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## *Attorney Owens explores the sweeping protections under the Massachusetts Wiretapping Statute.*

Massachusetts has some of the strictest illegal eavesdropping laws in the country. It is one of just eleven states that prohibits individuals from recording conversations in which the other speaker is unaware that he or she is being recorded. Criminal penalties for violations are severe, with violations punishable by five years in state prison. Violators sued in civil court can be liable for attorney's fees and punitive damages.

Illegally recorded conversations are generally suppressed from evidence in criminal cases, although exceptions apply. In civil and family law cases, blanket suppression of illegal recordings is not always the rule, but the Massachusetts statute includes punishment for the knowing use or disclosure of an illegal recording, creating big risks for those seeking to play illegal recordings for a judge.

In this blog, I revisit a [decade-old law review article](#) to explore the law of illegal eavesdropping in Massachusetts.

## Wiretapping Laws: The Basics

Wiretapping laws dictate how people can record audio of other people. These laws aim to balance two competing interests. Under federal law, it is illegal to "intercept" the spoken conversation of individuals by electronic recording without a search warrant if one or both parties do not consent. In eleven states, including Massachusetts, the consent is required from both individuals being recorded. In 39 states, only one party to the conversation needs to consent to being recorded.

Said another way: in 39 states, an individual can secretly record his or her conversation with another individual without the other individual's consent, while in the remaining 11 states (including Massachusetts), it is illegal to secretly record one's conversation with another without the other person's consent. The legal terms, the 39 states that allow secret recordings by participants are called "one-party consent" states while the 11 states that prohibit secret recordings by participants are called "two-party consent" states.

Back in 2007, I published a law review article titled, [Hearing Thy Neighbor: the Doctrine of Attenuation and Illegal Eavesdropping by Private Citizens](#). In the article, I briefly reviewed the history of the federal wiretapping statute, which was one of a number of post-Watergate reforms designed to crack down on police misconduct and invasions of privacy. In other words, the nation's wiretapping laws largely arose out of concerns about police wiretapping and recording the telephone calls and private conversations of U.S. citizens without a search warrant.

Today, we live in an age when most citizens carry minicomputers in their pockets (i.e. smartphones) that are capable of recording audio and video with a level of precision that police in the 1970's could have only dreamed of. Warrantless eavesdropping by police clearly remains a concern, but with most Americans today equipped with the kind of surveillance gear that would make a Cold War spy blush, many concerns about eavesdropping, current concerns about privacy and consent often focus on surveillance conducted not by law enforcement, but by corporations (e.g. Siri, Amazon Echo, Google Home, etc.) and ordinary citizens holding smartphones.

## Massachusetts is a Two-Party Consent State

Massachusetts is a two-party consent state that requires the consent of any individual whose voice is being recorded. Recording another individual's words without the individual's knowledge or consent is a felony in Massachusetts. To Massachusetts Wiretapping Statute, [G. L. c. 272 s 99](#), makes it illegal to:

[S]ecretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication...

Notably absent from the statute are the words "notice" or "consent", however. The different meanings of words matter, of course. If an individual is free to record another person simply by providing "notice", then arguably it would be enough for the person conducting the recording to hold up their iPhone and explain, "I'm recording you." Conversely, if "consent" is required for recording, then arguably it would be illegal to record another individual unless he or she specifically agrees. (Consider for a moment the ubiquitous phone message, "This call may be recorded for quality assurance or training purposes." Such a

message certainly provides notice. Presumably, an individual who chooses to proceed with a recorded call is also offering implied consent.)

In the landmark Supreme Judicial Court case, [Commonwealth v. Morganti \(2009\)](#), the SJC noted the following:

Under Federal law, California law, and Massachusetts law, the oral interception of the defendant's statements during this telephone call was not illegal if he knew of, or consented to, the interception.

In [Morganti](#), the SJC held that when a criminal suspect has prior notice that his or her words are likely to be recorded, then the suspect's decision to continue with the conversation constitutes "implied consent" by the suspect to being recorded. (In [Morganti](#), a criminal suspect was told in general terms that his conversation in a police interview room would be recorded; the suspect then made statements that he alleged were illegally recorded.) The SJC held:

Because the defendant knew that his words in the interview room were subject to being recorded, the actual interception of his words was not unlawful.

A key feature of the Massachusetts cases interpreting G. L. c. 272 s 99 appears to focus on the statute's use of the word "secretly". In general, the cases refer to violations of the statute requiring "secret" or "surreptitious eavesdropping" – i.e. a recording performed without the *knowledge* of the speaker. For example, in [Commonwealth v. Hyde \(2007\)](#), the SJC suggested that a recording party need only inform the other speaker "his intention to tape record the encounter, or even [hold] the tape recorder in plain sight", such that the recording "would not have been secret, and so would not have violated G. L. c. 272, § 99". Nevertheless, there remain many fine nuances surrounding the concepts knowledge, notice, consent and implied consent in recording situations.

**(Editor's Note: This is an opportune moment to pause and remind the reader: this blog is not legal advice. It is merely informational. Any reader who relies on an informational blog while making an audio recording is making a major mistake. *Please talk to a lawyer.*)**

## Serious Penalties for Violating Massachusetts Wiretapping Statute

The civil and criminal penalties for violating the Massachusetts Wiretapping are serious. Criminal penalties for direct violations of the statute are as follows:

[A]ny person who ... willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be **fined not more than ten thousand dollars**, or imprisoned in the **state prison for not more than five years**, or imprisoned in a jail or house of correction for not more than two and one half years, or **both so fined and given one such imprisonment**.

The statute also penalizes anyone who edits or alters an otherwise legal recording for use in court in a distorted or dishonest manner:

[A]ny person who ... **willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications** by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to **present in any judicial proceeding** or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more **than ten thousand dollars** or imprisoned in the **state prison for not more than five years** or imprisoned in a jail or house of correction for not more than two years or **both so fined and given one such imprisonment**.

The penalties for simply *using or disclosing* the contents of an illegally intercepted recording – regardless of who made the original recording – are serious too:

[A]ny person who ... willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or willfully uses or attempts to **use the contents** of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a **misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years** or by a fine of not more than **five thousand dollars or both**.

Indeed, merely *using and possessing* a recording device in a manner that suggests attempted eavesdropping carries stiff penalties:

A person who **possesses any intercepting device under circumstances evincing an intent to commit an interception** not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a **misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.**

In addition to the criminal penalties, the statute includes stiff civil penalties:

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person—

1. actual damages but not less than liquidated damages computed at the rate of \$100 per day for each day of violation or \$1000, whichever is higher; 2. punitive damages; and 3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

Civil damages arising out of violations of the statute have been found to be [non-dischargeable in bankruptcy](#).

## The Complicated Intersection Between Wiretapping and Gathering Evidence of a Crime

Police may use wiretapping to secretly record suspects. However, police typically need a search warrant to do so, or else it will be a violation of the Fourth Amendment, which prohibits searches that are “unreasonable.” If

police gather evidence of a crime while violating the suspect's civil rights under the Fourth Amendment, the illegally gathered evidence is often "suppressed" or excluded at trial. Furthermore, if a civil rights violation is the first link in a chain of evidence that eventually results in a criminal charge, then all of the newfound evidence can be excluded under what is known as the "fruit of the poisonous tree doctrine." This doctrine provides that all evidence that is derived from a civil rights violation is tainted, including subsequent evidence that would be admissible (such as confession) if no violation had occurred.

But what if – as in this case of child abuse in Florida – it was a private citizen, rather than a police officer, who illegally recorded someone, gathered evidence of a crime, and gave it to the police? In Florida, the answer is simple because the state is one of the 39 that only requires one party's consent to make a recording: The evidence was not gathered illegally.

In Massachusetts, on the other hand, a similar recording would have violated the state's wiretapping law. However, the Supreme Judicial Court has let police use illegally-obtained evidence in certain ways so long as law enforcement played no part in the eavesdropping. In [Commonwealth v. Damiano \(2005\)](#), a private citizen made a recording of a phone call that appeared to violate the Massachusetts Wiretapping Statute. The SJC did not allow the illegal recording directly into evidence, but the Court also did not apply the "fruit of the poison tree" doctrine to a subsequent confession the police obtained from the suspect.

Had the illegal recording in [Damiano](#) been made by police, it is likely that *all* of the subsequent evidence, including the confession, would have been suppressed under the doctrine. Because the illegal recording was made by a private citizen without police involvement, however, the SJC ruled that the confession was sufficiently "attenuated" from the illegal conduct to prevent suppression.

It is important to place [Damiano](#) and similar decisions in context. The Massachusetts Wiretapping Statute provides "any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom". The [Damiano](#) decision did allow for the direct admission of illegal recording in the criminal case; it merely allowed the evidence developed by the police after the recording was made to be admitted.

## **Exceptions to the State and Federal Wiretapping Statutes**

There are numerous exceptions to both the state and federal wiretapping rules affecting both admissibility of recorded conversations and the legality of the recording itself. Under the federal rule, courts have ruled that parties listening in on “extension phone lines” – i.e. a second phone line in the home – [does not violate the federal state](#). Similar exceptions exist under the federal rule of parents recording the phone conversations of their children within their home under theories of [vicarious consent](#). The applicability of federal exceptions to violations of the state statute often involve complex legal analyses, however.

Under [G. L. c. 272 s 99](#), explicit exceptions exist for phone carriers who access electronic communications in the ordinary course of business, employees using interoffice communications systems, and law enforcement officers acting under a warrant. Law enforcement and investigators who use illegal recordings made by third parties and private citizens are also generally protected from the prohibition on “use” and “disclosure” of unauthorized recordings, so long as they did not participate in the recording directly or indirectly. Finally, individuals who have obtained knowledge of an illegal recording in a lawful manner may testify under oath about the recording.

In 2018, a [federal court ruled](#) that Massachusetts police officers have the “diminished privacy interests of government officials performing their duties in public”, such that a citizen’s right to record a police officer in public is protected by the first amendment. In a subsequent [2019 decision](#), the circuit court held that private citizens in Massachusetts can secretly record public officials, including police officers, as follows:

[S]ecret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions. Because Section 99 fails intermediate scrutiny when applied to such conduct, it is unconstitutional in those circumstances.

Despite the seemingly strong holding, questions remain about what constitutes a “government official” and “public space” under the decision.

## Using Illegal Recordings in Civil Cases

The use of illegal recordings in civil cases is especially fraught and complicated, where the statute prohibits individuals from “using” illegal recordings in any way:

[A]ny person who ... willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor ...

Whether an attempt to admit illegal recordings into evidence constitutes an illegal disclosure in its own right is a complicated question, but it is fair to say that many judges would be inclined to suppress the introduction of illegal recordings into evidence, particularly if the party seeking admission is the individual who made the illegal recording. The Massachusetts Wiretapping Statute may not strictly require the suppression of illegal recordings in every case, but most judges are likely to be reluctant to allow a party to benefit from their own illegal conduct in a legal proceeding. (The federal [rule more explicitly bars](#) illegally recorded conversations from use in evidence in call cases, both civil and criminal.)

In the civil and Probate & Family context, parties sometimes conflate the issue of admissibility (i.e. whether a judge will consider the recording as evidence) with criminal and civil liability that may arise out of the use and disclosure of illegally recorded material. However, admissibility and liability are very different issues. Even if a judge allows the admission of an illegal recording into evidence in a civil case, the party who sought to admit the recording could face civil or criminal liability for their use and disclosure of the recording.

Although it is not a perfect analogy, one way to think of using an illegal recording in a civil case would be to imagine a party bringing cocaine or child pornography belonging to the party opponent to the court – in order to prove the bad behavior of the other party. A judge may agree that cocaine or child pornography are bad, but possessing these materials is *a/so* illegal to the party who brings them to court. So it goes with illegal recorded conversations: A party may succeed in playing the recording for the civil judge – and the judge may even believe the contents of the recording bolster that party's case – but that does not mean it was legal for the recording to be disclosed in court. Indeed, a party presenting an illegal recording to a civil court can easily find themselves subject to a criminal complaint or civil suit – for the improper use or disclosure of an illegal recording – even if the judge accepts the recording into evidence.



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