

Is Recording a Conversation Legal?

THE LAWS EVERYONE SHOULD KNOW

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Technology makes it easy – sometimes *too* easy – to record conversations. Between free voice recording apps or phones that record conversations with the touch of a button, recording conversations has never been easier. In fact, several of my recent cases involved clients that recorded conversations with individuals that later became their adversaries in a subsequent litigation. Those recordings were required to be produced to



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the adversaries to the extent they were responsive to the adversary's discovery requests and/or relevant to the litigation. If you intend to record a conversation, however, you should consider whether doing so is legal. This is important because eleven states prohibit recording a conversation unless all parties to the conversation consent and violators can face civil damages and/or criminal penalties. This article will explain the differences between "one" and "two

party consent" states and various states' laws regarding recording conversations.

ONE PARTY CONSENT VS. TWO PARTY CONSENT IN GENERAL

In the context of recording conversations, the states in our country are divided as either "one-party consent" states or "two-party consent" states. A "one-party consent" state makes it a crime to record or eavesdrop on an in-person or telephone conversation unless one party to the conversation consents. A "two-party consent" state makes it a crime to record or eavesdrop on a conversation, including a private in-person communication or telephone call, without the consent of all parties to the conversation. Most states, like New Jersey, New York and Texas are "one party consent" states. Eleven states, including California, Massachusetts, Florida and Pennsylvania are "two-party consent" states. Certain states also have state-specific nuances in their laws that are important to understand before recording conversations. This article discusses the relevant laws of New Jersey, New York, Florida and Pennsylvania in more detail.

NEW JERSEY AND NEW YORK

New Jersey and New York are "one-party consent" jurisdictions. In particular, New Jersey and New York law make it a crime to record an in-person or telephone conversation unless at least one party to the conversation consents. Thus, in these jurisdictions, you may record a conversation or phone call if you are a party to the conversation or you get permission from one party to the conversation in advance. Violating these laws could subject you to criminal prosecution and civil claims and damages for violating the law relating to recording conversations.



FLORIDA AND PENNSYLVANIA

Florida and Pennsylvania are "two-party consent" states and, therefore, it is a crime in these states to record a "wire, oral or electronic communication," unless all parties to the communication consent. There is an exception in Florida and Pennsylvania for in-person communications when the parties do not have a reasonable expectation of privacy in the conversation, such as when they are in a public place. Therefore, these conversations may be able to be recorded without violating these states' laws.

CHOICE OF LAW

Because each state has different laws on this issue, the next logical question is how to determine which law applies to your case. Unfortunately, it is not always clear which law will apply to a communication, especially if the communication is over the phone. For example, if you are recording a conversation with someone in a different state, it is difficult to say in advance which state's law applies. If all participants to a conversation are in the same state, however, then it is more likely that the law of that state will govern.

CONCLUSION

Many times, people record conversations in situations in which they are in a disagreement with another person. The relevant laws across the country, however, are not uniform. Therefore, it is important that you understand the laws of your state before using the freely available technology to record conversations. Otherwise, you may subject yourself to criminal prosecution and a civil suit by an injured party. Indeed, no one wants to have a discovery issue in a litigation that leads to an admission of a possible criminal act. If you have any questions about the laws in the states in which you live or work, you should speak to your trusted counsel. ■

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