SECRET TAPING OF CONVERSATIONS
IN EMPLOYMENT DISPUTES

by Douglas E. Dexter
Chair, Employment Law Group
Farella Braun + Martel LLP
San Francisco

Darnley D. Stewart
Bernstein Litowitz Berger & Grossmann LLP
New York, New York

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I. Value of secret taping

A. Secret taping is a continually recurring event because of the wide accessibility of small, cheap, effective, simply operated recording devices, and the powerful and irreplaceable nature of the evidence such taping can produce.

1. Secret taping is usually a self-help measure undertaken by lay people without an understanding of the legal issues involved. This may be especially true of secret taping by employees in employment disputes.

2. Often the focus of employment litigation is discriminatory conduct forbidden by law and/or company policy. Thus a supervisor’s sexual harassment of an employee may be expressed in circumstances where the offending party imagines he or she is safe from disclosure, or at least from corroboration. As a result records of unguarded expressions, documenting either discriminatory conduct or attitudes probative of such conduct, can be of exceptional value to the employee’s case.

B. “Employees are demanding more rights in the workplace; a number are suing to enforce their rights. Employee taping seems to be on the rise and can be significant in employment discrimination and sexual harassment cases where the crucial evidence is conversations between an employee and a manager. Surreptitious taping may be on the rise because lessening job security may also lessen employee trust, because new technology makes secret taping easier.” Carol M. Bast, “What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping,” 47 DePaul Law Rev. 837, 849 (1998) (footnotes omitted).

C. “Few pieces of evidence are more persuasive than a tape recording of a party to a lawsuit in which the party says something that hurts his or her case. A clear and audible tape can, in a few moments, produce a visceral impact on the jury than no expert witness, exhibit package or parade of mid-level managers can hope to match.” Edward T. Ellis, “Employee Use of Surreptitious Tape Recording to Gather Evidence for an Employment Lawsuit,” from Current Developments in Employment Law, SB07 ALI-ABA 217 (1996).
II. Overview of principal legal issues

A. The legal situation with regard to secret recordings depends largely on the following factors.

1. Was the person making the recording a party to the conversations?
   a) In some jurisdictions, secret recording is permitted when one party to the conversation consents; others require consent by all parties.

2. Did the non-consenting party have a reasonable expectation of privacy the conversation?
   a) Some jurisdictions have an objective test for a reasonable expectation of privacy, others a more subjective one.
   b) Some jurisdictions focus on the non-consenting party’s expectations concerning the subject-matter of the conversation, others on the expectation that it would not be recorded.

III. State and federal wiretap statutes

A. The federal wiretapping law, 18 U.S.C. § 2510 et seq., is an uncomfortably complicated statute. At its core, though, it forbids anyone to intercept “wire, oral or electronic communications,” except under certain circumstances. 18 U.S.C. § 2511(a).

1. “Wire communication” means “any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception …” 18 U.S.C. § 2510(1).

2. “Oral communication” means “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.” 18 U.S.C. § 2510(2).

3. “Electronic communication” includes “any transfer of … sounds … transmitted in whole or in part by a wire [or] radio … but does not include … any wire or oral communication …” 18 U.S.C. § 2510(12).

B. Originally the federal statute did not apply to cell phones or even cordless phones, which are oral communications by radio – it was thought that since they were radio transmissions they were sent out on the air for all to hear, and no one could have a reasonable expectation of privacy in their content.

1. But “[t]he 1986 Act changed the scienter requirement from ‘willful’ to ‘intentional, in recognition of the fact that someone using a radio scanner to receive public communications might inadvertently tune in to


a) “Congress found that cordless telephones play an integral part of our society, that people expect that such telephone calls will be private and, accordingly, amended § 2511 to protect cordless telephone calls.” Spetalieri v. Kavanaugh, 36 F.Supp.2d 92, 113 (N.D.N.Y. 1998).

b) “Cordless telephones transmit radio signals between the handset and the base unit. These radio signals can be intercepted by scanners or other radio receivers.... Where at least one of the participants is using a cordless telephone, the person intercepting the signal can hear all of the participants to the conversation.” Id., 36 F.Supp.2d at 100 n.1. “Telephone conversations in which all participants are using traditional, hard-wired telephones cannot be intercepted by scanners or other radio receivers.” Id. n.2.

3. A distinction between wire and radio-based phone conversations sometimes survives in state law.

a) California, for example, forbids eavesdropping on or recording confidential communications “whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio…” Penal Code § 632(a) (emphasis added).

b) In California radios (including cellular and cordless telephones) are covered by a separate statute, Penal Code § 632.7, which “prohibits intentionally intercepting or recording
communications involving cellular telephones and cordless telephones. This prohibition applies to all communications, not just confidential communications.” *Flanagan v. Flanagan*, 27 Cal.4th 766, 771, 117 Cal.Rptr.2d 574, 577 (2000):

c) This makes for a practical problem in enforcement, as the coverage for cell phones is for all communications, not just confidential ones (that is, ones which the participants expect will not be intercepted or recorded), but there is often no practical way to tell whether a party to a conversation is on a cell phone or not.

C. In addition to the federal law, every state except Vermont has a statute on secret taping. They are conveniently abstracted at a website maintained by the Reporters Committee for Freedom of the Press, <www.rcfp.org/taping>. Sometimes they are modeled on the federal law and sometimes not. The most important issue is usually whether consent is required by all parties to a conversation or only one. See discussion in Part IV below.

1. “The federal statute is only preemptive in those situations where there is no state law on the subject of conversation interception, or the state law is less strict.” *Roberts v. Americable International, Inc.*, 883 F.Supp. 499, 503 n.6 (E.D.Cal. 1995).

D. The federal law is a one-party consent law with an exception for recordings made with a tortious or criminal purpose.

1. “*It shall not be unlawful* under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.” 18 U.S.C. § 2511(2)(d) (emphasis added).

   a) See, e.g., *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993), where the court affirmed summary judgment for a defendant because, when he surreptitiously taped the plaintiff’s phone conversations, his purpose was neither criminal nor tortious and therefore his actions fell within the exception in § 2511(2)(d). For another case emphasizing the tortious intent test, see *Vazquez-Santos v. El Mundo Broadcasting Corp.*, 283 F.Supp.2d 561, 566-569 (D.P.R. 2003).

2. The exception for criminal or tortious purpose is a special feature of the federal law, and establishing it is the burden of the party seeking the
exception.

a) See, United States v. Cassiere, 4 F.3d 1006, 1021 (1st Cir. 1993); accord, e.g., Commodity Futures Trading Commission v. Rosenberg, 85 F.Supp.2d 424, 435 (D.N.J. 2000).

b) “[T]he ‘tortious purpose’ referenced by the federal permission/exception must be a tortious purpose other than the mere intent to surreptitiously record an oral conversation.” Roberts v. Americable International, Inc., 883 F.Supp. 499, 503 (E.D.Cal. 1995) (emphasis by the court).

E. The “course of business” exception.

1. The “device” identified in the definition of “intercept” in the federal law does not include “any telephone or telegraph instrument, equipment or facility, or any component thereof … furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business ….” 18 U.S.C. § 2510(5)(a).

a) Many state laws have similar provisions, varying in sometimes important details. Whether recording calls is lawful under this provision or not can be a highly technical question. See, for example, Schmerling v. Injured Workers’ Ins. Fund, 368 Md. 434, 795 A.2d 715 (2002), deciding that recording equipment installed on a company’s PBX did not qualify under the telephone equipment exception to the state’s wiretap law, which was modeled on the federal law.

b) “Courts have employed various methods of defining or discerning that which is encompassed by the term ‘telephone equipment.’ Some courts have focused on the entity that designed or sold the add-on equipment, and some have focused on the degree of integration. * * * We agree with courts that have taken a more functional approach to this determination. That is, to be deemed telephone equipment, the equipment must further the use of or functionally enhance the telecommunications system.” Schmerling, 368 Md. at 453, 795 A.2d at 725-726.

c) On the other hand, in Arias v. Mutual Central Alarm Service, Inc., 202 F.3d 553, 557 (2d Cir. 2000), the identity of similar recording equipment was accepted as telephone equipment without dispute. Counsel should take expert advice before
advising an employer whether its recording equipment complies with local law.

2. Listening in on an extension.

   a) The same provision exempts listening in on an extension phone, which is not unlawful where the extension is part of the regularly installed phone system.

   b) State laws do not always contain this exemption. See, e.g., *Apter v. Ross*, 781 N.E.2d 744, 756 (Ind.App. 2003): “[T]he Federal Wiretap Act’s extension telephone exemption is not incorporated into the Indiana Wiretap Act. In addition, the Indiana Wiretap Act on its own does not contain language that could be construed as an extension telephone exemption.” On this basis, the Indiana court excluded from evidence a tape made from a telephone extension, *because and so lawful under federal law.*

   c) “In a number of instances courts have based their determination that eavesdropping on an extension telephone did not constitute an invasion of the conversants’ constitutional privacy rights on the ground that a person has no expectation that his privacy will be protected from persons listening in on extension telephones.” Todd R. Smyth, Annotation, “Eavesdropping on Extension Telephone as Invasion of Privacy,” 49 A.L.R.4th 430 § 2[a] (1986 + supp.).

      (1) There may also have been a wish not to intrude legislatively into what is in many cases a question of domestic manners. For more on this topic see Julieann Karkosak, “Tapping into Family Affairs: Examining the Federal Wiretapping Statute as it Applies to the Home,” 68 Univ. of Cincinnati Law Rev. 995 (2000).

   d) This exception for phone extensions has been held to apply in private homes as well as business situations. See, e.g., *Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994) (conversations between son and mother recorded by non-custodial father on answering machine connected to extension phone).

      (1) The question is by no means free from doubt. See, e.g., *Pollock v. Pollock*, 154 F.3d 601, 607 (6th Cir. 1998) (rejecting application to home phones); *State v. Morrison*, 203 Ariz. 489, 490-491, 56 P.3d 63, 64-65 (2002) (exempting recordings on more restrictive vicarious consent theory applicable only to calls of minor children†). For a case rejecting the “domestic telephone
extension exception” as unauthorized by state law, see State v. Christensen, 119 Wash.App. 74, 80 and n.12, 79 P.3d 12, 15 and n.12 (2003).

F. Wiretapping and eavesdropping distinguished.

1. **Wiretapping** means intercepting communications by an unauthorized connection to the transmission line, while **eavesdropping** means intercepting communications by the use of equipment which is not connected to any transmission line. See, e.g., People v. Ratekin, 212 Cal.App.3d 1165, 1168-1169, 261 Cal.Rptr. 143, 145 (1989) (parsing California statutes).

   a) Putting a microphone in the flowers or in a desk drawer is eavesdropping. So is wearing a concealed microphone, or turning a telephone into a listening device.

2. The federal law covers eavesdropping as intercepting an oral communication.

   a) So do most state laws. See, e.g., Pennsylvania’s Wire-tapping and Electronic Surveillance Control Act, 18 Pa.C.S.A. § 5701 et seq.

IV. Was the person doing the recording a party to the conversations?

A. Federal law and the law of 38 states (and the District of Columbia) make it unlawful to tape a conversation unless at least one party to the conversation consents. This permits a party to tape her own conversations without informing the other participants, because she herself has consented.

B. The remaining 12 states require consent by all parties to a conversation.


   a) The federal statute is 18 U.S.C. § 2511. As noted, it requires only one party to a conversation to consent to its being recorded.

   b) Of course if all-party consent is obtained the taping is no longer secret.

2. The Reporters Committee for Freedom of the Press website at <www.rcfp.org/taping>, already mentioned, includes a state-by-state guide to the law of all the states, with statutory citations, and an accompanying chart.

3. “Traveling on the Interstate from Maine to Florida, one would start in Maine (one-party consent), and travel through New Hampshire and Massachusetts (two-party consent), Connecticut (one-party consent for
oral conversation and two-party consent for telephone conversation), Rhode Island, New York, and New Jersey (one-party consent), Delaware and Maryland (two-party consent), and Virginia, North Carolina, and South Carolina (one-party consent), to Florida (two-party consent). Thus, from Maine to Florida there are at least six major changes in eavesdropping law, which shows how confusing and complicated it is to keep eavesdropping requirements straight.” Carol M. Bast, “What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping,” 47 DePaul Law Rev. 837, 917 (1998).

C. Party consent is for practical purposes the most important element determining whether secret taping is lawful. Many other consequences flow from this determination, for example the propriety of attorney participation and availability of work-product protection (see Part VII below), whether information so obtained may be disclosed (see Part VIII.B.2), and sometimes whether the recording is admissible in evidence (see Part VI).

D. Even in states where one party’s consent is enough, that party must participate in the conversation. Recording a telephone conversation without being part of it means no participant has consented and is usually (but not always) unlawful. See Part V below.

E. Consent can be implied. Thus a person who hears the familiar mantra “for quality control purposes, all calls may be monitored or recorded,” and does not hang up, is considered to have consented to the recording.

V. Did the non-consenting party have a reasonable expectation of privacy in the conversation?

A. This distinction mostly applies in those states requiring consent by all parties, but in those states it can be critical.

1. For example, in California the law applies to “confidential communications, defined to mean “carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto.” Penal Code § 632(c).

2. This has been paraphrased as “requir[ing] nothing more than the existence of a reasonable expectation by one of the parties that no one is ‘listening in’ or overhearing the conversation.” Flanagan v. Flanagan, 27 Cal.4th 766, 772-773, 117 Cal.Rptr.2d 574, 578 (2002) (citation omitted).

B. Where the expectation of the parties is pivotal, the question arises whether that expectation is a subjective or objective one.

1. “One line of authority holds that a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the
conversation is not being overheard or recorded. Under the other line of authority, a conversation is confidential only if the party has an objectively reasonable expectation that the content will not later be divulged to third parties.” *Flanagan*, 27 Cal.4th at 768, 117 Cal.Rptr.2d at 575 (citations omitted). The California Supreme Court adopted the first formula. *Ibid.*

C. Another question is just what that expectation expects.

1. “[I]n varying situations … analysis can yield differing results as to whether there is either an expectation of privacy or a expectation of non-interception. Generally, where there is an expectation of privacy there is also an expectation of non-interception. Such is not always the case, however. For instance, if one is being examined by his or her physician and knows from past experience that the doctor often carries a small tape recorder in a pocket to record patient interviews, one’s expectation of non-interception is nearly non-existent, but the expectation of privacy is still extremely high. On the other hand, if one is speaking with the town gossip at a public swimming pool under circumstances insuring that the gossip is not wearing a body wire, one’s expectation of non-interception is very high, but the expectation of privacy is very low. Thus, an expectation of privacy does not always carry a concomitant expectation of non-interception, and vice versa. For purposes of violation of the [state] Wiretap Act, while we consider the expectation of privacy as a factor, it cannot be the determining factor in our analysis.” *Commonwealth v. McIvor*, 448 Pa.Super. 98, 104-105, 670 A.2d 697, 700 (1996) (en banc).

a) For a case example finding a doctor had a reasonable expectation of privacy in his clinic’s examination room, see *Lieberman v. KCOP Television, Inc.*, 110 Cal.App.4th 156, 167-170, 1 Cal.Rptr.3d 536, 543-545 (2003).

b) a) Since the *McIvor* case the Pennsylvania Supreme Court has held for an objective rather than a subjective standard, saying that “one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy.” *Agnew v. Dupler*, 553 Pa. 33, 40, 717 A.2d 519, 523 (1998). But the analysis is still valuable. A dissent preferred the separate inquiries defined in *McIvor*. See 553 Pa. at 43, 717 A.2d at 525.

2. “Under the normal circumstances of everyday life, there are few instances when one would expect his/her spoken words to be intercepted. Unless a person is forewarned or simultaneously creates his/her own recording, a person is generally safe in assuming that words leaving his/her lips travel only as far as can be heard by the naked ear

D. Determinations on these questions tend to be case-specific.

1. “Thus, we have Myers sitting on his couch, drinking beer with his childhood friend who is positioned two feet away on the door step of Myers’ rural home. Are these circumstances under which Myers could have reasonably expected that his spoken words were not subject to interception? Of course they are. Any other result would ignore the realities of our daily lives.” Myers, 450 Pa.Super. at 488-489, 676 A.2d at 665.

2. On the other hand, in Barr v. Arco Chemical Corp., 529 F.Supp. 1277 (S.D.Tex. 1982), Barr secretly recorded a meeting with his employer to discuss his employment (and at which he was fired). He later played the tape to others, and Arco sued. The court held it was “inconceivable that the defendant could prove any facts relating to the circumstances of the communication between defendant Arco and plaintiff which would justify an expectation of privacy on Arco’s part. * * * The communication by Arco’s agents terminated plaintiff’s employment. No employer could reasonably expect when it dismisses an employee that the employee will not report the fact to family and friends and, in attempts to explain it, rely on the communications by the employer. Here … a recording would serve to ensure the accuracy of the report of employer’s communication.” 529 F.Supp. at 1282.

3. “It is clear beyond any doubt that because all the police officer plaintiffs knew that the beeped phone lines were recorded, they had no subjective expectation that conversations on those lines would be private, and there certainly is no evidence on this score. Moreover, even were the evidence not so conclusive on the subjective prong … , ample evidence supports the conclusion that the significance of the beeps was common knowledge among the Woodbridge police officers and thus, that any subjective expectation of privacy could not be reasonable. Summary judgment will, therefore, be granted in favor of defendants … insofar as those claims rely on conversations occurring on beeped phone lines.” PBA Local No. 38 v. Woodbridge Police Dept., 832 F.Supp. 808, 818 (D.N.J. 1993).

4. On the other hand, in Dorris v. Absher, 179 F.3d 420, 425 (6th Cir. 1999), the court said: “A person whose communication is illegally intercepted must have an expectation of privacy that is both subjectively and objectively reasonable. In the present case, the frank nature of the employees’ conversations makes it obvious that they had a subjective expectation of privacy. After all, no reasonable employee would
harshly criticize the boss if the employee thought that the boss was listening. The essential question, therefore, is whether this expectation of privacy was objectively reasonable. We believe that the facts of this case make clear that it was. The conversations took place only when no one else was present, and stopped when the telephone was being used or anyone turned onto the gravel road that was the only entrance to the office. The record thus indicates that the employees took great care to ensure that their conversations remained private. Moreover, the office was a small, relatively isolated space. * * * We therefore conclude that the employees had a reasonable expectation of privacy in their workplace.” (Citation omitted).

E. A catalogue of all the subtle variations in this concept among all the jurisdictions would be tedious indeed. “A great deal of ink has been expended in this state’s law books … attempting to define what constitutes … a justified expectation.” Myers, 450 Pa.Super. at 485, 676 A.2d at 663. It is sufficient for present purposes to note that, where consent is insufficient to sanitize a recording, resolution may require an inquiry into the legitimate expectations of the person complaining of the recording.

F. As noted, the definitions section of the federal wiretap and eavesdropping law, 18 U.S.C. § 2510(2), defines an “oral communication” as one “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”


a) Katz was a Fourth Amendment case, in which a defendant was held to have had a reasonable expectation of privacy in a closed phone booth, and the fact that the bug the authorities placed on the booth “did not happen to penetrate the wall of the booth” had “no constitutional significance.” Katz, 389 U.S. at 353, 88 S.Ct. at 512.

b) In Matter of John Doe, the FBI sent agents posing as traders into the trading area of the Chicago Mercantile Exchange to record what was said there. The court affirmed a finding that a trader did not have a reasonable expectation that his conversations in the foreign currency pit of the Exchange were private (and so the recordings did not violate the Act).
VI. May secretly recorded tapes be used as evidence?

A. Secret taping ordinarily has little value in legal proceedings unless the tape is admissible in evidence later.

B. At common law, in civil cases, there was no prohibition against using improperly or even unlawfully obtained evidence.

1. See, e.g., Collins v. Collins, 904 S.W.2d 792, 799 (Tex.App. 1995): “The courts do not concern themselves with the method by which a party to a civil suit secures evidence pertinent and material to the issues involved ... and hence evidence which is otherwise admissible may not be excluded because it has been illegally and wrongfully obtained.”

2. “[W]rongfully or illegally obtained evidence is to be suppressed only where the evidence was obtained in violation of an individual’s constitutional rights or in violation of a statute that expressly requires suppression as a sanction.” State ex rel. Peckham v. Krenke, 229 Wis.2d 778, 787, 601 N.W.2d 287, 292 (1999).

   a) See also, e.g., I.K. v. M.K., 194 Misc.2d 608, 610, 753 N.Y.S.2d 828, 829 (N.Y. Sup. 2003) (“Whatever prohibitions exist against the use of such evidence, are purely statutory in nature.”).

C. The rule in criminal cases has a constitutional basis in the Fourth Amendment and does not apply in private employment disputes.

1. See, e.g., United States v. Janis, 428 U.S. 433, 455 n.31, 96 S.Ct. 3021, 3033 n.31 (1976): “It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act.”

2. “[I]llegally obtained evidence, which would be subject to suppression if secured by a government official, need not be suppressed when obtained by a private citizen acting on his or her own behalf.” Tartaglia v. Paine Webber, Inc., 350 N.J.Super. 142, 148, 794 A.2d 816, 820 (2002).

D. But many statutes do provide that recordings made in violation of the law may not be received as evidence.

1. Recordings made in violation of the federal law may not be used as evidence in federal or state proceedings. See 18 U.S.C. § 2515, which provides that “Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this
chapter.”

2. The Collins case from Texas, mentioned above, is an example of the federal statute providing the ground for exclusion in a state action. Texas Rules of Evidence 402 provides, in part, that “[a]ll relevant evidence is admissible, except as otherwise provided ... by statute.” Although no Texas law specifically forbade introducing the wiretap evidence, the federal statute did, and that was sufficient. 904 S.W.2d at 798.

   a) The Texas court also noted that the state wiretap statute did provide for an injunction prohibiting the “divulgence or use of information obtained by an interception.” This was “sufficient to rebut the presumption of admissibility under rule 402.” Id. at 799.

3. If a recording is lawful under the extension telephone exception, it may be used in evidence. See, e.g., Burnett v. State, 789 S.W.2d 376 (Tex.App. 1990).

4. Despite its reach to all state cases, the federal statute does not in practice preempt state admissibility rules, because the federal law is relatively lenient.

   a) For example, the federal law is a one-party consent law, and has an exception for tapes not made with a “tortious purpose” not generally found in state laws.

   b) The federal statute only applies where party making the oral communication had a justified expectation of privacy in the communication. See 18 U.S.C. § 2510(2). Stricter rules are not preempted – states can still exclude taped tapes not made in violation of the federal Act.

   c) Similarly the federal law has a telephone extension exemption – some states do not. Thus in Apter v. Ross, 781 N.E.2d 744, 756 (Ind.App. 2003), a tape made from a telephone extension, lawfully under federal law, was still excluded in Indiana.

   d) Further analysis would be repetitive. The federal law only preempts weaker state laws, and as to wire communications and oral eavesdropping state laws are usually as strong or stronger. But in Vermont, which has no specific law on the subject, the federal law serves as a default.

E. California Penal Code § 632(d) is typical of state statutes. It provides: “Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential
communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.”

1. In *Schonauer v. DCR Entertainment, Inc.*, 79 Wash.App. 808, 818-819, 905 P.2d 392, 399-400 (1995), a private action charging sex discrimination in employment, the court reached a similar conclusion under RCW 9.73.050. This statute provided in pertinent part that “[a]ny information obtained in violation of [the state secret recording statute] RCW 9.73.030 ... shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state...” The court upheld the exclusion of a taped phone call supporting the employee’s position, because all parties to the conversation had not consented to it as the recording statute required.


   a) *Mingo* has been criticized for applying the Illinois law in federal court. See *Glinski v. City of Chicago*, 2002 WL 113884, *4 (N.D.Ill.).

3. In Florida, an all-party consent state with an exclusionary statute (F.S.A. § 934.06), the state supreme court nevertheless allowed admission of a victim’s tape recording of his own murder, on the rather contrived ground that while the murderer had no legitimate expectation of privacy – while he may have had a subjective expectation of privacy it was not one society was prepared to recognize. See *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985).

F. Without a statute or constitutional principle to guide them, courts decide on admitting unlawfully obtained evidence in civil cases by a policy-based calculus.

1. “The exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. With respect to the exclusionary rule and its use beyond criminal proceedings ... it is proper to balance the likely social benefits of excluding unlawfully seized evidence against the likely costs. Where the costs exceed the benefits, the exclusionary rule need not be applied.” *Fedanzo v. City of Chicago*, 333 Ill.App.3d 339, 352, 775 N.E.2d 26, 37 (2002) (citations and quotation apparatus omitted).

   a) See also, e.g., *Ahart v. Colorado Dept. of Corrections*, 964 P.2d 517, 520 (Colo. 1998) (same, noting absence of “bright line” and
need for case-by-case determination).

2. Where the benefits include redress for unlawful employment discrimination, a court unfettered by an exclusionary statute is likely to be lenient in admitting secret tapes.

G. However, even where the recording itself is inadmissible because unlawfully made, a person who was a party to the conversation may testify about it unless barred for other evidentiary reasons.

1. “Preventing Frio’s testimony as to conversations of which he enjoys an untainted recall extends a measure of privacy no party to any conversation reasonably can anticipate or expect. Such a holding would not only exclude evidence obtained as a result of the illegality, the tape recordings, but would also preclude evidence independently obtained as a result of the conversation, the statements themselves. Nothing in the Privacy Act can be read so as to conclude a party whose confidential communications have been recorded gains greater protection than if they had not been so intercepted. The statute neither can, nor purports to, remove the risk inherent in speaking, namely, the risk the party to whom the remarks are addressed might later repeat the conversation.”


2. Frio also held that an unlawfully made recording may be used to refresh a witness’ recollection. In the passage just before the one quoted above, the California court stated: “Because past recollection recorded involves a witness unable to testify fully and accurately absent use of a written memorandum, such testimony falls within the proscription of [the Privacy Act]. Neither the tainted recordings nor the notes derived from them can be read in evidence. However, use of these same materials to refresh recollection does not involve reading or offering them in evidence. As such, [the Act] is not violated by using said materials in that fashion. The witness’ recollection of the communications derives in the first instance not from the illegal tape recordings or the notes prepared from them, but from the ‘independent source’ of the witness’ lawful first hand participation in the conversations. The testimony thus remains the witness’ independent recollection of the event.”

   Frio, 203 Cal.App.3d at 1492-1493, 250 Cal.Rptr. at 825.

H. Conflicts situations.

1. The case sometimes arises where a recording would be excluded under state law but is offered in federal court. The results are sometimes “Even recorded conversations that violate state law are
admissible in federal proceedings, at least in regard to federal claims, if
the recordings comport with the federal requirement that one party
consent.” *Fenje v. Feld,* 301 F.Supp.2d 781, 816 (N.D.Ill. 2003) (citing
authorities).

2. But the results can sometimes be inconsistent.

   a) In *Zhou v. Pittsburg State University,* 252 F.Supp.2d 1194, 1203-
   1204 (D.Kan. 2003), the court held that the federal rule, allowing
   use of a conversation where one party consented to the recording,
   prevailed over a contrary state rule where jurisdiction rested on a
   federal question.

      (1) However, in *Barr v. Arco Chemical Corp.,* 529 F. Supp.
      1277 (S.D. Tex. 1982), also a federal question case, a
      court in a one-party consent state (Texas) applied a more
      restrictive statute from an all-party consent state
      (Pennsylvania), holding there was no reasonable
      expectation of privacy under the more restrictive statute).

   b) In *Feldman v. Allstate Ins. Co.,* 322 F.3d 660, 666-667 (9th Cir.
   2003), the Ninth Circuit held that in a diversity action the state
   exclusionary rule was substantive and would therefore prevail
   under *Erie.*

      151, 152-153 (E.D.Pa. 1988), also a diversity case, the
      court preferred the federal statute.

   499, 503 (E.D.Cal. 1995), an employment sex discrimination
   action arising on both federal and state grounds, where the court
   preferred the federal single-party consent law to the more
   restrictive California law.

   d) In a federal criminal trial, a court admitted a recording made in
   violation of a state all-party consent law. “Even if Pennsylvania
   law was violated, that fact would not render the recordings
   inadmissible in a federal criminal trial. As long as federal law is
   satisfied and federal standards of reasonableness are met, the
   evidence is admissible despite the fact that the interception, per
   se, was a violation of state law.” *United States v. Felton,* 592
   753 F.2d 276 (3d Cir. 1985)

3. Where federal law is not an issue, and the taping was unlawful where
done but not where offered, admission follows ordinary choice of law
principles under which admissibility is governed by the law of the
forum state. Thus in *I.K. v. M.K.*, 194 Misc.2d 608, 609-610, 753 N.Y.S.2d 828, 829 (N.Y. Sup. 2003), the court held recorded conversations admissible in New York (a one-party consent state) even though they were unlawfully recorded in Pennsylvania (an all-party consent state).

a) In the reverse situation, where the taping was lawful where done but would have been unlawful if made in the forum state, local policy considerations cloud the issue somewhat. But the rule that admissibility follows the law of the forum would probably still prevail.

4. Even if the illegality does not bar admission, there can be other problems.

a) For example, the taped evidence must still meet ordinary evidentiary tests of relevance, authentication, chain of custody, and the like. For an example in an employment-based secret taping case see *El Grande Steak House v. Ohio Civil Rights Commission*, 651 N.E.2d 440, 445 (Ohio App. 1994) (evidence received).

b) But if the evidence was unlawfully gathered, bringing it forth may involve civil or even criminal exposure for the party who made the tape. See Part VIII below.

I. Admissibility is not critical in all situations.

1. For example, in an internal investigation, a secretly made tape, although inadmissible, could still provide the “reasonable ground for believing” in employee misconduct sufficient to constitute “good cause” for termination.

a) There are evidentiary problems, but not insuperable ones.

(1) If an employer (or employer’s investigator) was a party to the conversation, she can testify to it directly.

(a) Naturally the same is true if the employee made the tape.

(2) An employee who demands that the tape be produced waives the protection of the exclusion statute.

(3) Even without those circumstances, the employer could still testify that she heard the tape (or was told about it) and regarded it as a reasonable basis for her conclusion about the employee’s conduct. What the investigator told the employer would not be offered for the truth of the
matter asserted, so as to be inadmissible hearsay. The jury question would instead be whether an employer hearing this story from an investigator was reasonable to rely on it.

b) However, it remains a difficult issue and variations in state law (for example, the waivability of the exclusion statute) could complicate matters.

VII. May an attorney cooperate in secret taping?

A. Formerly this was generally not permitted for attorneys.

1. The old rule, stated in ABA Formal Ethics Opinion 337 (1974), and followed by courts and bar authorities in many states, held that (with limited exceptions not relevant here) a lawyer could not ethically make (or direct to be made) recordings without the consent of all parties.

   a) At first, this prohibition was tied to the attorney’s duty to avoid the appearance of impropriety.

   b) Later it was justified on the basis that it was “conduct which involves dishonesty, fraud, deceit or misrepresentation.”

B. The new rule now generally does permit this for attorneys, but only where local law does not forbid it and it is not made unethical by other circumstances.

1. ABA Formal Ethics Opinion 01-422, issued in June 2001, withdrew the former opinion discussed above.

2. Reasons for the change.

   a) “[T]he belief that nonconsensual taping of conversations is inherently deceitful … is not universally accepted today.” Ibid.

      (1) “[E]ven though recording of a conversation without disclosure may to many people ‘offend a sense of honor and fair play,’ it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.” Ibid. (citation omitted).

      (2) This change in manners was noted in the context of telephone conversations – it is probably not yet true in the case of face-to-face conversations.

   b) In practice the rule had come to be attended by a variety of exceptions – permitting for example recordings to document criminal utterances such as threats or obscene calls, to document conversations with potential witnesses against later perjury, for
the lawyer’s self-protection, for criminal defense lawyers (to prevent prosecutors gaining an unfair advantage from the law enforcement exception), for “testers” in housing discrimination cases, and others. The ABA Committee thought a general prohibition with so many exceptions was unworkable.

c) Formal Opinion 337 was also thought inconsistent with the ABA’s later-developed Model Rules of Professional Conduct.

d) *Anderson v. Hale*, 202 F.R.D. 548 (N.D.Ill. 2001) rejected the view (which the ABA was shortly to adopt in Opinion 01-422) that technological developments have deprived people generally of an expectation of privacy in their telephone conversations.

(1) It cannot be expected even after Opinion 01-422 that all courts will accept that people cannot reasonably rely on the privacy of their telephone conversations. But with the change in the ABA’s position the balance may have tipped, bringing earlier authority into question. See *Mena v. Key Food Stores Co-operative, Inc.*, 195 Misc.2d 402, 758 N.Y.S.2d 246 (N.Y. Sup. 2003) (applying Opinion 01-422; dictum).

3. But where state law forbids the practice (as in all-party consent states) it is still unethical. The Committee cited:

a) Model Rule 8.4(b), which forbids a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” and

b) Model Rule 8.4(c), which forbids “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.”

c) Also Model Rule 4.4 forbids methods of gathering evidence which violate the rights of third persons. Where (as in California) state law gives an unconsenting party an affirmative right not to have her conversations secretly recorded, Model Rule 4.4 is implicated.

4. “That a lawyer may record a conversation with another person without that person’s knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded. To do so would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person.” ABA Formal Ethics Opinion 01-422.

5. “The Committee does not address in this opinion the application of the Model Rules to deceitful, but lawful conduct by lawyers, either directly
or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, discriminatory practices, and trademark infringement. We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical.” *Ibid.* (footnote omitted).

6. The ABA Committee was divided on the propriety of secret recording by a lawyer of her conversations with her own client, a topic beyond the scope of the present subject.

7. The ABA Opinion is of course only advisory, although state courts and bar authorities may choose to give it great weight.


   b) A change in the ABA Committee’s view does not necessarily mean that the old rule no longer applies in a given local jurisdiction.

C. Where it is improper for an attorney to tape secretly herself, she cannot escape responsibility by instructing the client to do the taping instead, or even by ratifying the client’s suggestion.

1. “Obviously, when an attorney actually requests or engineers a contact or action by another that would otherwise be prohibited by the disciplinary rules, he or she can be deemed to have ‘caused’ it and to have ‘circumvented’ the rule. An attorney cannot legitimately delegate to another what he himself is prohibited from doing, nor may he use another as his alter ego.” *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 82 (S.D.N.Y. 1993).

2. But if the client has improperly recorded tapes made without the attorney’s knowledge, as noted in Part VI above they may nevertheless be admissible. It is not unethical for an attorney to use such tapes, or advocate for their admission, even if it would have been unethical to have made them herself.

   a) But proceed with caution – such tapes may cause civil or even criminal exposure for whoever made them.

D. Exclusion as a sanction.

1. *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp.2d 1147, 1158-1160 (D.S.D. 2001), the court found taping lawful under
state law was nevertheless unethical under Opinion 337, and excluded the evidence as a sanction.

2. But this is discretionary. Compare *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F.Supp.2d 119, 126 (S.D.N.Y. 1999) (exclusion denied even though taping was unethical).

3. With the withdrawal of Opinion 337 the scope for exclusion for lawful but unethical taping should contract sharply.

E. No work-product protection for improperly recorded tapes.

1. To the extent tapes are recorded unlawfully or even unethically, there is authority for holding work-product protection to have been vitiating.
   a) *Anderson v. Hale*, 202 F.R.D. 548 (N.D.Ill. 2001), is a case in point. The court held that unethical conduct vitiating work-product protection because it was inimical to the purposes of the rule. Illinois law forbade taping conversations without consent by all parties, and the rules of the federal trial court mirrored the ABA Model Rules. The court denied protection to secretly taped conversations with friendly witnesses as unethical because it violated rules against “dishonesty, fraud, deceit or misrepresentation,” and against gathering evidence in a way that violated the rights of third persons.

   b) The reasoning of this case should not apply in a state where the recording was not unlawful, especially as work-product protection is a creature of federal common law and federal law allows single-party consent. Nevertheless courts have reached similar conclusions in one-party consent states. See, e.g., *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983) (“While this practice violates no law, the Code of Professional Conduct imposes a higher standard than mere legality”) (footnote omitted).

   (1) From one-party consent states, see also, e.g., *Otto v. Box U.S.A. Group, Inc.*, 177 F.R.D. 698 (N.D.Ga. 1997) (improper taping vitiating work-product protection); *Sea-Roy Corp. v. Sunbelt Equipment & Rentals, Inc.*, 172 F.R.D. 179 (M.D.N.C. 1997) (same); and cases cited there.

   (a) *Otto* is especially relevant to taping by employees because it extends the treatment of taping by lawyers to unrepresented parties who have not yet obtained counsel. It holds they are entitled to work-product immunity for their materials, despite
not being attorneys, but conditioned on the same standards of conduct as for attorneys.

c) Anderson v. Hale rejected the view (which the ABA was shortly to adopt in Opinion 01-422) that technological developments have deprived people generally of an expectation of privacy in their telephone conversations.

(1) It cannot be expected even after Opinion 01-422 that all courts will accept that people cannot reasonably rely on the privacy of their telephone conversations. But with the change in the ABA’s position the balance may have tipped, bringing earlier authority into question. See Mena v. Key Food Stores Co-operative, Inc., 195 Misc.2d 402, 758 N.Y.S.2d 246 (N.Y. Sup. 2003) (applying Opinion 01-422; dictum).

2. Sea-Roy suggests another basis for withholding work-product protection for secret tapes. Under Federal Rules of Civil Procedure 26(b)(3), “[p]arties have a right to their adopted and verbatim statements and other persons may request a copy of theirs. The right to request necessarily presumes awareness of the statement. Therefore, Rule 26(b)(3) implicitly requires disclosure of the existence of surreptitiously recorded statements at some time prior to trial. As a matter of policy and prudential construction, this Court determines that Rule 26(b)(3) requires a recording party to inform the person being recorded at the time of the recording in order to qualify the statement for work product protection.” Sea-Roy, 172 F.R.D. at 184-185 (citations and footnote omitted, emphasis added).
VIII. Remedies for unlawful taping

A. Criminal penalties.

1. Most states, and federal law, provide some form of criminal sanction for unlawful interception and surreptitious taping.
   
   
   b) California Penal Code § 632 is an example of a state criminal statute. All the state criminal statutes are abstracted in the helpful “state by state guide” section at <www.rcfp.org/taping>.

B. Civil penalties for tort

1. Unlawful eavesdropping, wiretapping or recording a private conversation, or disclosure of its contents, is a violation of privacy and usually actionable.

   a) Often a state’s privacy law provides both criminal penalties and a private cause of action. For example:

      (1) Washington’s privacy law is codified in Chapter 9.73 of the Revised Code. RCW § 9.73.030 forbids various offenses against privacy including secret taping without all-party consent. Section 9.73.060 provides for a civil action and liability for damages, and § 9.73.080 provides a criminal penalty.

      (2) California’s Penal Code § 632 provides a criminal punishment and § 637.2 a civil action and liability for damages.

      (3) In Texas, Penal Code § 12.33 provides a criminal penalty and Civil Practice & Remedies Code § 123.002 provides the civil action.

      (4) Examples could be greatly multiplied. For a good treatment of the state statutes see the state-by-state list at <www.rcfp.org/taping>.

   b) A chart at the same website shows that every state except Vermont provides criminal penalties, but that 15 states have no specific statutory provision for civil actions.
(1) The states are Alabama, Alaska, Arizona, Arkansas, Colorado, Iowa, Kansas, Kentucky, Montana, New York, North Dakota, Oklahoma, Oregon, South Dakota and Vermont.

(2) But even without a specific statute, an action for invasion of privacy can be maintained under the common law. See, e.g., Rucinsky v. Hentchel, 266 Mont. 502, 505, 881 P.2d 616, 618 (1994).

(a) For a good local example, see Marich v. MGM/UA Telecommunications, Inc., 113 Cal.App.4th 415, 7 Cal.Rptr.3d 60 (2003) (privacy violation where TV crew taped phone conversation where police notifies parents they had found their son’s body).

(b) Intention matters here – in Marich the company had liability even though they did not intend to broadcast the recording. The court contrasted, 113 Cal.App.4th at 424, an example from an earlier case, which held “it is not the purpose of the statute to punish a person who intends to make a recording but only a person who intends to make a recording of a confidential communication. For example, a person might intend to record the calls of wild birds on a game reserve and at the same time accidentally pick up the confidential discussions of two poachers. To hold the birdwatcher punishable under the statute for such a fortuitous recording would be absurd.” People v. Superior Court of Los Angeles County, 70 Cal.2d 123, 133, 74 Cal.Rptr. 294, 301 (1969).

(3) And if the taping violates federal law, an action will lie under 18 U.S.C. § 2520.

c) For a useful although not exhaustive survey of state and federal cases on the subject see Russell G. Donaldson, Annotation: Construction and Application of State Statutes Authorizing Civil Cause of Action by Person Whose Wire or Oral Communication is Intercepted, Disclosed, or Used in Violation of Statutes,” 33 A.L.R.4th 506 (1984 + supp.).

Constitution prohibits unreasonable interception of telephone and telegraph communications; and the Florida Constitution prohibits unreasonable interception of private communications.” Carol M. Bast, “What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping,” 47 DePaul Law Rev. 837, 851 (1998). This article considers the state constitutional provisions in some depth. More may have been added in the past few years.

(1) For example, California’s constitutional provision is found in Article 1, § 1: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” This provision establishes a private right of action against non-governmental entities. See Hill v. National Collegiate Athletic Ass’n, 7 Cal.4th 1, 15, 26 Cal.Rptr.2d 834, 842 (1994).

(2) “A statute … is in derogation of a constitutional right, the right of privacy, must be strictly construed. * * * No violations … will be countenanced, nor will the failure of prosecutors to diligently follow [its] strict requirements … be lightly overlooked. We must remain steadfast in this determination because there can be no greater infringement upon an individual’s rights than by an indiscriminate and unchecked use of electronic devices. Where, in the wisdom of the legislature, such devices may be authorized, … that use will be strictly adhered to and jealously enforced; for the alternative, no privacy at all, is unthinkable.” Boettger v. Miklich, 534 Pa. 581, 586, 633 A.2d 1146, 1148 (Pa. Commonwealth Ct. 1993) (upholding civil liability for disclosure to tax authorities of content of unauthorized interception by police officer to tax authorities).

e) Sometimes a privacy action will succeed where an eavesdropping complaint would fail under a lenient state law. Cf. Becker v. Computer Sciences Corp., 541 F.Supp. 694, 702 (S.D.Tex. 1982) (“While Texas does not provide a remedy for the surreptitious recording of telephone conversations where only one party to the conversation consents, Texas does recognize a cause of action for invasion of the right to privacy.”).
2. State laws often independently forbid disclosure of protected conversations.

   a) See, for example, La. R.S. § 15:1307, which forbids any person to “broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation” of the Louisiana Electronic Surveillance Act. Like many other state laws, “Louisiana’s Electronic Surveillance Act was fashioned after its federal counterpart.” Keller v. Aymond, 722 So.2d 1224, 1227 (La.App. 1998).

      (1) The federal provision, 18 U.S.C. § 2511(1)(c), provides a penalty for anyone who “intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection,” and this is made privately actionable under § 2520.

   b) But these laws vary in their particulars. For example, in New Jersey the law against disclosing the contents of an intercepted communication does not apply where the content “has become common knowledge or public information.” N.J. Stat. § 2A:156A-3.

   c) The Reporters Committee website chart lists only ten states without anti-disclosure provisions. They are Arizona, Arkansas, Connecticut, Florida, Georgia, Oregon, South Carolina, South Dakota, Vermont and Washington.

   d) Disclosure is not a necessary element of tortious taping.

      (1) In Coulter v. Bank of America, 28 Cal.App.4th 923, 33 Cal.Rptr.2d 766, 771 (1994), an employee was held liable under Penal Code § 637.2 for 160 surreptitious recordings of conversations with supervisors and co-workers, even though he did not disclose their content. He was assessed $132,000 in damages.

      (2) For a holding that a plaintiff with no actual damages can still recover, see Lieberman v. KCOP Television, Inc., ---110 Cal.App.4th ---156, 166-167, 1 Cal.Rptr.3d 536, 542-543 (2003) (statutory damages available for each invasion of privacy without proof of actual damage).

   e) The litigation privilege or civil immunity statute should ordinarily protect a party for liability for presenting protected
material in evidence, or as discovery under subpoena.

(1) For example, in *Kearney v. Kearney*, 95 Wash.App. 405, 415, 974 P.2d 872, 877 (1999), the court said the state witness immunity doctrine protects a witness offering unlawfully obtained recordings from civil liability for dissemination.

(a) It also noted that the Washington recording statute forbade receiving this material into evidence, but not offering it. *Id.*, 95 Wash.App. at 414-415, 974 P.2d at 877.

(2) But disclosure in less formal circumstances, such as pre-litigation negotiation or an internal demand for relief, could be actionable.

f) Penalties for disclosure can be criminal as well as civil. For example, Kentucky makes divulging illegally obtained information a misdemeanor. See *Ky. R.S.* § 526.060 (1974). So do many other states.

g) There are constitutional questions attending prohibition of disclosure of truthful information of public concern. See *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753 (2001). This problem is beyond the scope of these materials.

3. Public employees who violate the wiretapping and eavesdropping laws can also be sued under the Civil Rights Act, 42 U.S.C. § 1983. For an example see *Dorris v. Absher*, 179 F.3d 420 (6th Cir. 1999).


C. Exclusion of evidence. See Part VI above.

D. Professional sanctions for attorneys. See Part VII above.

E. Termination of employment.

1. In *Bodoy v. North Arundel Hospital*, 945 F. Supp. 890, 899 (D. Md. 1996), aff’d, 112 F.3d 508 (4th Cir. 1997), Bodoy claimed both racial and retaliatory motives for his discharge. But the court found he had been discharged for surreptitiously taping with his supervisors (unlawful as Maryland is an all-party consent state), and that “his engagement in illegal taping” was a “legitimate, non-discriminatory reason for his discharge.”
2. It is an interesting question whether the result would have been the same in a on-party consent state, where the taping would not have been illegal but could have been unacceptable as a matter of company policy. In *Talanda v. KFC National Management Co.*, 1997 WL 160695, *6* (N.D.Ill.), the court noted that Talanda’s secret recording of conversations with his superiors, although then lawful under Illinois law, and even worse playing the tape for another concerned employee, “unnecessarily created a climate of intrigue and suspicion, undermining both his and [his superior’s] authority.” Moreover, “making the recording … reflect[ed] distrust … and disloyalty.” Although this was not the direct issue in *Talanda*, it is not hard to imagine similar considerations justifying a decision to terminate employment for surreptitious taping.

IX. Where the employer rather than an employee is recording

A. “Most employers are familiar with the principle that an employer who wishes to monitor or tape record employees’ business transactions (e.g., to monitor the quality of customer service transactions, or to deter excessive use of telephones for personal use) may do so upon obtaining a ‘consent to be monitored at any time’ from its employees. The consent may be made a condition of employment.” Edward T. Ellis, “Employee Use of Surreptitious Tape Recording to Gather Evidence for an Employment Lawsuit,” from Current Developments in Employment Law, SB07 ALI-ABA 217, 220 (1996).

1. The results of the 2001 American Management Association survey revealed that 43.3% of the respondents reported that they monitored employee telephone use, while 11.9% of the respondents reported that they recorded and reviewed employee telephone conversations. See 2001 AMERICAN MANAGEMENT ASSOCIATION SURVEY, Workplace Monitoring and Surveillance, Summary of Key Findings.

B. Actual knowledge constitutes consent even without notice. See, e.g., *Knight v. Department of Police*, 619 So. 2d 1116 (La.App. 1993), writ denied, 625 So. 2d 1058 (La. 1993), where recording and transcription of a telephone conversation in which a police captain made racially derogatory remarks did not violate the Louisiana one-party consent statute because both parties to the conversation knew that incoming calls to police headquarters were regularly monitored and recorded.

C. “A few states have enacted statutes dealing directly with employer use of electronic monitoring and surveillance. A number of other states recently have considered or presently are considering placing restrictions on the ability of employers to electronically monitor employee communications and activities or requiring employers to notify employees of their monitoring activities.” L. Camille Hebert, *EMPLOYEE PRIVACY LAW* § 8A:1 (2003). The states Hebert
mentions include Connecticut, Delaware, Illinois, Montana, South Dakota, Tennessee, Utah, West Virginia and Wisconsin.

1. Many of these statutes relate to e-mail, monitoring sensitive areas such as bathrooms and locker rooms, and other topics beyond the scope of these materials. Relevant provisions require such concessions as enhanced notice provisions, see 19 Del. Code § 705, and separate personal-only phone lines, see Illinois Stats. Ch.720 § 5/14-3(j)(ii).

2. A Connecticut statute, C.G.S. § 31-48b(d), provides that “No employer or his agent or representative and no employee or his agent or representative shall intentionally overhear or record a conversation or discussion pertaining to employment contract negotiations between the two parties, by means of any instrument, device or equipment, unless such party has the consent of all parties to such conversation or discussion.” But an unpublished case, Saloomey v. A Child’s Garden, Inc., 1996 WL 278252 (Conn.Super.) has restricted this section to collective bargaining.

D. The Federal Communications Commissions requires that telephone companies require of their subscribers that a “beep tone” be provided on telephone lines when recording is in progress. There is no need for this when notice has been given by other methods (for example the “quality control” announcement), but otherwise it should be done. In theory failure to do so can result in loss of telephone service. For more on this highly technical area see In the Matter of Use of Recording Devices in Connection with Telephone Service, 2 F.C.C.R. 502, 1987 WL 343819.

X. Videotape

A. Videotape: in a vidotape the audio track counts as a sound recording.

B. California’s statute does not apply to a hidden camera without sound capability, which did not record any communications, because the Legislature “inten[ded] to protect only sound-based or symbol-based communications.” People v. Drennan, 84 Cal.App.4th 1349, 1355, 101 Cal.Rptr.2d 584, 588 (2000).

1. The court distinguished a case where surreptitious silent video recording of sexual activity was held a privacy violation because “sexual relations is a form of communication.” Drennan, 84 Cal.App.4th at 1353-1353, 101 Cal.Rptr.2d at 587 (distinguishing People v. Gibbons, 215 Cal.App.3d 1204, 263 Cal.Rptr. 905 (1989).

2. Gibbons was poetic in its construction of the statute, saying that “[w]hile communication and conversation are similar in their meaning, conversation refers to a spoken exchange of thoughts, opinions, and feelings while communication refers more broadly to the exchange of
thoughts, messages or information by any means.” 215 Cal.App.3d at 1208, 263 Cal.Rptr. at 908. Drennan disagreed sternly “both with this manner of statutory construction and with the conclusion reached,” 84 Cal.App.4th at 1354, 101 Cal.Rptr.2d at 587, and held that “taking of pictures of two or more people carrying on a confidential conversation does not constitute the recording of a confidential communication under” Penal Code § 632. 84 Cal.App.4th at 1359, 101 Cal.Rptr.2d at 590.

Last revised April 2004
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