

To: Chairmen: Senator Coleman

Representative Fox

Vice Chairmen: Senator Doyle

Representative Holder-Winfield

Ranking Members: Senator Kissel

Representative Heatherington

Members of the Judiciary Committee

This document set contains:

1. LCO No. 4247, which is the language of Raised Bill No. 1149, and

2. a document titled SB 1149 – Explanation of Changes, which provides an explanation for each modification and each addition that SB 1149, AN ACT CONCERNING THE RECORDING OF TELEPHONIC COMMUNICATIONS, makes to the existing language of §52-570d of the General Statutes of Connecticut, 2011 edition.

The purpose of the document set is to provide readily available material that may assist committee members when considering SB 1149 for Joint Favorable (JF) status to a consent calendar.





General Assembly

Raised Bill No. 1149

January Session, 2011

LCO No. 4247

04247 _____ JUD

Referred to Committee on Judiciary

Introduced by:

(JUD)

AN ACT CONCERNING THE RECORDING OF TELEPHONIC COMMUNICATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 52-570d of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2011*):

(a) No [person] party, active or otherwise, in a telephonic communication shall, [use any instrument, device or equipment to] by any means, record [an oral private telephonic communication unless the use of such instrument, device or equipment (1) is] or cause to be recorded such communication unless it: (1) Is preceded by documented and reciprocal consent of [all parties to the communication and such] every other party prior [consent either is obtained in writing or is part of, and obtained at] to or as part of the start of [, the] any recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication [by the recording party] and if any party provides verbal notification, any party may record provided verbal notification or another is recorded, or (3) is accompanied by an automatic tone warning [device which automatically] that produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while [such instrument, device or equipment is in use] recording and if any party provides the automatic tone warning, any party may record.

(b) [The] Unless otherwise specified, the provisions of subsection (a) of this section shall not apply to:

(1) Any federal, state or local criminal law enforcement official who in the [lawful] performance of his duties records telephonic communications;

(2) Any officer, employee or agent of a public or private safety agency, as defined in section 28-25, who in the [lawful] performance of his duties records telephonic communications of an emergency nature;

(3) Any person who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication;

(4) Any person who, as the recipient of a telephonic communication which occurs repeatedly or at an extremely inconvenient hour, records such telephonic communication;

(5) Any officer, employee or agent of any communication common carrier who in the [lawful] performance of his duties records telephonic communications or provides facilities to an investigative officer or criminal law enforcement official authorized pursuant to chapter 959a to intercept a wire communication;

(6) Any officer, employee or agent of a Federal Communications Commission licensed broadcast station who records a telephonic communication solely for broadcast over the air;

(7) Any officer, employee or agent of the United States Secret Service who records telephonic communications which concern the safety and security of the President of the United States, members of his immediate family or the White House and its grounds; [and]

(8) Any officer, employee or agent of a Federal Communications Commission broadcast licensee who records a telephonic communication as part of a broadcast network or cooperative programming effort solely for broadcast over the air by a licensed broadcast station; [.]

(9) Any party who records a telephonic communication, provided:

(A) Any party under this state's jurisdiction has complied with subsection (a) of this section and every other party is operating under the authority of or under contract with the United States regardless of location, or

(B) Any party under this state's jurisdiction has complied with subsection (a) of this section and has given consideration to laws, if any, that apply within any given termination point's jurisdiction and every other party is not under this state's jurisdiction;

(10) Any party who records a telephonic communication, provided the intent of the recording is to memorialize evidence of a crime before, during or after the fact and the unaltered and undisclosed recording must be submitted to law enforcement within a reasonable amount of time; and

(11) Any recording that results from any automatic or automated system that may be reasonably categorized as a voice mail, call center, phone answering or similar system and where the calling party was acting under informed consent in the telephonic communication.

(c) For the purposes of this section:

(1) "Party" means any officer, agent or employee of this state or any political subdivision thereof, an individual acting for or on behalf of the United States government, and any individual, partnership, association, joint stock company, trust, limited liability company, corporation or other legal entity;

(2) "Consent" means any instance of an express, implied or informed agreement, approval or permission that is directly linked to a specific recorded telephonic communication; and

(3) "Jurisdiction" means any entity denoted as an authority of or under contract with the United States government or any of the states of the United States.

(d) Regardless of jurisdiction, where consent by all parties to any given telephonic communication is required, consent shall be considered obtained when any party has given verbal notification to every other party and such notification is recorded at the beginning and is part of the recorded communication.

(e) It shall be unlawful for any person or persons to record any telephonic communication if such recording is for the purpose of committing any criminal or tortious act.

[(c)] (f) Any person aggrieved by a violation of subsection (a) or (e) of this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fee.

This act shall take effect as follows and shall amend the following sections:		
Section 1	July 1, 2011	52-570d

Statement of Purpose:

To amend provisions concerning the illegal recording of telephonic communications.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]



SB 1149 - Explanation of Changes

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Introduction

- A significant overarching point is that SB 1149 **does not**, in any way, alter the original intent of P.A. 90-305 (Effective Date: October 1, 1990), which was the expectation of privacy during an intrastate telephonic communication. P.A. 90-305 was codified as §52-570d of the General Statutes of Connecticut.
- SB 1149 upgrades the operation of a statute that suited the limited needs of a 1990s telephonic communications environment into the needs of the contemporary and future telephonic communications environment where technology and use have increased exponentially and will continue to increase exponentially. Since the 1990s, the ubiquitous use of conference calls, wireless telephones, message answering systems, etc.
- The difficult portion of the legislative process has been completed. Please complete the process to effect a JF to a consent calendar.
- For reference, SB 1149 as set out by LCO No. 4247 is attached.

Explanation of Changes

- The introductory clause of §§(a) has been updated in a manner that increases clarity and replaces discrete redundant words with definitive broad concepts. Examples are:

(1) The term "person" has been replaced with "party, active or otherwise." Rationale: "Person" is ambiguous because a "person" could be anyone, i.e. one who is or **is not** a party to the call, whereas "party" clearly narrows the meaning to only those who are part of the call. A "person" **other than** a party is accounted for in §53a-187(a)(1) that reads **"Wiretapping"** means the intentional overhearing or recording of a **telephonic ... communication ... by a person other than a sender or receiver thereof**, without the consent of either the sender or receiver, by means of any instrument, device or equipment." [Emphasis added.]

(2) "...party, active or otherwise," adds clarity by eliminating the question of whether or not a party who is one of five in a conference call counts if that party only listens, i.e., passive, rather than converse like every other party.

(3) The redundant words "instrument, device or equipment" have been replaced with "by any means" and inclusion of "cause to be recorded" would encompass anything as in a software application activated by a puffer controlled by a quadriplegic or a software application that sensed eye movement where a dwell of the eye is associated with point on a computer screen that in turn activates a recorder.

- The existing paragraphs (1), (2), and (3) of §§(a) were structured in a manner that envisioned only a two party telephonic communication with only one party expected to record. That concept has been outpaced by contemporary intra and interstate teleconferencing of three or more parties where several elect to record. SB 1149 incorporates language that makes the section fairer and more efficient for any party operating under Connecticut's jurisdiction by introducing equal status for every party, which means that if a party has gained permission to record, then any party will also have that permission **AND** no party is permitted to record until all consent. Examples are:

¶ (1) has been modified so that:

SB 1149 - Explanation of Changes

(a) an all-encompassing "documented" consent is required in lieu of the limited "in writing" or recorded real time [oral] consent, e.g., a previously recorded call contains documented consent to record a series of calls, which will commence three days later; and

(b) has been modified so that "...and reciprocal," operates in conjunction with "documented" to create a provision that adds discipline by preventing any recording until the consent is mutual.

¶ (2) simply adds a provision that permits any number of parties to record after at least one verbal notification is recorded real time. The existing language requires one verbal notification for each party that records. Example: You call a party knowing that a verbal announcement will be made so you record that announcement. What is the need for an additional verbal notification? This concept is not unique – see Revised Code of Washington that reads:

RCW 9.73.030(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication ..., in any reasonably effective manner, that such communication ... is about to be recorded

¶ (3) simply adds a provision that permits any number of parties to record when at least one provides the automatic tone warning. What is the need for two or more tone warnings? Example: Each of five parties to a conference call recording would make a disturbingly high number of beeps.

- A set of three paragraphs – (9), (10), and (11) – are added to the existing preceding eight paragraphs of §§(b) that reads: "The provisions of subsection (a) of this section shall not apply to."

- ¶ (9)(A) implements a transparency in government provision by providing a Connecticut party an opportunity to record calls with any entity of the federal government pursuant to 18USC2511(2)(d) that reads: (It should be noted that at least 35 states' laws operate in this manner.)

(2)(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, ... communication where such person is a party to the communication ... 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.

- ¶ (9)(B) implements the principle of fairness for a Connecticut party when recording a non-federal interstate call. Briefly, the provision would direct the Connecticut party to be cognizant of the law applicable to the far-end party. If the legislature at the far-end has enacted law that confers the decision to record to the party, then the Connecticut party could apply that law. To give an example, assume that the Connecticut legislature enacted a law that did not permit a right turn during a red light signal for vehicular traffic. A Connecticut party travels to a state that does permit a turn on red. The Connecticut party would most likely take advantage of the permitted turn on red. If the call involved more than two parties, one or more of which were parties in Connecticut and the remaining either interstate or federal, the recording party is required to apply a provision of subsection (a) to the Connecticut party before any recording would be permitted.

- ¶ (10) implements a provision that would allow recording of a call that would be used as evidence of a crime. The existing §52-184a prohibits such evidence. The provision contains safe guards that require that the recording be unaltered and undisclosed and must be turned over to law enforcement in a reasonable amount of time. This provision would support The Judiciary Committee's HB 6367 (Raised) AN ACT CONCERNING THE FAILURE OF A WITNESS TO REPORT A SERIOUS CRIME. The example would be where a party who had committed a criminal act "bragged" about its commission and was recorded.

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Sec. 52-184a. Evidence obtained illegally by electronic device inadmissible. No evidence obtained illegally by the use of any electronic device is admissible in any court of this state.

- ¶ (11) is simply a proactive provision in that it closes the door to the possibility that caselaw may find that a recorded telephonic communication pursuant to the existing §§52-570d(a)(2), i.e., verbal notification method, that resulted from a message answering or automated voice mail system, which **do not** include the verbal notification, "which is recorded at the beginning and is part of the communication by the recording party, is illegal.
- (NOTE: The existing §§(c) is moved and re-lettered §§(f).) A new §§(c) adds a set of three defined terms – "Party," "Consent," and "Jurisdiction" that enhance clarity and eliminate any potential for ambiguous construction. The meaning for "Party" was synthesized from Connecticut's §§1-1(k) "person" and 54-41a(4) "person." The meaning for "Consent" was sourced from the definition for "consent" as published in Black's Law Dictionary, abridged Seventh edition, 244. "Jurisdiction" is a limiting term that includes federal authorities and any one of the states of the United States. Generally, the term operates with ¶(9) of §§(b).
- A new §§(d) that was sourced from §§ RCW 9.73.030(3) of the Revised Code of Washington as set out above. Washington's Code governing "Privacy, violating right of," in general, are conceptually the same as in Connecticut's statutes. And, it is most likely that the language of the existing §§52-570d(b)(3)(4) were taken verbatim from RCW 9.73.030(2)(b)(c) that reads: "(b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour,..."

The main purpose for this subsection is to make it clear that Connecticut's law has standing when there is a conflict of law situation. Jurisdictions such as Maryland do not define consent as being inclusive of the variants, implied or informed. Should conflict of law become a factor in any given proceeding, this subsection's language will support the party that operated under Connecticut's jurisdiction.

- A new §§(e) that was sourced from §§18USC §2511(2)(d) as set out above. The language also complements the existing language of subsection (b) paragraph (3) of this section but is more encompassing.

Closing Statement:

Over time telephonic communications have exponentially increased with the advent of advanced technological features such as teleconferencing, the ubiquitous message answering telephones and almost everyone's constant companion, the cell phone. SB 1149 takes the existing language of §52-570d and with amendments and additions makes the section relevant in today's environment and beyond.

In summation, please do not allow SB 1149 (Raised) to die in committee. Please put the bill up for review at a committee meeting. Please be a proponent for a JF or JFS report to a consent calendar. Please solicit support from other members of the committee.

I would make myself available to clarify any point or answer any question concerning SB 1149. Also see Lawrence Jezouit's written, oral, and additional testimony and a perfecting amendment that are posted under SB 1149 bull page or the Judiciary Committee Testimony web page 3/25/2011.

