

Summary Raised Bill No. 487 in favor of by Lawrence Jezouit:

Legislative amendments to §52-570d Action for illegal recording of private telephonic communications. For a more detailed explanation of the amendments, see the Lawrence S. Jezouit Written Testimony RB 487. (Two sided printing)

[1] Definitions Subsection: The term "Consent" eliminates any potential for ambiguity by ensuring that an appropriate form of consent will be applied to a given recorded telephonic communication based on the circumstances surrounding the event, e.g., see (b)(1) documented consent, (d)(6) §§53a-187(a)(1) sender or receiver consent and (d)(7) voice mail. Empirical research of state's law and caselaw reveals that there is significant ambiguity with regard to the meaning of terms such as "one-party consent" and "all-party consent" and whether or not one gives oneself consent. The language included herein eliminates any possibility for ambiguous interpretation where one never gives oneself consent. The term promotes efficiency throughout the section by ensuring that consent is reciprocal thus permitting any party to record provided it is documented as set out within the provisions of the section.

[1] The term "Party" synchronizes the CGA's purpose and intent of §§53a-187(a)(1) Wiretapping, §52-184a. Evidence obtained illegally and §52-570d(b) Action for illegal recording. In 1990 passage of P.A.90-305, codified as §52-570d, caused a lawful act to become unlawful, which in turn caused legally obtained evidence to become inadmissible.

[1] The term "Telephonic Communication" eliminates any potential for ambiguity by ensuring that the "universe" of phone calls is limited to voice communication that is consistent with the CGA's original intent. Digital transfers of data such as faxes, financial transactions, etc. are excluded. The scope of any given telephonic communication is set from end-to-end between and among devices, including the devices. Every technology used to transmit voice and the provider of the service is captured.

[2] Privacy Protected and Permitted Conduct Subsection: Prefatory clause clearly sets the scope of its subdivisions as intrastate but works in harmony with subsection (f) that encompasses a CT citizen's privacy rights into extraterritorial telephonic communications. Prefatory clause is modernized to simplify, to account for technology advances, and to eliminate ambiguity. Revised language cures the absurd and unworkable existing language of subdivisions (1) and (2) with regard to verbal consent and verbal notification. The language of the first two subdivisions was revised to ensure that any real time verbal component is part of the recording and the language of the third subdivision was revised to promote efficiency when conference calls are recorded. A new subsection was added to ensure that a recording party conforms to a subdivision with regard to an intrastate party joining during or after the beginning of an ongoing recording.

[3] Exceptions Subsection: Eliminates two subdivisions that permitted the recording of evidence of a "harassment" crime – §53a-182b and §53a-183. However, each will be covered under a "new" subdivision (4) that expands the memorializing of evidence for the Penal Code. Eliminates three subdivisions that were obsolete before passage. One existing subdivision updated to include service providers in addition to common carriers. Adds four subdivisions where (4) provides a CT party to memorialize evidence of crimes (As indicated above

"harassment" crime was excepted but crimes of sexual abuse, violence, drugs, etc. were not); where (5) promotes transparency between a CT party and any agent of the U.S.; where (6) harmonizes the existing conduct permitted pursuant to the 1969 provision §§53a-187(a)(1); and where (7) permits the recording of the ubiquitous voice mail to a message answering system or other similar technology either self recorded or recorded by a service provider.

With regard to the use of voice mail systems – proposed Exception (7) – as it relates to the existing §§52-570d(a)'s verbal notification provision a significant majority – including attorneys – who have evaluated the provision are of the "opinion" that there is an implied consent when one speaks a voice mail "after the beep" and therefore the requirement that the "...verbal notification [] is recorded at the beginning and is part of the communication..." does not pertain. They are in error as that "opinion" or "holding" is off the table as set by CT Appellate Court precedent as set out in *HOLLER v. BUCKLEY BROADCASTING CORP.* 47 Conn. App. 764, 770 (1998) that reads:

Section 52-570d creates a statutory cause of action that was not available at common law. Therefore, **the language of the statute must be strictly construed.** See *Munroe v. Great American Ins. Co.*, 234 Conn. 182, 187, 661 A.2d 581 (1995); *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 290, 627 A.2d 1288 (1993); *Wethersfield v. National Fire Ins. Co.*, 145 Conn. 368, 371, 143 A.2d 454 (1958). [Emphasis added.]

Until the CT Supreme Court reverses this lower court precedent, §52-570d(a)(1)(2), strictly construed, means that verbal consent and verbal notification must be at the beginning and part of the recording. Reversal is unlikely considering the CT S. Ct. authorities cited in *Holler*.

See also [Attorney General's Opinion \(Opinion\)](http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=281820&pp=12&n=1) Attorney General, Richard Blumenthal January 9, 2001 at <http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=281820&pp=12&n=1>. Last viewed March 20, 2014.

The opinion clearly states:

[T]he Department of Revenue Services [] requested an opinion from my office as to whether a telephone recording system [as described] is in compliance with Conn. Gen. Stat. § 52-570d(a). ... This system may be legally implemented only if the Department can insure that all parties to every telephone call will receive notification that the call will be recorded whether the call is incoming or outgoing. *Opinion* at 1.

...
If such *automated* [verbal] notification is given *at the beginning of all* [] *calls and such* [verbal] *notification is recorded at the beginning of the communications*, these methods of notification would comply with the second alternative method of notification under the statute and would not conflict with the requirements of Conn. Gen. Stat. § 52-570d. *Opinion* at 2.

[4] This new subsection makes it unlawful for a party to record or cause to be recorded any telephonic communication if the recording is for the purpose of committing any criminal or tortious act of this State and provides that such recording is admissible evidence. The provision is patterned after 18USC2511(2)(d) that at least 25 other states have adopted and other states' law.

[5] **CGA Scope of CT Privacy Right:** This new subsection recognizes the limitation of CT's jurisdictional reach but at the same time takes into account that the use of modern day telecommunications makes interstate telephonic communications a common occurrence. Research of choice of law/conflict of law opinions reveals that the legislature that does not express extraterritorial privacy rights of its citizens may in fact jeopardize those rights. Expressing an expectation of privacy rights for CT citizens within an interstate telephonic communication would be viewed favorably in such cases.