisiana for the Second Circuit held that a wife’s secretly-recorded telephone conversations with her husband on her own telephone were not illegally intercepted since the calls were recorded by a party to the conversation. *Brown v. Brown*, 877 So.2d 1228 (La. Ct. App. 2004).

### Maine

Interception of wire and oral communications is a “Class C” crime under the state criminal code, and an interceptor is someone other than the sender or receiver of a communication who is not in the range of “normal unaided hearing” and has not been given the authority to hear or record the communication by a sender or receiver. ME. REV. STAT. ANN. tit. 15, § 710. Thus, the statute does not prohibit a party to the conversation from recording.

Disclosure of the contents of intercepted communications, knowing the information was obtained by interception, is a “Class C” violation of the criminal code as well. ME. REV. STAT. ANN. tit. 15, § 710.

Anyone whose communications have been intercepted can sue for civil damages and recover the greater of \$100 a day for each day of violation or actual damages, and also attorney fees and litigation costs. ME. REV. STAT. ANN. tit. 15, § 711.

A hidden cameras law makes it a “Class D” crime to use a camera to view or record a person in a private place, “including, but not limited to, changing or dressing rooms, bathrooms and similar places,” or in a public place if one views any portion of another person’s body “when that portion of the body is in fact concealed from public view under clothing,” and a reasonable person would expect it to be safe from surveillance. ME. REV. STAT. ANN. tit. 17-A, §511.

### Maryland

Under Maryland’s Wiretapping and Electronic Surveillance Act, it is unlawful to tape record a conversation without the permission of all the parties. See *Bodoy v. North Arundel Hosp.*, 945 F.Supp. 890 (D. Md. 1996). Additionally, recording with criminal or tortious purpose is illegal, regardless of consent. MD. CODE ANN., CTS. & JUD. PROC. § 10-402.

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., CTS. & JUD. PROC. § 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).

The Court of Special Appeals of Maryland held that because states are at liberty to adopt more restrictive provisions than those contained in federal law, the secretary-treasurer of a local union who recorded conversations between himself and management representatives could still be prosecuted under the state statute, even if his conduct was arguably protected under the National Labor Relations Act. *Petric v. State*, 504 A.2d 1168 (Md. Ct. Spec. App. 1986).

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. The court may award actual damages and reasonable attorney fees. A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding one year or a fine not exceeding \$2,500 or both.

### Massachusetts

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. MASS. ANN. LAWS ch. 272, § 99.

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.

For example, in *Com. v. Hanedanian*, 742 N.E.2d 1113 (Mass. App. Ct. 2001), the appellate court held that a defendant’s conduct of intentionally making a secret tape recording of oral communications between himself and his attorneys, without consent, violated the statute, even though the defendant was a party to the conversation.

However, the First Circuit, applying the holding in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), held in 2007 that a woman who accepted from a source a recorded tape, that she had reason to know was recorded illegally by the source, could not be punished for publishing the tape on her website. The court held that the woman had a First Amendment right to publish the tape she received. *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007).

An appellate court has also held that the recorded conversation or communication does not need to be intelligible in order for the interception to violate the wiretapping statute. *Com. v. Wright*, 814 N.E.2d 741 (Mass. App. Ct. 2004).

### Michigan

Any person who willfully uses any device to overhear or record a conversation without the consent of all parties is guilty of illegal eavesdropping, whether or not they were present for the conversation. 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. MICH. COMP. LAWS § 750.539c.

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. This interpretation allows a participant in a conver-

sation 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).

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.

Additionally, the Court of Appeals of Michigan held in 2006 that neither the secretary to a school district superintendent who allegedly circulated a facsimile sent to the superintendent, nor those who saw the facsimile, were liable under the state eavesdropping statute, since the facsimile machine was not used to record or access the messages sent to the superintendent. *Vollmar v. Laura*, 2006 WL 1008995 (Mich. Ct. App. 2006) (Unreported).

### Minnesota

It is legal for a person to record a wire, oral or electronic communication if that person is a party to the communication, or if one of the parties has consented to the recording — so long as no criminal or tortious intent accompanies the recording. MINN. STAT. § 626A.02. Unlawful recordings, or disclosure of their contents when there is reason to know the information was obtained illegally, carry maximum penalties of imprisonment for five years and fines of \$20,000. In addition, civil liability for violations statutorily can include three times the amount of actual damages or statutory damages of up to \$10,000, as well as punitive damages, litigation costs and attorney fees. MINN. STAT. § 626A.13.

Under state court interpretations, when an employee of a local television station secretly videotaped a veterinarian treating a pet in a private home for an investigative news report, the station did not violate the wiretapping law because its employee was a party to the communication and it had no tortious intent. Regardless of the fact that allegations of tortious trespass existed, the court found the station’s intent was commercial, not tortious. *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402 (Minn. Ct. App. 1995), *cert. denied*, 1998 Minn. LEXIS 77 (Minn. Jan. 28, 1998).

It is a misdemeanor to use any type of device for “observing, photographing, recording, amplifying or broadcasting sounds or events through the window or other aperture of a sleeping room in a hotel, a tanning booth or any other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts or the clothing covering the immediate area of the intimate parts.” MINN. STAT. § 609.746. *State v. Morris*, 644 N.W.2d 114 (Minn. App. 2002) (defendant who concealed video camera in bag and used it to videotape up the skirts of females in department store violated statute prohibiting interference with privacy).

### Mississippi

It is generally a violation of Mississippi law to intercept and acquire the contents of wire, oral or other communications with a mechanical or electronic device. The law against interception of communications applies neither to a “subscriber” to a telephone who “intercepts a communication on a telephone to which he subscribes,” nor to members of the subscriber’s household. MISS. CODE ANN. § 41-29-535, *Wright v. Stanley*, 700 So.2d 274 (Miss. 1997) (state law prohibition on wiretapping did not apply to former wife who intercepted communications on her own telephone).

Violations can be punished as misdemeanors carrying the potential for imprisonment for up to one year and fines of up to \$10,000. MISS. CODE ANN. § 41-29-533. It is a felony, however, for anyone who is not a law-enforcement officer to disclose the contents of intercepted communications for any reason other than testifying under oath in a

governmental or court proceeding, and the penalty for such disclosure can be up to five years imprisonment and up to \$10,000 in fines. MISS. CODE ANN. §§ 41-29-511, 529. Civil liability for an unlawful interception is expressly authorized for actual damages, \$100 a day for each day of violation or \$1,000 — whichever is greater — along with punitive damages, attorney fees and litigation costs. MISS. CODE ANN. § 41-29-529.

In addition, the law specifically provides that if a person is a party to a communication, or has obtained consent from any one of the parties, no liability can be imposed unless the interception was accompanied by a criminal or tortious intent. MISS. CODE ANN. § 41-29-531.

Also, the contents of cellular telephone communications are unlawfully obtained when access is gained by a person who is not the intended recipient, or is not authorized to have access to the transmission. The possible penalties for unlawfully obtaining access to cellular communications are imprisonment for up to six months or a fine of up to \$1,000. MISS. CODE ANN. § 97-25-49.

## 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 newsgatherers.

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*)

The Phone Rule extends to broadcasting previously recorded messages. The FCC has recently imposed fines for both for broadcasting a recorded voicemail greetings of an individual (*In the matter of Courier Communications Corp.*) as well as voicemail messages left on radio personality’s personal cell phones (*In the matter of Capstar TX Limited Partnership*).

## Missouri

An individual who is a party to a wire communication, or who has the consent of one of the parties to the communication, can lawfully record it or disclose its contents, unless the person is intercepting the communication for the purpose of committing a criminal or tortious act. MO. REV. STAT. § 542.402. Recording or disclosing the contents of a wire communication by all other persons is a felony.

Anyone whose communications have been recorded or disclosed in violation of the law can bring a civil suit to recover the greater of actual damages, \$100 a day for each day of violation or \$1,000, and can recover punitive damages, attorney fees and litigation costs as well. MO. REV. STAT. § 542.418.

A Missouri appellate court has held that radio broadcasts from cordless telephones are not wire communications, and thus, recording such radio broadcasts is not illegal under the eavesdropping statute. *Missouri v. King*, 873 S.W.2d 905 (Mo. App. 1994).

It is also a felony to view or photograph a person in “a state of full or partial nudity” if the person “is in a place where he would have a reasonable expectation of privacy.” MO. REV. STAT. § 565.253.

## Montana

A reporter in Montana cannot tape record a conversation without knowledge of all parties to the conversation. *See* MONT. CODE ANN. § 45-8-213-C. Exceptions to this rule include the recording of: elected or appointed officials and public employees, when recording occurs in the performance of public duty; persons speaking at public meetings, and persons given warning of the transcription. If one party gives warning, then either party may record. MONT. CODE ANN. § 45-8-213-1-C-i, ii, iii. It is illegal to purposely intercept an electronic communication. It is also illegal to disclose the contents of an illegally recorded conversation. MONT. CODE ANN. § 45-8-213-2.

A person convicted of the offense of violating privacy in communications shall be fined an amount not to exceed \$500 or be imprisoned in county jail for a term not to exceed six months, or both. Penalties increase with each offense. MONT. CODE ANN. § 45-8-213-3.

In 2003, the Montana Supreme Court found that a tape-recorded conversation between a defendant and others while the defendant was in prison did not violate state wiretapping laws because the prison notified the defendant that his telephone conversations were subject to monitoring. *State v. DuBray*, 77 P.3d 247, 263 (Mont. 2003).

## Nebraska

It is not unlawful to intercept a wire, electronic, or oral communication when the interceptor is a party to the conversation or one of the parties to the communication has given prior consent, unless the communication is intercepted for the purpose of committing any criminal or tortious act. NEB. REV. STAT. § 86-290-1-b, c. Neither is it unlawful to intercept communications available to the general public or signals causing harmful interference. NEB. REV. STAT. § 86-290-1.

It is illegal to intentionally disclose, or publish, the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through illegal interception. NEB. REV. STAT. § 86-290-1.

Only injunctive relief can be sought for a first offense; subsequent violation gives rise to a \$500 fine. NEB. REV. STAT. § 86-290-5-b.

In addition, any person whose communication is intercepted or disclosed may recover in a civil action from the person or entity which engaged in the violation such relief as a judge deems appropriate, including injunctive or declaratory relief and reasonable attorney fees and other litigation costs. NEB. REV. STAT. § 86-297-1.

## Nevada

Consent of all parties is required to tape a conversation in Nevada. Intercepting or delaying a telephone conversation is a misdemeanor. NEV. REV. STAT. ANN. § 707.900. However, if the interception is made with the prior consent of one of the parties to the communication and an emergency situation exists in which it is impractical to gain a court order before intercepting the communication, an exception may be made. § 200.620. This exception applies mostly to law enforcement officers who proceed without a warrant. *See* NEV. REV. STAT. ANN. §

179.410, *et seq*; *Koza v. State*, 100 Nev. 245, 252-253 (Nev. 1984).

In December 1998, the state’s highest court stated in a 3-2 decision that the state wiretapping statutes require an individual to obtain the consent of all parties before taping a telephone conversation, and thus, that an individual who tapes his own telephone calls without the consent of all participants unlawfully “intercepts” those calls. *Lane v. Allstate Ins. Co.*, 969 P.2d 938, 941 (Nev. 1998).

In addition, it is a crime to intrude upon the privacy of another by surreptitiously listening to, recording, or disclosing any conversation gained by means of electronic or mechanical device, unless authorized to do so by one of the parties of the conversation. NEV. REV. STAT. ANN. § 200.630, .650.

Violations of the statute can be punishable by \$1,000 or \$100 per day, whichever is greater, punitive damages for violations of privacy, and costs reasonably incurred in bringing the action to court. NEV. REV. STAT. ANN. § 200.690.

## New Hampshire

It is a felony to intercept or disclose the contents of any telecommunication or oral communication without the consent of all parties. N.H. REV. STAT. ANN. § 570-A:2-I. It is punishable by imprisonment of one to seven years. N.H. REV. STAT. ANN. § 625:9. However, it is only a misdemeanor if a party to a communication, or anyone who has the consent of only one of the parties, intercepts a telecommunication or oral communication. N.H. REV. STAT. ANN. § 570-A:2-I. Misdemeanors are punishable by imprisonment up to one year. N.H. REV. STAT. ANN. § 625:9.

Any person whose telecommunication or oral communication is intercepted or disclosed has a civil cause of action against any person who unlawfully obtains such communication and is entitled to recover: actual damages at a rate of \$100 per day or \$1,000, whichever is greater; punitive damages; and reasonable attorney fees or other litigation costs. N.H. REV. STAT. ANN. § 570-A:11.

In addition, it is a violation of privacy to install or use any device for the purpose of observing, photographing, or recording in or outside any private place. N.H. REV. STAT. ANN. § 644:9-I. The state’s highest court has held that a classroom was not a private place where a school custodian could reasonably expect to be safe from video surveillance. *State v. McLellan*, 744 A.2d 611, 615 (N.H. 1999).

## New Jersey

It is a crime to purposely intercept any wire, electronic, or oral communication. It is also a crime to disclose or use the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained unlawfully. N.J. STAT. § 2A:156A-3. However, if the contents of the communication have “become public knowledge or public information,” then the disclosure is not a crime. N.J. STAT. § 2A:156A-3.

The statute makes an exception and allows interception if the person intercepting is a party to the communication, or if one party has given prior consent, unless such communication is intercepted for the purpose of committing any criminal or tortious act. N.J. STAT. § 2A:156A-4. The fact that one subscriber to a particular telephone has consented does not authorize interception of conversations by other parties who use that telephone. N.J. STAT. § 2A:156A-4.

Civil liability for unlawful interception or disclosure can be imposed for the greater of actual damages, \$100 per day of violation \$1,000, and can include punitive damages, attorney fees, and litigation costs. N.J. STAT. § 2A:156A-24.

## New Mexico

The crime of “interfering with communication” involves knowingly and unlawfully tapping any connection that belongs to another without consent of the person owning, possessing, or controlling the property. N.M. STAT. ANN. § 30-12-1(B). The crime also includes copying transmitted messages without consent, delaying the sending of any communication, or using any device to commit any of the prohibited acts. N.M. STAT. ANN. § 30-12-1(B).

Whoever commits the crime of “interfering with communications” is guilty of a misdemeanor, unless the interference is: (1) By court

order; (2) By the operator of a communications carrier switchboard operator in the course of his or her normal duty; or (3) Under color of law in the investigation of a crime. N.M. STAT. ANN. § 30-12-1.

Any person whose right to privacy has been violated under the statute may sue for actual damages of \$100 per day of violation or \$1,000, whichever is higher. A person whose rights have been violated may also recover punitive damages, reasonable attorney fees, and court costs. N.M. STAT. ANN. § 30-12-1.

The Supreme Court of New Mexico held that the consent requirement in the statute refers to consent to the sending of the communication. *Arnold v. New Mexico*, 610 P.2d 1210, 1213 (N.M. 1980). A journalist should be sure to get consent to publish a recorded conversation, based on this authority. *See id.*

## New York

Intercepting or unlawfully engaging in wiretapping without the consent of one party is a felony. N.Y. PENAL LAW §§ 250.00, 250.05. Mechanical wiretapping is illegal under the statute only when the party whose wires are tapped is not a party involved in the conversation. *People v. Gibson*, 23 N.Y.2d 618 (N.Y. 1969). However, a party to the conversation may surreptitiously record a conversation. *Id.* In addition, those who talk in the presence of a non-participating third party may have no expectation of privacy with respect to statements overheard by the third party. *People v. Kirsh*, 176 A.D.2d 652 (N.Y. App. Div. 1991).

These laws apply to conversations conducted over cellular or cordless phones. *People v. Fata*, 159 N.Y.S.2d 348 (N.Y. App. Div. 1990).

A state court 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.D.2d 318 (N.Y. App. Div. 1994).

Publication may also constitute the crime of “tampering with private communications,” a misdemeanor. N.Y. PENAL LAW § 250.25. A person is guilty of this crime when he divulges the contents of a private letter or communication knowing that it has been opened or read. N.Y. PENAL LAW § 250.25.

## 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.

## North Carolina

Without the consent of at least one party to the communication, it is a felony to willfully intercept, endeavor to intercept, or get any other person to intercept any wire, oral, or electronic communication or to use any device, which transmits by radio, wire, or cable, to do so. N.C. GEN. STAT. § 15A-287(a)(1).

In interpreting the meaning of “consent,” an appellate court determined that implied consent to interception occurs when one party is warned of monitoring and yet continues with the conversation. *North Carolina v. Price*, 170 N.C. App. 57 (N.C. App. 2005).

It is also illegal to willfully disclose or use the contents of any wire, oral, or electronic communication, knowing that the information was obtained unlawfully. N.C. GEN. STAT. § 15A-287(A)(3),(4).

“Electronic communication” does not include any communication from a tracking device. N.C. GEN. STAT. § 15A-286(8).

Any person whose wire, oral, or electronic communication has been intercepted, disclosed, or used has a civil cause of action against any person who intercepts or discloses the information. The violated party is entitled to recover actual damages (but not less than \$100 per day or \$1,000, whichever is higher), punitive damages, and reasonable attorney fees and litigation costs. N.C. GEN. STAT. § 15A-296(A).

No cause of action exists against a party who merely endeavors to intercept a communication. *Kroh v. Kroh*, 152 N.C. App. 347 (N.C. App. 2002).

## North Dakota

Anyone who is a party to a conversation or who has obtained consent from one party to the conversation may legally record or disclose the contents of any wire or oral communication so long as he does not have criminal or tortious intent. N.D. CENT. CODE § 12.1-15-02.

If a third party intentionally intercepts or discloses any wire or oral communication by any electronic, mechanical, or other device, it is a felony, carrying a maximum penalty of a \$5,000 fine and imprisonment for five years. N.D. CENT. CODE §§ 12.1-15-02(1) (2008), 12.1-32-01.

“Oral communication” means any words uttered by a person exhibiting an expectation that such communication is not subject to interception. N.D. CENT. CODE § 12.1-15-04(5).

Eavesdropping—“secretly loitering about a building” with the intent to overhear information—is a misdemeanor. N.D. CENT. CODE § 12.1-15-02(2). To publish overheard information with intent to annoy or injure others is a misdemeanor, punishable by up to one year’s imprisonment and a fine of up to \$2,000. N.D. CENT. CODE § 12.1-32-01.

## Ohio

It is not a crime to intercept a wire, oral, or electronic communication if the person recording is a party to the conversation, if one party has consented to taping, or if the conversation is not taped for the purpose of committing a criminal or tortious offense. OHIO REV. CODE ANN. § 2933.52. Under the statute, consent is not required to tape 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,” OHIO REV. CODE ANN. § 2933.51(b). The Ohio Supreme Court has held that prisoners do not have a reasonable expectation in their communications, for purposes of the wiretapping law. *State v. Robb*, 723 N.E.2d 1019 (Ohio 2000).

Cordless telephone conversations purposely picked up by a neighbor’s baby monitor were considered “oral communications,” accompanied by a reasonable expectation of privacy. *Ohio v. Bidimost*, 644 N.E.2d 318 (Ohio 1994).

Illegal interceptions are felonies and also carry potential civil liability for the greater of actual damages, \$200 per day of violation or \$10,000, along with punitive damages, attorney fees, and litigation expenses. There is a two-year statute of limitations to bring a civil action. OHIO REV. CODE ANN. § 2933.65.

Ohio also has anti-voyeurism law that prohibits surreptitiously invading a person’s privacy for sexual purposes. OHIO REV. CODE ANN. § 2907.08.

## Oklahoma

It is a felony to willfully intercept, endeavor to intercept, or disclose the contents of any wire, oral, or electronic communication. OKLA. STAT. TIT. 13 § 176.3. It is not a crime for a person to intercept a wire, oral, or electronic communication when the person is a party to the conversation or when one party to the conversation has given prior consent, so long as the person does not intercept the communication for criminal purposes. OKLA. STAT. TIT. § 176.4.

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. § 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. § 176.3.

It is also a misdemeanor to secretly loiter with the intent of eavesdropping and to repeat or publish anything overheard. OKLA. STAT. TIT. 21 § 1202.

## Oregon

It is a “Class A” misdemeanor for a third party to intercept, attempt to intercept, or get any other person to intercept any wire or oral communication without the consent of any parties to the conversation. OR. REV. STAT. § 165.543.

People who violate the statute are subject to fines, not to exceed \$6,250, and prison time, not to exceed one year. OR. REV. STAT. §§ 165.543, 161.615.

Unless one is a party to the conversation or has received consent from one of the parties, it is illegal to obtain any part of a telecommunication or a radio communication. OR. REV. STAT. § 165.540(1)(a). It is illegal to tamper with telephone wires unless one is a party to the conversation. OR. REV. STAT. § 165.540(1)(b). One cannot use a device to record a conversation unless all parties of the conversation are informed. OR. REV. STAT. § 165.540(1)(c). It is also illegal for a party to obtain, divulge, or use a conversation knowing it was obtained illegally by someone else. OR. REV. STAT. § 165.540(1)(d),(e).

To record a conversation with an un concealed recording device, all parties to the conversation must either know or reasonably expect that the conversation is being taped. OR. REV. STAT. § 165.540(6)(c).

The state’s highest court has held that taping of a telephone conversation with one party’s consent was not illegal under the statutes. *State v. Lissy*, 747 P.2d 345 (Or. 1987).

Defendant’s utterance of words into a telephone during a phone call to a third person, in the presence of an informant who was wearing a body wire, was a “telecommunication,” which by statute could not be obtained by a non-participant in the conversation without consent from at least one participant. *Oregon v. Fleetwood*, 16 P.3d 503 (Or. 2000).

No Oregon statute prevents eavesdropping. *Oregon v. Cartwright*, 418 P.2d 822 (Or. 1966).

A court of appeals ruled in 1989 that the restrictions of these statutes placed no burden on the First Amendment rights of journalists. *State v. Knoble*, 777 P.2d 985 (Or. Ct. App. 1989).

## Pennsylvania

It is a felony of the third degree to intentionally intercept, endeavor to intercept, or get any other person to intercept any wire, electronic, or oral communication without the consent of all the parties. 18 PA. CONS. STAT. § 5703(1).

The statute is set to expire in December 2008, but could be amended and remain on the books. Under the current statutory language, consent of all parties is required to tape a conversation. 18 PA. CONS. STAT. § 5704. Consent is not required of any parties if the parties do not have a reasonable expectation of privacy for their non-electronic communication. *See* definition of “oral communication,” 18 PA. CONS. STAT. § 5702.

Anyone whose communication has been unlawfully intercepted can recover actual damages in the amount of \$100 per day of violation or \$1,000, whichever is greater, and also can recover punitive damages litigation costs, and attorney fees. 18 PA. CONS.

STAT. § 5725.

A person commits a misdemeanor if he views, photographs or films another person in a state of full or partial nudity without consent, under circumstances where the nude person has an expectation of privacy. 18 PA. CONS. STAT. § 7507.1.

## Rhode Island

Any person who intercepts, attempts to intercept, or gets any other person to intercept any wire, electronic, or oral communication or discloses the communication can be imprisoned for no more than five years, under Rhode Island law. R.I. GEN LAWS § 11-35-21.

Under the statute, consent is not required for the taping of a non-electronic in person communication uttered by a person who does not have a reasonable expectation of privacy in that communication. *See* definition of “oral communication,” R.I. GEN LAWS § 12-5.1-1.

The statute provides for civil liability of actual damages of \$100 per day for each day of violation or \$1,000, whichever is higher, punitive damages, and reasonable attorney fees and other litigation expenses. R.I. GEN LAWS § 12-5.1-13.

The state’s highest court has expressly recognized that the law allows the recording of conversations with the consent of one party only. *Pulawski v. Blais*, 506 A.2d 76 (R.I. 1986). The Supreme Court of Rhode Island has also stated that Rhode Island’s wiretapping laws should be interpreted more strictly than federal wiretapping statutes “in the interest of giving the full measure of protection to an individual’s privacy.” *State v. O’Brien*, 774 A.2d 89 (R.I. 2001).

## South Carolina

One party can consent to the recording of a wire, electronic or oral communication. S.C. CODE ANN. §§ 17-30-20, 17-30-30. It is a felony for a third party to do so. 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,” S.C. CODE ANN. § 17-30-15.

Anyone whose communication has been unlawfully intercepted can recover actual damages in the amount of \$500 per day of violation or \$25,000, whichever is greater, and also may recover punitive damages, litigation costs, and attorney fees. S.C. CODE ANN. § 17-30-135.

Another South Carolina statute makes it a misdemeanor to eavesdrop or be a “Peeping Tom” on the premises of another. S.C. CODE ANN. § 16-17-470. The term “Peeping Tom” includes using video or audio equipment to invade the privacy of others. However, the statute does not apply to bona fide newsgathering activities. S.C. CODE ANN. § 16-17-470(E)(5).

An intermediate appellate court held that the “Peeping Tom” statute was not applicable to newspaper reporters who attempted to overhear city council proceedings during a closed executive session because the reporters were on public property—not the premises of another—and did nothing “to enable them to overhear what was going on in the executive session other than to wait in the place provided as a waiting room for reporters and other members of the public.” Neither the overhearing nor the publication of anything overheard violated the South Carolina statute. *Herald Publishing Co. v. Barnwell*, 351 S.E.2d 878 (S.C. App. 1986).

## South Dakota

One can record an oral or wire communication without obtaining consent of all the parties if he is present to the communication. Additionally, a third party can record an oral or wire communication if one party consents. It is a felony otherwise. S.D. CODIFIED LAWS § 23A-35A-20. This crime is punishable by five years in prison and the possibility of a \$10,000 fine. S.D. CODIFIED LAWS § 22-6-1.

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,” S.D. CODIFIED LAWS § 23A-35A-1.

Generally, the consent of one participant in any communication to the recording removes it from the type of interception prohibited under the South Dakota wiretapping statute. *South Dakota v. Braddock*,

452 N.W.2d 785 (S.D. 1990); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp.2d 1147 (D.S.D. 2001).

Using a hidden camera in a “private place” without consent is a misdemeanor. S.D. CODIFIED LAWS § 22-21-1. A “private place” is a place where one may reasonably expect to be safe from intrusion or surveillance, but not a place to which the public has access. S.D. CODIFIED LAWS § 22-1-2. Using a hidden camera in a hidden place is punishable by one-year imprisonment in county jail, a \$2,000 fine, or both. S.D. CODIFIED LAWS § 22-6-2.

### Tennessee

A person who is a party to a wire, oral, or electronic communication, or who has obtained the consent of at least one party, can lawfully record a communication and divulge the contents of the recorded conversation unless he has a criminal or tortious purpose. TENN. CODE ANN. § 39-13-601. Violations are punishable as felonies with jail sentences of between two and 12 years and fines not to exceed \$5,000. TENN. CODE ANN. §§ 39-13-602, 40-35-111.

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,” TENN. CODE ANN. § 40-6-303.

Anyone whose communications have been unlawfully intercepted can file a civil suit to recover the greater of actual damages or liquidated damages of \$100 per day of violation or \$10,000, whichever is greater. A plaintiff can also claim punitive damages, attorney fees, and litigation costs. The statute of limitations for such a lawsuit is two years. TENN. CODE ANN. § 39-13-603.

Recording or disseminating a communication carried out through a cellular or cordless phone, or disseminating the contents with knowledge of their illegal origin, without the consent of at least one party, can be punished as a felony with a potential prison sentence of between one and six years and a fine not to exceed \$3,000. TENN. CODE ANN. §§ 39-13-604, 40-35-111.

It is a misdemeanor to photograph, film, or observe a person without consent where there is a reasonable expectation of privacy; when the photographing, filming or viewing “would offend or embarrass an ordinary person,” and when the filming is done for sexual purposes. TENN. CODE ANN. §§ 39-13-605, 39-13-607. Dissemination of a photograph or videotape taken in violation of these provisions is a felony. TENN. CODE ANN. §39-13-605(2).

### Texas

So long as a wire, oral, or electronic communication—including the radio portion of any cordless telephone call—is not recorded for a criminal or tortious purpose, anyone who is a party to the communication, or who has the consent of a party, can lawfully record the communication and disclose its contents. TEXAS PENAL CODE § 16.02.

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,” TEXAS CODE CRIM. PRO. ART. 18.20.

A person whose wire, oral, or electronic communication is intercepted or disclosed has a civil cause of action against the interceptor or discloser. TEXAS CIV. PRAC. & REM. CODE § 123.002. Such a person is entitled to recover \$10,000 for each occurrence, actual damages in excess of \$10,000, as well as punitive damages and attorney fees and costs. TEXAS CIV. PRAC. & REM. CODE § 123.004.

In addition, unlawful recording of a conversation or disclosure of its contents with reason to know of the illegal interception is a felony punishable by two to 20 years in prison and a fine not to exceed \$10,000. TEXAS PENAL CODE § 12.33.

The U.S. Court of Appeals in New Orleans (5th Cir.) held in 2000 that a television station and reporter who obtained illegally recorded tapes of telephone conversations, but who had not participated in the illegal recording, could nonetheless be held civilly liable under the federal and Texas wiretapping statutes. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000). The case was appealed to the U.S. Supreme Court, along with two other cases raising similar issues. The Supreme Court refused to hear the Texas case but decided in one of the other

cases, *Bartnicki v. Vopper*, 532 U.S. 514 (2001), that media defendants could not be held liable for publishing information of public concern that was obtained unlawfully by a source where the media were blameless in the illegal interception. Following the *Bartnicki* decision, the parties in the *Peavy* case settled out of court.

### Utah

An individual legally can record or disclose the contents of any wire, oral or electronic communication to which he is a party, or when at least one participant has consented to the recording, unless the person has a criminal or tortious purpose in making the recording. UTAH CODE ANN. § 77-23A-4.

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,” UTAH CODE ANN. § 77-23A-3.

Unlawful interception of communication, including disclosure of the contents of a communication with reason to know of the illegal origin, is a felony—except that when the communication consists of the radio portion of a cellular telephone call, it is a misdemeanor. Civil liability for unlawful interception can include the greater of actual damages, mandatory damages ranging from \$50 to \$1,000, depending on whether it is a first or subsequent offense, \$100 per day of violation, or \$10,000. Equitable or declarative relief is also available under the statute. Civil actions are governed by a two-year statute of limitations. UTAH CODE ANN. § 77-23A-11.

Installing a hidden camera or audio recorder to tape a person in a “private place” without consent is a misdemeanor. UTAH CODE ANN. § 76-9-402. A “private place” is a place where one may reasonably expect to be safe from intrusion or surveillance. UTAH CODE ANN. §76-9-401.

### Vermont

There are no specific statutes in Vermont addressing interception of communications, but the state’s highest court has held that surreptitious electronic monitoring of communications in a person’s home is an unlawful invasion of privacy. *Vermont v. Geraw*, 795 A.2d 1219 (Vt. 2002). The court decided that the overhearing of a conversation in a parking lot is not unlawful because the conversation was “subject to the eyes and ears of passersby.” *Vermont v. Brooks*, 601 A.2d (Vt. 1991).

### Virginia

An individual can record or disclose wire, oral, or electronic communications to which he is a party, or if one party to the communication consents. Otherwise, it is a felony. VA. CODE ANN. § 19.2-62.

A lawyer’s recording of a telephone conversation with the consent of one, but not all, parties to the conversation was found to be legal, though unethical, under Virginia law. *U.S. v. Smallwood*, 365 F.Supp.2d 689 (2005).

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 violating the law include imprisonment for one to five years or, at the discretion of a jury or judge, confinement in jail for up to 12 months and a fine of not more than \$2,500, either or both. VA. LEGIS. 579. A civil cause of action is authorized by statute for \$100 per day of violation or \$1,000, whichever is greater. VA. CODE ANN. § 19.2-69. Punitive damages, attorney fees, and litigation costs can be recovered under the statute as well. VA. CODE ANN. § 19.2-69.

### Washington

All parties generally must consent to the interception or recording of any private communication, whether conducted by telephone, telegraph, radio or face-to-face, to comply with state law. WASH. REV. CODE § 9.73.030. The all-party consent requirement can be satisfied if “one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner,

that such communication or conversation is about to be recorded or transmitted.” In addition, if the conversation is to be recorded, the requisite announcement must be recorded as well. WASH. REV. CODE § 9.73.030.

A party is determined to have consented to recording if he is aware that the recording is taking place. *Washington v. Modica*, 149 P.3d 446 (Wash. Ct. App. 2006).

Consent to recording of real-time conversation using online discussion software is implicit because participants know the conversations will be recorded on the other party’s computer. *Washington v. Townsend*, 20 P.3d 1027 (Wash. Ct. App. 2001).

Moreover, an employee of a news organization engaged in news-gathering is deemed to have the requisite consent to record and divulge the contents of conversations “if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers.” WASH. REV. CODE § 0.73.030(4). Anyone speaking to an employee of a news organization who has been deemed to have given consent cannot withdraw that consent after the communication has been made. WASH. REV. CODE § 0.73.030(4).

Statutory liability exists only for nonconsensual recording or intercepting, not divulging, of private conversations. *Kearney v. Kearney*, 974 P.2d 872 (Wash. Ct. App. 1999). The statutory terms “record” and “intercept” do not encompass the meaning of divulge.

Whether a communication is considered “private” under the statute depends on the factual circumstances. *Washington v. Townsend*, 57 P.2d 255 (Wash. 2002). The state Supreme Court has identified three factors bearing on the reasonable expectations and intent of the parties: (1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the non-consenting party and his or her relationship to the consenting party. *Lewis v. State Dept. of Licensing*, 139 P.3d 1078 (Wash. 2006).

### West Virginia

Recording a wire, oral, or electronic communication, or disclosing its contents, is not a violation of West Virginia law when the person recording is a party to the communication or has obtained consent from one of the parties, so long as the recording is not accompanied by a criminal or tortious intent. W. VA. CODE § 62-1D-3.

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,” W. VA. CODE § 62-1D-2. In *West Virginia Dept. of Health and Human Resources v. Wright*, the state Supreme Court held that a woman whose children’s screams could be heard by neighbors nevertheless had a reasonable expectation of privacy in her home, for purposes of the wiretapping law. 453 S.E.2d 646 (1994).

Recording any such communication, or disclosing its contents with knowledge of the illegal interception, is a felony punishable by imprisonment for not more than five years and a fine of not more than \$10,000. W. VA. CODE § 62-1D-12. An individual whose communications have been unlawfully intercepted can recover civil damages in the amount of actual damages, but not less than \$100 per day of violation, along with punitive damages, attorney fees, and litigation costs. W. VA. CODE § 62-1D-12.

### Wisconsin

If the person who records the wire, electronic, or oral communication is a party to the conversation or has obtained prior consent from one party, he may lawfully record and divulge the contents of the communication, unless he does so for the purpose of committing a criminal or tortious act. WIS. STAT. § 968.31.

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,” WIS. STAT. § 968.27.

Wisconsin law expressly authorizes civil damages for violations and allows recovery of the greater of actual damages, \$100 for each day of violation or \$1,000, along with punitive damages, litigation costs, and attorney fees. WIS. STAT. § 968.31.

Recording a communication without consent is criminally punishable by up to six years in prison and/ or a \$10,000 fine. WIS. STAT. § 939.50.

### Wyoming

It is legal for a party to a wire, oral, or electronic communication to record that communication, and it is legal for anyone to record with the consent of one of the parties to a communication, unless the communication is intercepted to further a criminal or tortious purpose. WYO. STAT. § 7-3-702.

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,” WYO. STAT. § 7-3-701.

Recording communications, or disclosing their contents with reason to believe they were obtained illegally, is a felony punishable by a fine of not more than \$1,000 and imprisonment for not more than five years. WYO. STAT. § 7-3-710. Violations also create the potential for civil liability for actual damages or \$1,000 for each day of violation, whichever is more. Punitive damages, litigation costs, and attorney fees can be recovered, as well.

### Citations for cases in articles:

- Alvarado v. KOB-TV*, 493 F.3d 1210 (10th Cir. 2007)
- Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001)
- Baugh v. CBS*, 828 F. Supp. 745 (N.D. Cal. June 22, 1993)
- Boebner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007).
- 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)
- Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007)
- Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006)
- 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)