

Response to The Division of Criminal Justice's (DCJ) written testimony re Raised House Bill 5503 An Act Concerning the Recording of Telephonic Communications. Author: Lawrence Jezouit, ljez@comcast.net.

The Division of Criminal Justice opposes H. B. No. 5503, An Act Concerning the Recording of Telephonic Communications, and would respectfully recommend that the Committee take NO ACTION on this bill. The Division of Criminal Justice has carefully reviewed this bill, including having discussed the matter in detail with one of its proponents, and can find no justification or need for passage of this seriously flawed legislation. Specifically, our objections include:

With all due respect to the good offices of the Division of Criminal Justice a fair reading of its written testimony reveals a lack of professionalism and a product that contradicts the claim of having "carefully reviewed this bill." It appears that the DCJ has a mindset of confrontational rather than one of understanding or accommodating. On the other hand, it is reasonable to rationalize that mindset because of the environment in which the DCJ operates – adversarial where the state goes to battle against the defense and the accused criminal.

As an example, the DCJ insultingly writes

...(1) it contains an apparent typographical error -the word "or" obviously should be" of;" (2) even correcting for this typographical error, the two uses of "any party" is unclear because, as written, this could be two different parties, and (3) it merely repeats- and poorly at that- the phrase which proceeds it- "is preceded by verbal notification which is recorded "

The insult is directed to the drafters, namely the LCO staff. The DCJ is the one in error because the word "or" is used in the disjunctive sense – that is there are two conditions meant to be set out in the legislation. The legislation reads:

(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,

And the language that was offered by the proponent read:

(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 that verbal notification or another is recorded,

Simply, the DCJ failed to envision what was clearly set out to account for the "real world" in modern-day telephonic communications. CT law requires that each party record the verbal notification and if a party "joins" a call with the intention to record **after** the initial recorded verbal notification, then that party falls under "**or another is recorded,**" which is not too difficult a scenario to grasp within a statutory framework.

Assume that there is an important conference call where the parties will discuss contract requirements to build something. There are 6 CT based corporate and government governmental entities and 4 interstate based corporate entities and each determines that a recording of the call made by using state of the art equipment is vital to provide a record of

agreements and technical specifications. For justified reasons this particular conference call included 8 parties on an ad hoc basis and without the "preplanning" §§52-570d(a)(1) was not appropriate for 3 of the parties because their entry into the conference call was delayed by 17 minutes for one, 23 minutes by a second and 29 minutes by the third minutes and they were not able to record the initial round of consents by the other seven parties who relied on §§52-570d(a)(1). To make the each of the three recordings legal under §§52-570d(a)(2) each party would fall under that part of the language "or another is recorded."

Under existing language absent a written consent, each of the seven are required to consent sequentially taking time whereas the proposed §§52-570d(a)(1) "(1) **is preceded by documented and reciprocal consent.**" That means that when the seven are "on hook," only one party has to say the call is being recorded while the other six are recording. The language was chosen based on the "plain meaning rule," §1-2z of the CGS and was clearly set out in the 2011 session's written testimony, which was readily available for careful review, in more than one place but accented by the following:

To assist in the understanding of the proposal please review the definition of the terms:
document, *vb.* [documented, *past tense*] 1. to support with *records*, instruments, or other evidentiary authorities <document the chain of custody>. 2. **to record**; to create a written record of <document a file>. >. Black's Law Dictionary, Abridged Seventh Edition, page 394.
record, *n.* [records, plural] 1. A documentary account of past events, usu. designed to memorialize those events; information that is inscribed on a tangible medium or **that, having been stored in an electronic or other medium, is retrievable in perceivable form.** UCC § 2A-102(a)(34). Black's Law Dictionary, Abridged Seventh Edition, page 1023. (Note: As the term "record" supports the term "document.")
reciprocal, *adj.* 1. Directed by each toward the other or others; **MUTUAL**. 2. **BILATERAL** <a reciprocal contract>. 3. Corresponding; equivalent. Black's Law Dictionary, Abridged Seventh Edition, page 1021.

Simply put and to answer the DCJ pursuant to §1-2z, "plain meaning rule," which was taken into account by the proponent of the bill, documented means documented and reciprocal means reciprocal. And in the context of the clause: ... (1) **is preceded by documented and reciprocal consent of every other party prior to or as part of the start of any recording and the existing language reads: (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording.**

The existing §§52-570d(a)(1) provides for "written" consent and "verbal" consent and each falls within the common meaning and the legal meaning of the term "documented." The proposed language goes one step beyond by adding the concept that when one obtains consent in writing or verbally it is deemed to be reciprocal. Therefore any one or more of the parties to the call may record without going through the process over again that is required under the existing language.

Had the DCJ "**carefully reviewed this bill**" with a mindset focused on due diligence, as I am sure that they do when prosecuting a case, then the DCJ most likely would have testified in support of rather than against RHB5503. What the DCJ mocks is in fact proactive language that allows for efficient use of a statute in contemporary times and in real time.

It should also be noted that the "proponent" of the bill attempted to exercise due diligence. One method that was used was to research federal and state statutes in the subject matter area. It was found that Washington State was a likely source for §§52-570d(b)(3)(4) – See RCW

9.73.030(2)(b)(c) and it was also found that the Washington Legislature was proactive by including in their statute the following provision:

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 or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

Would the DCJ's respond unfavorably and derogatorily to the RCW provision?

The only "glitch" that may have caused the DCJ to respond in the manner that it did was that the LCO, inadvertently or otherwise, did not include the word "that" between the words "provided" and "verbal."

From the content of the response, one can only conclude that he DCJ neglected to review any of the extensive set of supporting documents that are on file at the CGA website under SB1149 from the 2011 session.

03/25/2011 Lawrence Jezouit, Written Testimony

03/25/2011 Lawrence Jezouit, Supplemental Testimony

03/25/2011 Lawrence Jezouit, Supplemental Testimony 4-12

03/25/2011 Lawrence Jezouit, 3-25

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- There is no need to change "person" to "party," which the bill defines. Connecticut General Statutes section 1-1 (k), "person" already applies to the listed non-human entities.

The purpose of converting the term "person" to "party" is to build a firewall between §52-570d(a) and §§53a-187(a)(1). The firewall corrects an unintended detrimental consequence that occurred upon passage of P.A. 90-305. §§53a-187(a)(1) permits a "person" to record a telephonic communication when consent is obtained from a "sender or receiver." That is to the 1969 CT Statute sets out a lawful behavior. However, that same "person" acting pursuant to §§53a-187(a)(1) becomes subject to a civil action under §52-570d(a) , a "Catch-22." Would it be possible for the DCJ to present one or more examples where it is considered acceptable to enact statutes that oppose each other – that legal in one instance and illegal in the same instance?

There are maxims or axioms set out as guides for construing statutes. Among them are, generally speaking, there should be no absurd result as in §§53a-187(a)(1) contradicting §52-570d or statutes should act in harmony.

- What does "documented and reciprocal consent" mean, and how is that obtained on a telephone, which you cannot use to record anything until you get the documented and reciprocal consent in the first place? Why mandate reciprocal consent when, in most instances, the recording is being done by one participant?

See definitions and discussion above

The DCJ misrepresents the proposed language by asking the question "...and how is that obtained on a telephone, which you cannot use to record anything until you get the documented and reciprocal consent in the first place?" A fair reading of the question would lead one to assume the DCJ is "thinking" paper document rather than reading the language - (1) Is preceded by documented and reciprocal consent of every other party prior to or as part of the start of any recording. In this instance the words "documented and reciprocal" are within the syntax are adjectives of the word "consent." Alternatively it could have been written: 'consent that is documented and consent that is reciprocal.

- The newly proposed "and if any party provides verbal notification, any party may record provided verbal notification or another is recorded" language is rife with problems: (1) it contains an apparent typographical error -the word "or" obviously should be "of;" (2) even correcting for this typographical error, the two uses of "any party" is unclear because, as written, this could be two different parties, and (3) it merely repeats- and poorly at that- the phrase which proceeds it- "is preceded by verbal notification which is recorded "

See explanation above where there is no "typographical error." The comment "(2) even correcting for this typographical error, the two uses of "any party" is unclear because, as written, this could be two different parties," exactly answers the intent of the language except that there must **not** be any "correction" since there is no typo. The word "any" means "any" and **yes** there could be 2 different parties as well as 3 or 4 or 5 or 6 or 7 etc. parties in one telephonic communication. Maybe it is too obvious for DCJ. Therefore, if **any** given party provides the verbal notification, then **any** given party is permitted to record consistent with the proviso. Simply, using the reasonable conference call example, that means there are five parties and any one of the five may provide the verbal notification and as a result, any one or more of the remaining four parties may record consistent with the proviso. Possibly, the DCJ would say 'it ain't rocket science – it says what it says.'

Had the DCJ "carefully reviewed this bill[']s 2011 written testimony starting at page 5 the DCJ would have found a very detailed explanation that is extensively supported by Federal Communications Commission documents.

- The same two criticisms, minus the typographical error, hold for the newly proposed "and if any party provides the automatic tone warning, any party may record."

The two criticisms, whatever they are, are absolutely unfounded. Try to envision a conference call where five parties will record pursuant to the existing §§52-570d(a)(3) and that means that there will be **five beep tones going at the same time**, which is what the DCJ demands. In this day and age, any survey or test would reveal that **one beep tone** would suffice to satisfy the need to provide notification that a call is being recorded whether it be by one party or (not a typo) **any**, as in one of (not a typo) many, one or (not a typo) more of (not a typo) X number of (not a typo) parties. DCJ demands five beep tones while the proponent of the bill believes that one will suffice.

To enlighten the DCJ, as a "careful review" would reveal, **the language of §§52-570d(a)(3) is that of 47CFR64.501 and/or a telephone service provider's tariff.** And a further "careful review" from a perspective of the CT statute, would prove that the single permitted method to record a call from June 30, 1948 through May 1981, some 33 years, and **some 9 years before** the passage of §§52-570d(a)(3) was the "automatic tone warning." And, further, DCJ should be

reminded that it, as in this case, opposed passage of SB455 that was the precursor of §52-570d. See transcript of Judiciary Committee date March 17, 1990, at State Library's page marked 1091.

CHIEF STATE'S ATTY. JACK KELLY: Senator Avallone, other members of the Committee. First, and most importantly, happy st. Patrick's Day. I will be as brief as possible concerning the many bills on the agenda that the Division of Criminal Justice has an interest in.

...

The second would be SB455, AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS. We realize the backdrop under which this proposal is before you. However, I think some of the language here is very imprecise and is going to lead to substantial litigation in court.

For example, in section b (1) we have the term criminal law enforcement official. That's really ill-defined. Would it include prosecutors, would it include inspectors under the Division of Criminal Justice?

Secondly, in section 4, we have the word repeatedly used, is that to mean more than once, several times? We have the terminology of extremely inconvenient hour used, again, that's quite imprecise. We believe that the law as it is currently interpreted by the courts is sufficient with the safeguards now in place, so we'll not have that problem again.

We just think this bill creates more problems that it would solve and there would be an awful lot of litigation involved, so we would oppose it.

The proponent requests that the Judiciary Committee of 2012 take the same action as did the Judiciary Committee of 1990 and the is set out a Joint Favorable on the Act Concerning the Recording of Telephonic Communications.

- The new exception (9) (A) is senseless because any party who has complied with subsection (a) falls outside of the reach of the law anyway and, therefore, is already excepted from its reach.

The DCJ miss construes the intent of the provision. First the is in fact "Choice of Law" or "Conflict of Law" caselaw on this subject some of which the proponent of this bill has reviewed but as carefully as would the DCJ had it done so. See *Lord v. Lord*, Superior Court at Bridgeport, No. CV01 038 02 79, Memorandum Filed August 20, 2002 or *Kearney v Salomon Smith Barney, Inc.*, 117 Cal. App. 4th 446 (2004) and *Kearney v Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006). From the proponents reading of caselaw like *Kearney* there is considerable importance given to the content of a jurisdiction's laws and those legislatures that **protect their constituents** fair better in the outcome of such caselaw. That is the thrust of exception (9) and its language allows a CT party to record based on the lowest common denominator by recognizing that about 60% of the population may record at will just like a CT party could before passage of §52-570d. Remember the DCJ's **official position as documented by its own testimony is that of 1969, P.A. 828, S. 189, which permits any party to record undisclosed and at will. See *State of Connecticut v. Charles DeMartin*, 171 Conn. 524, 544 at FN 13 (1976):**

The words "wiretapping" and "mechanical overhearing of a conversation" are defined to make it clear that the eavesdropping occurs only when there is an "intentional overhearing or recording of a conversation" which is carried out "by a person other than a sender or receiver thereof" and "without the consent" of at least one party thereto. General Statutes § 53a-187 (a) (1), (2). Thus, it is clear that one may tape one's own conversation, whether one is the caller or the one being called. [Emphasis added.]

- The phrase "given consideration to laws" as used in new exception (9) (B) is too vague to meaningfully apply.

Again, the DCJ misses the point because the DCJ **did not carefully review the supporting documents such as pages 13 and 14 of the proponent's written testimony on file at the CGA website un 2011 SB1149.** The purpose is to **protect the CT party** by giving a flag when involved in an **interstate telephonic communication.** **The DCJ would have gone ballistic had the proponent listed every jurisdiction's subject matter laws.**

Again, the proponent did not "divine statutory language" by whim but rather by research. An example is that of the Washington State Revised Code as indicated below:

RCW 9.73.030

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to **intercept, or record any:**

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals **between points within or without the state** by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of **all the participants** in the communication;

In the proponent's view, the Washington State's Legislature **does not protect** its residents who participate in an interstate telephonic communication. Say a party in Washington State calls a party in New York State and has good reason to record the call without notification. In New York any party may record at will. That is the "ground rule" and the voters have never moved to change it. That New York party expects no notification so why does Washington, like CT require the "home team's party" to jump through the hoops? In a Choice/Conflict of Law case the Washington party may in some circumstances be at a disadvantage if that party makes an undisclosed recording even though the New York party most likely does not care. DCJ is too harsh in this day and age even though its official position, unless substantiated otherwise, is to repeal §52-570d. Idiomatically speaking, the DCJ "talks out of both sides of its mouth" in that it readily accepts contradictory laws – 53a-187(a)(1) permits qualified recording **by a person** but is happy to subject that **person** to a civil action in spite of the fact that it testified against that statute.

- What does "acting under informed consent" mean in new exception (11), which applies to voice mail? How does one obtain informed consent in such a context, when the called party is not there?

To provide clarity, exception (11) is set out below:

(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.

It appears that DCJ is having difficulty determining which party's perspective should be applied. In this instance the language excepts the civil action that could have been taken by the recorded party. Here the recorded remains on the line and speaks the message that is being recorded. That behavior may reasonably be characterized as "informed consent," that is defined as "A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives." It would appear that that exactly describes the behavior of the recorded party while keeping in mind that the thrust of this whole section is devoted to preserving the right of a party's privacy so it only stand to reason that the party relinquishing that privacy act in an informed manner. It is very similar to one going for an elective medical procedure that carries risks and alternatives, which one takes into account and then decides as opposed to one being "duped" into the procedure and that would be characterized as uninformed consent.

Under existing law, the statute requires that the verbal notification be included as part of the recording and reads:

(2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party ...

The exception merely permits (1) the use of contemporary devices that record calls **but do not include the verbal notification** and (2) provides a harmonization of §§53a-187(a)(1) with §§52-570d(a) like when a doctor contracts for a third party to automatically record calls for his practice during off hours.

The DCJ expressed to the proponent that the statute does not require that the verbal notification be recorded in spite of the fact that the language so requires and that the OLR's Bill Analysis associated with sSB455 so states:

Knowledge of all parties can be established in three ways : (1) by orally announcing to all parties to the conversation at the beginning that it is being **recorded (this announcement its el f must be recorded)**, (2) by prior written consent, or (3) by supplying an automatic and distinct signal repeated every 15 seconds while recording equipment is in use.

As indicated above, the source of the language is that of the FCC's Memorandum Opinion and Orders. The question was reviewed and reinforced after the "all-party consent" provision was adopted. See 95 FCC 2d 848, 850, 851-852 (9183): (Note: It stands to reason that the extrinsic aids attach to the language under the assumption that there is ambiguity, which in this case there is not. But it seems that the DCJ does not accept the plain meaning of the words of the statute.)

7. After carefully considering the above arguments, we will grant AT&T's request in part. We clearly intended that consent to record be obtained prior to recording a conversation. We will therefore clarify paragraph 23 of the Order to specify that the ((all party consent requirement" is satisfied only if the consent is obtained prior to recording the conversation.⁵ **Moreover, while we recognize AAA's and Delphi's concern that the method of obtaining consent remain flexible, we are persuaded that if there is to be any possibility of enforcement, the consent, if verbal, must be recorded.** Thus, if a telephone company's investigation into alleged nonconsensual recording discloses a conflict between the parties to the conversation on the

matter of consent, the recording party will have to provide taped or written evidence that consent was obtained.

...

12. As discussed above, after considering the arguments presented here, we have decided to broaden the exception for law enforcement recording. **Additionally, we have clarified that the consent to record must be obtained prior to the recording; that the consent, if verbal, must be recorded; ...**

Informed consent means informed consent as was explained in the 2011 written testimony at page 15. See below

For the word "consent" the definition makes it clear that any form – express, implied or informed – qualifies to the effect that permission has been/was given for that recording. Example: By giving notification of the intent to record, the notification itself implies that the party doing the recording consents to the recording, i.e., express consent is NOT required.

express consent. Consent that is clearly and unmistakably stated.

Implied consent. Consent inferred from one's conduct rather than from one's direct expression.

Informed consent. 1. A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.

Black's Law Dictionary, Abridged Seventh Edition, page 244.

- The word "consent" needs no definition. See new section (C)(2).

The proponent believes that the definition precludes any possibility for ambiguity since it covers its three forms unambiguously. The proposed language does in fact invoke the variations of consent and it is better to have that out front. One may view any number of public hearings or committee meetings and oft encounter a legislator question whether or not a term is defined.

- The definition of "jurisdiction" in new subsection (c)(3) makes no sense, and does not correspond to the well-established legal meaning of the word jurisdiction. This definition is inconsistent with other traditional uses of the word "jurisdiction" in the statute.

Again, there seems to be a lack of careful review on the part of the DCJ. That is the purpose of the definition to be applicable only to this section, which in turn does not harm the "traditional" definition. The proponent considered the ramifications of the lack of such definition and did rely on revision of the federal subject matter statute as a guide. Consider that the "traditional" definition would encompass municipal laws or laws of another country. This definition of jurisdiction is set out within the context of the national discussion from the 1968 CRIME CONTROL OMNIBUS CRIME CONTROL AND SAFE STREETS, P.L. 90-351. Within the reports associated with that federal action, the Congress gave effect to state laws and although not subordinate, it was made known that federal law should not pre-empt state law. See Senate Report 90-1097, 1968 U.S.C.C.A.N. 2112, 2181 the states: "There is no intent to preempt State law." And cited by the FCC in the FCC Record Vol 02, No. 02, 502, 504 (1987): "Moreover, then Omnibus Act does not limit the states' authority to impose stricter regulations within their own jurisdictions."²³

The bottom line is that the interstate telephonic communications statutes applicable to the section are limited to the federal government and to the states. International laws are not considered nor are national municipal laws, if any