

A copy of: <http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations> which was accurate circa 2015 but you may want to check with your most recent state laws.

## **Recording Phone Calls and Conversations**

If you plan to record telephone calls or in-person conversations (including by recording video that captures sound), you should be aware that there are federal and state wiretapping laws that may limit your ability to do so. These laws not only expose you to the risk of criminal prosecution, but also potentially give an injured party a civil claim for money damages against you.

From a legal standpoint, the most important question in the recording context is whether you must get consent from one or all of the parties to a phone call or conversation before recording it. Federal law and many state wiretapping statutes permit recording if one party (including you) to the phone call or conversation consents. Other states require that all parties to the communication consent.

Unfortunately, it is not always easy to tell which law applies to a communication, especially a phone call. For example, if you and the person you are recording are in different states, then it is difficult to say in advance whether federal or state law applies, and if state law applies which of the two (or more) relevant state laws will control the situation. Therefore, if you record a phone call with participants in more than one state, it is best to play it safe and get the consent of all parties. However, when you and the person you are recording are both located in the same state, then you can rely with greater certainty on the law of that state. In some states, this will mean that you can record with the consent of one party to the communication. In others, you will still need to get everyone's consent. For details on the wiretapping laws in the fifteen most populous U.S. states and the District of Columbia, see the State Law: Recording section. In any event, it never hurts to play it safe and get the consent of all parties to a phone call or conversation that you intend to record.

### **Who must give permission to record a telephone or in-person conversation?**

Federal law permits recording telephone calls and in-person conversations with the consent of at least one of the parties. See 18 U.S.C. 2511(2)(d). This is called a “one-party consent” law. Under a one-party consent law, you can record a phone call or conversation so long as you are a party to the conversation. Furthermore, if you are not a party to the conversation, a “one-party consent” law will allow you to record the conversation or phone call so long as your source consents and has full knowledge that the communication will be recorded.

In addition to federal law, thirty-eight states and the District of Columbia have adopted “one-party consent” laws and permit individuals to record phone calls and conversations to which they are a party or when one party to the communication consents. See the State Law: Recording section of this legal guide for information on state wiretapping laws.

### **When must you get permission from everyone involved before recording?**

Eleven states require the consent of every party to a phone call or conversation in order to make the recording lawful. These “two-party consent” laws have been adopted in California, Connecticut, Florida,

Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania and Washington. (Notes: (1) Illinois' two-party consent statute was held unconstitutional in 2014; (2) Hawai'i is in general a one-party state, but requires two-party consent if the recording device is installed in a private place; (3) Massachusetts bans "secret" recordings rather than requiring explicit consent from all parties.). Although they are referred to as "two-party consent" laws, consent must be obtained from every party to a phone call or conversation if it involves more than two people. In some of these states, it might be enough if all parties to the call or conversation know that you are recording and proceed with the communication anyway, even if they do not voice explicit consent. See the State Law: Recording section of this legal guide for information on specific states' wiretapping laws.

## Can you record a phone call or conversation when you do not have consent from one of the parties?

Regardless of whether state or federal law governs the situation, it is almost always illegal to record a phone call or private conversation to which you are not a party, do not have consent from at least one party, and could not naturally overhear. In addition, federal and many state laws do not permit you to surreptitiously place a bug or recording device on a person or telephone, in a home, office or restaurant to secretly record a conversation between two people who have not consented.

Federal law and most state statutes also make disclosing the contents of an illegally intercepted telephone call illegal. See the section on Risks Associated with Publication in this guide for more information.

## What if you are recording the activities of the police or other government officials in public?

Special considerations apply when recording police officers or other public officials. You may have a constitutional right to openly record the activities of police and other officials in public, so long as you do not interfere with those activities or violate generally applicable laws. For more information, see the section on Recording Police Officers and Public Officials.

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