

Secretly Recording Private Conversations. Is It Legal?

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How many times have you been talking to someone you trust, or even someone you don't know that well, and casually said: "Well, just between you and me" or "Off the record?"

You may think those phrases give you some protection that your statement won't be repeated at all or at least won't be attributed to you. But how would you feel if it turns out that what you said was secretly recorded despite your little nod to secrecy? Well, it happens all the time. Maybe you've even done it yourself.

With the proliferation of smartphones, cameras, apps, and other recording devices, it often seems like we are more surprised when someone or something isn't recorded.

We see and hear about recordings, public and private, almost daily. You've seen it on TV. Sometimes it's cell phone footage of police arrests, and sometimes it's just something funny or silly that someone else has witnessed. You've heard others' private phone calls. You know about undercover agents wearing "wires." And, yes, there are even secretly recorded sex tapes. We live in a world of surveillance.



So in today's digital age, is there really an expectation of privacy? There certainly seems to be a never-ending struggle between our First Amendment right to keep the government from stopping us and the right to our own privacy.

Recordings are made for many reasons. Not all are secretive, unexpected, or nefarious. Many are for legitimate business reasons, for instance. We've all heard a recording on the other end of the line that says, "This call may be recorded for quality control purposes." Many employees also often record work calls or meetings so they can go back and listen or take notes.

But, what about when someone is secretly recorded? Is it legal?

Well, it depends. Where you do the recording, what you record, and who you record will impact which laws apply. There is a minefield of related federal and state wiretapping laws. And, take caution, secret recordings can lead to criminal and civil liability at both the state and federal levels.

There are many secrecy considerations for video and audio recordings, including:

1. Are you recording a phone call you are on or is it a call you are not a party to?
2. Is the recording done in a public place?
3. Is the recording of someone in their own home?
4. Is the recording impeding the duties of a police officer?

Texas wiretapping law is known as a “one-party consent” law. Under the Texas penal code, it is a crime to intercept or record any “wire, oral, or electronic communication” unless one party to the conversation consents. Interestingly enough, this includes you if you are a party to the conversation and the one doing the recording. If you are not, then one of the people being recorded must give permission in advance. One major warning: If you are recording a conversation involving people in more than one state, those other states’ laws may require consent from all parties.

The law is more relaxed when it comes to oral communications when the speakers do not have an “expectation that such communication is not subject to interception under circumstances justifying such expectation.” In other words, you may be able to record in-person conversations without consent if the communications take place in a public place like the mall, a restaurant or out on the street.

Other settings such as court hearings or public meetings have different rules as well. For example, Texas law permits sound and video recordings of court proceedings, but requires the consent of the judge, parties and witnesses. Judges also can place additional limitations. At public meetings, the Government Code generally permits the use of sound and video recording devices, but the governing body holding the meeting can impose reasonable rules to maintain order at the meeting.

Checklist before you record someone else:

- Check the law of your state before you decide to record.
- If you are recording someone in another state, check the law of that state, too.
- Get consent from all necessary parties.
- Make sure the consent is part of the recording.
- When in doubt, ask for consent to record.

Privacy is important to everyone. But, as long as we live in this constantly evolving world of technology, audio and video recordings will only continue to grow in popularity. Let’s just hope that individual privacy rights are not eroded to the point of no return. After all, you never know who might be listening

The information in this column is not intended as legal advice, but to provide a general understanding of the law. Readers with legal issues, including those whose questions are addressed here, should consult attorneys for advice on their particular circumstances.

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