

**HIDDEN
CAMERAS****HIDDEN
MICROPHONES****At the Crossroads
of Journalism,
Ethics and the Law****← CONTENTS**

Statutes and Court Cases: Introduction

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The body of law that governs eavesdropping, recording, and the use of hidden cameras is complex. In addition to federal law, nearly every state has its own statute, each with case law that interprets the statute in slightly different ways. Recent advances in technology, such as the proliferation of cellular and cordless telephones, have raised new questions about what is permissible. The controversy over Linda Tripp's secret recordings of phone conversations with White House intern Monica Lewinsky is just the latest in a series of high-profile incidents regarding these issues. These incidents point to the complexities involved in this area:

- In 1992, reporters from the ABC news program "PrimeTime Live" obtained jobs at Food Lion stores and secretly taped what they characterized as unsanitary food-handling practices. The use of hidden cameras in private places is specifically prohibited by a dozen states, but North Carolina, where the Food Lion case arose, is not one of them. In addition, secret audio recording is legal in North Carolina with the consent of one party (in this case, the reporters themselves). Thus, Food Lion's lawsuit, which resulted in a \$5.5 million verdict last year against ABC, was based on the deception of the reporters who applied for jobs at Food Lion. (The damage award was later reduced to \$315,000.)
- A Florida couple pleaded guilty to interception, and one Congressman sued another over the 1996 use of a radio scanner to intercept a cellular telephone

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call in which House speaker Newt Gingrich discussed strategy with Republican leaders on handling his ethics problems. Ohio Republican Rep. John Boehner, whose cellular telephone was apparently the source of the interception, sued Democratic Rep.

- Jim McDermott of Washington in March 1998 for leaking transcripts of the tape to the news media. Federal law prohibits intentional interception of calls from cellular telephones without consent and also prohibits the disclosure of the contents of any such interception, if the person knew the recording was illegal. The federal trial court dismissed Rep. Boehner's suit, saying that McDermott had successfully exploited loopholes in the law that made his actions legal.
- As of this writing, Maryland's state prosecutor has begun a grand jury probe into whether Pentagon employee Linda Tripp's secret tape recordings of Monica Lewinsky violated state law. Maryland law requires the consent of all parties in order to legally record a telephone conversation, and Tripp recorded the conversations from her home in Maryland without Lewinsky's knowledge or consent. But the statute is rarely enforced, and a 1995 opinion by the Maryland Court of Special Appeals indicates that Tripp may not be criminally liable if she did not know it was illegal to record the conversations.

Why are cases such as these important to the media? Federal law and most state statutes make it illegal to use or disclose the contents of a communication if you know or have reason to know that it was illegally intercepted or recorded. A broadcast station therefore may be criminally liable for broadcasting an illegally intercepted conversation.

Broadcasters need to know the rules about intercepting, recording and disclosing

communications in order to avoid criminal and civil liability. This project was designed to provide broadcast journalists with answers to common questions about intercepting, taping and using other people's conversations.

What is covered

This project summarizes federal law and the state statutes that govern eavesdropping, wiretapping, use of hidden cameras, trespassing to record or eavesdrop and other activities having to do with secretive or undercover information gathering. Only the laws--and the cases that interpret those laws--that are applicable to the news media are included. Not included are statutory provisions having to do with interception by law enforcement officers, administrative personnel or telephone operators, or recordings made solely for the purpose of mechanical or service quality checks.

This project also summarizes the case law interpreting the applicable statutes in the 50 states, the District of Columbia and Puerto Rico. The cases interpreting the federal statute are decided by an extensive system of federal district courts and appeals courts and are too numerous and varying to be included here. Suits are often brought under both the state and federal interception statutes, however, so it is a good idea to be familiar with the case law governing both. Your attorney can advise you on the case law in your federal jurisdiction.

Keep in mind that nonstatutory, or common, law in each state may allow a plaintiff to sue for actions taken by the media in the course of newsgathering. For example, a state may allow plaintiffs to sue for invasion of privacy even though the state does not have a specific law prohibiting it or even describing it. Unique or important common law rules that have been used against broadcasters are described in this project (such as in the "PrimeTime Live" case in North Carolina), but generally the common law, because it is fashioned by the courts on a

case-by-case basis, is beyond the scope of this project.

Which law applies?

Federal and state laws on eavesdropping and wiretapping "coexist," which means that they both may apply to a given situation. The federal statute prohibits the interception of wire communications, which are defined as communications made through a common carrier involved in the transmission of interstate or foreign communications. Congress has broad powers to regulate interstate commerce, so federal law will apply to virtually any telephone or cellular communication, whether the phone call is interstate or not.

In the case of oral (face-to-face) communications, the "interstate commerce" aspect is missing and the federal law's reach is less clear. Some courts have ruled that in order to constitutionally enforce the federal law that prohibits eavesdropping on an oral communication, there must be a "federal nexus" in the facts of the case. This federal connection may be found when the offense occurs on federal property, for example, or when a federal agency, such as the FBI, is involved in the surveillance.

Generally, if one is acting lawfully under a state's statute, one will be acting lawfully under the federal law. The federal statute authorizes the states to enact similar legislation that is more restrictive regarding interception and recording but not that is more permissive than the federal law. So a state's law may require the consent of all parties to record, for example, whereas the federal law allows recording with the consent of just one party. In such states, the stricter state law sets the standard.

The federal law will control, however, when the state law is not protective enough. When the federal statute was amended in 1986 and 1994 to give greater protection to cellular and cordless telephone communications, many states did not amend their own statutes to

include the protections. In these cases, federal law will generally "pre-empt" the state law, meaning that the stricter federal law applies. That is because Congress intended the federal statute to set a nationwide minimum standard for protection against the infringement of citizens' privacy.

Interstate telephone calls

What law applies if a telephone call is placed from one state to another? The answer, unfortunately, is "it depends." Federal law may apply, along with the law of either state. When a civil lawsuit crosses state boundaries, the court will usually use complicated choice-of-law rules to decide which state's law to apply. When interstate interception or recording is involved, or when you are not sure whether federal or state law applies, the best course is to be aware of both sets of applicable laws and make sure your actions are legal under both.

Hidden cameras vs. recording

If a hidden camera also records sound, the eavesdropping or recording statutes in most states will apply to the sound portion of the recording. Without a separate law that address video images, however, the video portion may not be unlawful. In New Jersey, for example, an appellate court ruled that the state's eavesdropping statute did not prohibit silent video recording or the video portion of a hidden camera recording that included sound. No law specifically prohibited hidden cameras in New Jersey. Where states have enacted specific laws against hidden cameras, they are summarized in this handbook along with the laws against eavesdropping and recording.

Note: This project is meant to provide general guidelines regarding the law. It is not intended to provide specific legal advice. Seek the advice of counsel before taking action with regard to any of the matters discussed in this material.

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