

Chapter 30

Offenses Against the Right to Privacy

Research References

West's Key Number Digest

Telecommunications ☞491 to 541

A.L.R. Library

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Legal Encyclopedias

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Electronic Eavesdropping by Concealed Microphone or Microphone-Transmitter, 30 Am. Jur. Proof of Facts 1

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§ 30:1 Introduction

The right to privacy,¹ or “the right to be let alone,” while not explicitly in the U.S. Constitution, has been determined to be a right of constitutional dimensions.² Article 250 focuses on the right of privacy in communications, providing criminal sanctions, particularly in the area of telephonic conversations. A civil cause of action may be brought for violating a person’s privacy right as well, based upon federal statute or state statute.³

The subject of overhearing, recording, and later using conversations is an area of law layered by state and federal, procedural and substantive, civil and criminal law.

There are eight sections of article 250: one definitional, seven substantive crimes. One of the crimes is a felony. In federal law, section 2510 et seq. of Title 18, US Code governs wiretapping and eavesdropping.⁴ Procedurally, the CPLR weighs in, along with the federal statute, to govern the use of statements in court, or in any forum, for that matter, including administrative proceedings.⁵

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¹Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). In his dissent in *Olmstead v. U.S.*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376 (1928), Justice Brandeis wrote of “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

²See *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

³See 18 U.S.C.A. §§ 2520 et seq.. See also, *Dana v. Oak Park Marina, Inc.*, 230 A.D.2d 204, 660 N.Y.S.2d 906 (4th Dep’t 1997); see also General Business Law § 395-b, Civil Rights Law §§ 50, 51. Construction and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) Authorizing Civil Cause of Action by Person Whose Wire, Oral or Electronic Communication Is Intercepted, Disclosed or Used in Violation of Act, 164 A.L.R. Fed 139.

⁴18 U.S.C.A. §§ 2510 et seq.

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Crime	Level	Penal Law §
Eavesdropping	E felony	250.05
Possession of eavesdropping devices	A misdemeanor	250.10
Failure to report wiretapping	B misdemeanor	250.15
Divulging an eavesdropping warrant	A misdemeanor	250.20
Tampering with private communications	B misdemeanor	250.25
Unlawfully obtaining communications info.	B misdemeanor	250.30
Failing to report criminal communications	B misdemeanor	250.35

§ 30:2 Eavesdropping

Eavesdropping as defined in section 260.10 is a class E felony.

In New York, it is legal for one party to a conversation to tape it, even though the other party is unaware,⁶ thus an undercover police officer may wear a body wire without obtaining a warrant.⁷ Absent a reasonable expectation of privacy, overhearing as well as recording a conversation is proper.⁸ Similarly, it is legal for one party to a conversation

⁵Ruskin v. Safir, 177 Misc. 2d 190, 676 N.Y.S.2d 451 (Sup. Ct. 1998), order vacated on other grounds, appeal dismissed, 692 N.Y.S.2d 356 (App. Div. 1st Dep't 1999), order issued, 1999 WL 424401 (N.Y. App. Div. 1st Dep't 1999) (police disciplinary proceeding). CPLR 4506; see also, Goldberg, "Tape-Recorded Evidence," The Champion, April 2001, p. 24.

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⁶People v. Gibson, 23 N.Y.2d 618, 298 N.Y.S.2d 496, 246 N.E.2d 349 (1969). See also, Harry R. v. Esther R., 134 Misc. 2d 404, 510 N.Y.S.2d 792 (Fam. Ct. 1986); People v. Powers, 42 A.D.3d 816, 839 N.Y.S.2d 865 (3d Dep't 2007).

⁷People v. Erwin, 236 A.D.2d 787, 653 N.Y.S.2d 990 (4th Dep't 1997), appeal denied, 89 N.Y.2d 1011, 658 N.Y.S.2d 249, 680 N.E.2d 623 (1997).

⁸People v. Kirsh, 176 A.D.2d 652, 575 N.Y.S.2d 306 (1st Dep't 1991).

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to consent to another person eavesdropping on it.⁹ Where tapes are properly obtained—recorded by a party to the conversation, or with a party’s consent, for example—they are admissible in court. So are voice-mail and telephone messages, which are left by the speaker knowing of the recording.

Listening in on a conversation from a telephone extension is improper.¹⁰ Cordless telephones provide significantly less privacy, but the recording of these conversations by another (without a party’s consent) is nonetheless illegal under New York State law.¹¹

§ 30:3 Procedural bar to using conversations

Both federal law and the CPLR bar the introduction into evidence of illegally wiretapped conversations. The statutes are similar, and in broad strokes seek to bar the admission of such conversations in any forum, civil or criminal.¹² CPLR 4506 provides the procedural remedy where no eavesdropping warrant was issued: a suppression motion prior to the trial or hearing, returnable before a state supreme court justice.¹³ Where the issue arises at trial, caselaw approves objections and suppression motion in the trial court.¹⁴

⁹People v. Lasher, 58 N.Y.2d 962, 460 N.Y.S.2d 522, 447 N.E.2d 70 (1983). As discussed below, however, it is improper for an attorney as a party to a conversation to record it where the other person is unaware of it.

¹⁰People v. Dunham, 157 Misc. 2d 289, 596 N.Y.S.2d 289 (County Ct. 1992).

¹¹People v. Fata, 159 A.D.2d 180, 559 N.Y.S.2d 348 (2d Dep’t 1990); Ruskin v. Safir, 177 Misc. 2d 190, 676 N.Y.S.2d 451 (Sup. Ct. 1998), order vacated on other grounds, appeal dismissed, 692 N.Y.S.2d 356 (App. Div. 1st Dep’t 1999), order issued, 1999 WL 424401 (N.Y. App. Div. 1st Dep’t 1999); Sharon v. Sharon, 147 Misc. 2d 665, 558 N.Y.S.2d 468 (Sup. Ct. 1990).

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¹²CPLR 4506(1); 18 U.S.C.A. § 2515.

¹³CPLR 4506 (3), (4).

¹⁴See, e.g., Sharon v. Sharon, 147 Misc. 2d 665, 558 N.Y.S.2d 468 (Sup. Ct. 1990); People v. Dunham, 157 Misc. 2d 289, 596 N.Y.S.2d 289 (County Ct. 1992). In civil cases, it is a normal part of discovery to obtain any statements of one’s own client. CPLR 3101(e).

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Decisions have approved the use of illegally tape-recorded conversations for impeachment purposes.^{14.50}

Cameras now on the market may permit the surreptitious photo recording (or viewing without a videotape) of a person without that person's knowledge or permission. Where this takes place in public or a place where a person has no legitimate expectation of privacy, the intrusion may be legal; where it occurs in a private area — e.g., in one's home — it may constitute a civil tort of trespass or invasion of privacy.

**§ 30:4 Procedural bar to using conversations—
Family law issues**

In reported New York cases, the subject of wiretapping comes up most frequently, perhaps not surprisingly, in the area of domestic relations. Husbands wiretap their wives' telephone conversations. Wives wiretap husbands'. And, given the younger generation's precocity with electronic gizmos, it is perhaps not surprising to learn of a child overhearing and taping his parent.¹⁵

Following the federal and state statutory bars on using such conversations, several domestic relations decisions have denied admission into evidence.¹⁶ The fact that the tapping/taping person is the subscriber to the telephone service does not allow for conversations to be overheard. Nor is there an interspousal (and certainly no ex-interspousal) exception.¹⁷

Privacy is at the heart of the statutory proscription on eavesdropping and wiretapping. The extent of a child's privacy interest has been discussed in a few decisions. Is a

^{14.50}People v. Mc Cann, 292 A.D.2d 804, 738 N.Y.S.2d 642 (4th Dep't 2002).

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¹⁵Sharon v. Sharon, 147 Misc. 2d 665, 558 N.Y.S.2d 468 (Sup. Ct. 1990).

¹⁶Pica v. Pica, 70 A.D.2d 931, 417 N.Y.S.2d 528 (2d Dep't 1979); Sharon v. Sharon, 147 Misc. 2d 665, 558 N.Y.S.2d 468 (Sup. Ct. 1990); Connin v. Connin, 89 Misc. 2d 548, 392 N.Y.S.2d 530 (Sup. Ct. 1976). See also, Jaeger v. Jaeger, 207 A.D.2d 448, 616 N.Y.S.2d 230 (2d Dep't 1994), (harmless error); Harry R. v. Esther R., 134 Misc. 2d 404, 510 N.Y.S.2d 792 (Fam. Ct. 1986).

¹⁷Pica v. Pica, 70 A.D.2d 931, 417 N.Y.S.2d 528 (2d Dep't 1979); Connin v. Connin, 89 Misc. 2d 548, 392 N.Y.S.2d 530 (Sup. Ct. 1976). See also, People v. Dunham, 157 Misc. 2d 289, 596 N.Y.S.2d 289 (County Ct. 1992).

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child capable of giving consent to another person—a parent—to eavesdrop?¹⁸ Does the child’s guardian, in the *parens patriae* exercise of duties, have a right to know what is being said to a child? At what age does a child’s privacy rights emerge, *vis-a-vis* a parent?¹⁹

How about when the other party to the conversation is the other parent, with arguably equal rights to the child? Caselaw holds that such recording is impermissible. As one custody decision put it:

These children . . . are entitled to feel that they may communicate freely with their parents without fear that those communications will be recorded and revealed later. [The court will preclude the tapes’] use in this proceeding, although otherwise admissible, to protect the spirit of trust and confidence that needs to exist between child and parent in order for the children’s emotional health to be safeguarded.²⁰

Putting criminal considerations aside, engaging in eavesdropping, with or without the other person’s knowledge, upon a current or former spouse is a tactic almost guaranteed to raise, not diminish, distrust in a disintegrating family unit, and aggravate the already-high tensions that accompany most domestic relations cases, whatever the forum.

§ 30:5 **Procedural bar to using conversations—
Attorney’s role**

The attorney in, e.g., a domestic relations case who represents a parent or spouse who has improperly listened in on conversations should caution the client about the crim-

¹⁸See *People v. Hills*, 176 A.D.2d 375, 574 N.Y.S.2d 82 (3d Dep’t 1991) (in sodomy prosecution, mother and 15-year old victim consented to uncle taping conversation between victim and defendant).

¹⁹In the area of constitutional law, specifically searches by school officials, students have a recognized privacy right. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Ed. Law Rep. 1122 (1985).

²⁰*Harry R. v. Esther R.*, 134 Misc. 2d 404, 510 N.Y.S.2d 792 (Fam. Ct. 1986). See also, *Berk v. Berk*, 70 A.D.2d 943, 417 N.Y.S.2d 785 (2d Dep’t 1979), *rev’g* 95 Misc. 2d 33, 406 N.Y.S.2d 247 (Fam. Ct. 1978).

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inal law ramifications.²¹ The attorney should also be sure to not engage in an independent unethical act, such as advising a client to commit a crime. Such improper advice could be grounds for, among other things, disciplinary proceedings or disqualification in representing a litigant.

Taping a conversation by an attorney, whether face-to-face or telephonic, without the other person's knowledge, is unethical, though it is not criminal.²²

§ 30:6 Possession of eavesdropping device

Possession of an eavesdropping device is a class A misdemeanor. The possession must be with intent to use or permit it to be used in committing the offense of eavesdropping.²³ The statute does not apply to a "pen register," defined in CPL article 705, so long as the device cannot record messages.²⁴

§ 30:7 Failure to report wiretapping; Failure to report criminal communications

Telephone or telegraph corporations are required to report wiretapping to the authorities under § 250.15. Similarly, under section 250.35, these corporations as well as an electronic communications service and employees are under a duty to notify the authorities if corporate facilities are being used to conduct "any criminal business, traffic or transaction." The quoted words are undefined and potentially have significant breadth beyond eavesdropping or privacy issues.

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²¹The district attorney of a county has discretion to decline prosecution of a case, *People v. Eboli*, 34 N.Y.2d 281, 357 N.Y.S.2d 435, 313 N.E.2d 746 (1974).

²²NYS Bar Association Ethical Opinion 328 (1974). See also *In re Wittner*, 264 A.D. 576, 35 N.Y.S.2d 773 (1st Dep't 1942), order aff'd, 291 N.Y. 574, 50 N.E.2d 660 (1943). A more liberal approach is suggested in *Hall*, *Professional Responsibility of the Criminal Lawyer*, § 16:5 (2d ed). But see *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 758 N.Y.S.2d 246 (Sup 2003).

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²³Penal Law § 250.10.

²⁴See *People v. Bialostok*, 80 N.Y.2d 738, 594 N.Y.S.2d 701, 610 N.E.2d 374 (1993).

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Failure to report under either statute is a class B misdemeanor.²⁵

§ 30:8 Divulging an eavesdropping warrant

An eavesdropping warrant may be issued under CPL article 700 in a criminal investigation. Disclosing information to about a warrant or application for a warrant is barred by section 250.20.²⁶ Exceptions are provided for when permitted by CPL 700.65, or when made to a state or federal agency authorized to receive reports, or to either a law enforcement agency concerned with the application, a legislative committee, or a telephone or telegraphic corporation or electronic communications service whose facilities are involved.

The crime is a class A misdemeanor.

The statute proscribes divulging an “eavesdropping warrant,” while a “video surveillance warrant,” a separately defined term in CPL article 700, is not included. Nor is a “pen register,” which is defined in CPL article 705,²⁷ although it should be noted that some such devices have capacity beyond merely recording numbers.²⁸

§ 30:9 Tampering with private communications

Four subdivisions comprise the tampering statute, which is a class B misdemeanor.²⁹ Under subdivisions a and b, it is illegal to open, read or divulge the contents of a “sealed letter” or “other sealed private communication” without the permission of the sender or intended recipient.

The next two subdivisions deal with improperly obtaining or divulging information from a telephone or telegraphic

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²⁵Penal Law §§ 250.15, 250.35.

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²⁶Penal Law § 250.20.

²⁷See *People v. Guerra*, 116 Misc. 2d 272, 455 N.Y.S.2d 713 (Sup. Ct. 1982).

²⁸See *People v. Bialostok*, 80 N.Y.2d 738, 594 N.Y.S.2d 701, 610 N.E.2d 374 (1993).

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²⁹Penal Law § 250.25.

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corporation. It is a class B misdemeanor to obtain information of the contents of a communication through any means (“by connivance, deception, intimidation or in any other manner”) from the corporation, without the permission of the sender or recipient. Similarly, divulging that improperly obtained information is a B misdemeanor.

§ 30:10 Unlawfully obtaining communications information

It is a B misdemeanor to obtain, or attempt to obtain, information by any means (“by deception, stealth or in any other manner”) regarding the identification or location of telephone equipment and apparatus, or a record of any communication passing over telephone or telegraph lines.³⁰

§ 30:11 Unlawful videotaping: Stephanie’s law [New]

Several crimes relating to unlawful videotaping were enacted in 2003: Unlawful surveillance 1st and 2nd degrees, and Dissemination of an unlawful surveillance image 1st and 2nd degrees.³¹ A conviction of Unlawful surveillance 1st degree requires registration as a sex offender under Megan’s Law.³²

In a prosecution under the General Business Law for “video voyeurism,” operability of the viewing device was held to be an element of the statute.³³

An arrest for unlawful surveillance in the second degree was upheld where the defendant consented to allow an officer to view his camera’s screen and the officer discovered, in plain view, an image of a photograph consisting of a close up image of a girl’s undergarments visible between her legs

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³⁰Penal Law § 250.30.

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³¹Penal Law §§ 250.40–250.60.

³²Corr L §§ 168-a et seq. See § 6:111.

³³People v. Ceselka, 195 Misc. 2d 442, 759 N.Y.S.2d 633 (City Crim. Ct. 2003); Gen Bus L § 395-b, Unlawfully installing or maintaining a two-way mirror or other viewing device, is a violation.

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as she sat on the steps of the Metropolitan Museum of Art.³⁴

³⁴People v. Zapata, 41 A.D.3d 109, 837 N.Y.S.2d 110 (1st Dep't 2007).

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