

Scroll Right and Left for More Information.

Before proceeding to SB455 itself, the following is a lobbyist's testimony (See text highlighted in yellow.) at the JUD's public hearing on March 17, 1990 for SB455. Please note the discrepancies. By stating "consent of all parties," which is consistent with the bill's language, the unintended meaning is that only a non-party may record. Caselaw substantiates the construction. That is one does not ask oneself for consent. See authorities below and the document named Rules for Analysis - page 1 of 5 (Rev 2 - Oct 2011) appended herein.

[HN4] **A waiver is different than a consent.** A waiver, as defined by Webster as well as Black's Law Dictionary and others, constitutes an *abandonment* of a right, with no reservations for future use, which is a unilateral thing. *Panoulalias v. National Equipment Co.*, 269 F. 630 (2nd Cir. 1920). **A consent, on the other hand, is not unilateral but requires two parties, the one giving the consent and the one to whom the consent is given.** *ALASKA AIRLINES, Third-Party Plaintiff, v. UNITED STATES of America*, 399 F. Supp. 906; 910, June 16, 1975

There is no restrictive meaning to be gathered from the use of the word 'any' instead of 'all'. The phrases 'any patent case' and 'all patent cases' are interchangeable. 'Any' means that we are free to choose for consideration each patent case one by one until we have ended **by choosing 'all'**. **It, therefore, implies totality as plainly as does 'all'**. The only difference is that 'any' arrives at totality by a series of choices for consideration, **whereas 'all' arrives at totality in a single leap.** [Emphasis added.] See *FISCHER & PORTER CO. v. BROOKS ROTAMETER CO. et al.*, 86 F. Supp. 502, 503, July, 18, 1949

REP. TULISANO: Thank you. Sherri Haller. Betty Gallo here? Is Henry Bissonette still here?

~~BETTY GALLO: My name's Betty Gallo. I'm Chairman of the competition for the UConn game, but I'm here to testify on behalf of the Civil Liberties Union for different bills. We are testifying in opposition to HB5992, I mean in support of HB5992, AN ACT CONCERNING EMPLOYEE TESTING AND PERSONAL PRIVACY. We support the direction of this bill that would regulate the use of written employment test which unreasonably intrude upon employees' personal privacy. Too often firms use questions in employment tests which invade the employee's right to privacy.~~

~~We've received complaints from employees who have been asked questions relating to their religious beliefs and their sexual orientation. While employers may have a right to request information that's relative to a particular occupation, such personal information should fall into the area of personal privacy and not be allowed.~~

We're also supporting SB455, AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS. CCLU supports this bill which prohibits the recording of a telephone conversation without consent of all parties to the conversation. Under present state

It must be understood that Gallo is referring to subsection 53a-187(a)(1) definition of "wiretapping."

[sic = party]

and federal criminal laws, at least one part to a telephone conversation must provide consent, otherwise it's not a violation of the criminal statutes. The Federal Communication Commission does have a tariff requirement on telephone companies which provides that both parties to a telephone conversation must consent. However, this requirement is seldom voiced by the telephone company and does not carry significant sanctions.

[sic = must]

If the principle of individual privacy means anything, it means that all parties to a telephone conversation, should have the opportunity to at least consent to a tape recording of that conversation. It's SB455. We also testify in

Betty Gallo should not have said "not." Doing so makes her statement opposite from what the law states, i.e., it is a violation for a non-party to record without the consent of the sender or receiver.

Note the statement: "Under state ... law[], at least one party to a telephone conversation must provide consent," The statement unfurls a red flag in two instances. (1) The law is §§53a-187(a)(1) "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication or a communication made by cellular radio telephone 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.] Note that the person that records is a non-party to the telephonic communication. Here, a sender or receiver may record at will - see *State v. DeMartin*, 171 Conn. 524, 544 n. 13 (1976). (2) The JUD should have been alerted to §§53a-187(a)(1) and completed due diligence because SB455's language turned the subsection on its head by making a legal act illegal, i.e., a non-party, by consent, recording a call becomes an illegal act when consent is not obtained by the recorded sender or receiver; the party that did not give consent to the non-party.

An unintended detrimental consequence is that if the recording's purpose was to memorialize evidence of a crime, then under §52-184a 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, the evidence must be suppressed including any captured by the "fruit of the poisonous tree" doctrine.

See House legislative history of sSB455 Amendment A where there is a colloquy that establishes the scenario above and in spite of that, the bill was passed. Excerpt from House proceedings May 9, 1990: "REP. FARR: (19th) Just one other question, one concern I have on this. Somebody calls me, I realize that there are certain things that are excluded. Those are basically threat type of conversations. Somebody calls me and says, offers, for example to bribe me, to buy my vote in the Legislature, and I tape record that. Is that excluded from this, through you, Mr. Speaker, to Representative Mintz. REP. MINTZ: (140th) Through you, Mr. Speaker, if the bill states for blackmail calls, that would be excluded. The purchase of a vote I'm not quite sure falls under that kind of provision, so it might be excluded in this. REP. FARR: (19th) Well, through you, Mr. Speaker, to Representative Mintz, I'm not talking about blackmail. If somebody calls me up in my office and says, there's an important vote coming up, I'd like to offer you \$10,000 to change your vote, as I read the bill, if I recorded that conversation, went to somebody suggested, take the money, and I went to the State's attorney's office and said I have a tape recording, somebody called me, offered me \$10,000, this is a recording. They listen to the recording and then they arrest me. Isn't that the way the bill works, because I illegally recorded that telephone conversation. Through you, Mr. Speaker, to Representative Mintz. REP. MINTZ: (140th) Through you, Mr. Speaker, I don't believe that you'll be arrested for that. I think the only penalty under this is, they may bring a civil rights action against you, the person who you recorded the telephone conversation. REP. FARR: (19th) There are no criminal penalties whatsoever in this bill? REP. MINTZ: (140th) Through you, Mr. Speaker, none that I see. REP. FARR: (19th) Would that tape recording then be illegal for purposes of admission in a criminal proceeding? Through you, Mr. Speaker, to Representative Mintz. SPEAKER BALDUCCI: Representative Mintz. REP. MINTZ: (140th) Through you, Mr. Speaker, I believe that that tape recording probably would be suppressible in a criminal case. REP. FARR: (19th) Well, I'd just suggest to the Chamber that if that's the case, this may be a serious problem here. We're not talking about somebody, law enforcement officials going out and doing illegal tapes. I mean, somebody calls me on my phone and I happen to have the answering machine there, I leave it on because they're making what I think to be an illegal offer. We pass the bill. Apparently that doesn't, now is suppressible. I'm not sure I like the bill. Thank you."

Beware! Evil lurks in the passed 52-570d.

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STATE OF CONNECTICUT

Raised Bill No. 455

Page 1 of 2

Referred to Committee on JUDICIARY

LCG No. 2608

Introduced by (JUD)

General Assembly

February Session, A.D., 1990

AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS.

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

(NEW) (a) No person shall record a private telephonic communication by means of any instrument, device or equipment without the prior consent of all participants in such communication.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Any 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 of the general statutes, 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 anonymously, repeatedly or at an extremely inconvenient hour, records such telephonic communication.

CONNECTICUT STATE LIBRARY LEGISLATIVE REFERENCE SECTION

Genesis and Evolution of Sec. 52-570d

Note that this is the initial language: Subsec. (a) DOES NOT contain any subdivisions.

Lawrence S. Jezouit submits that the language of SB455 was adopted from the Revised Code of Washington (RCW) as codified from a 1967 statute at Title 9, Chapter 9.73 as set out in one or more of its sections.

Generally, for SB455's (a), see RCW §§9.73.030, which is set out to the right of SB455's text.

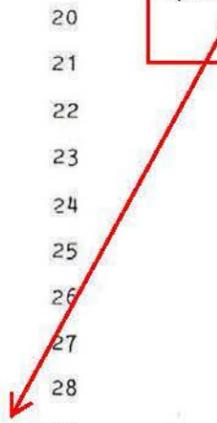
Annotations by L. Jezouit (LJ) are enclosed by a set of brackets, { }. RCW 9.73.030

(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: {The text of (1) was adopted by CT as "No person..." under (LJ)'s assumption that CT statutes define the term "Person" while incorporating the word "record." (See underlined language of the RCW.)}

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

..... {§§9.73.030(2) in part reads: (Refer to SB455's (b)(2)(3)(4).)}

(2) Notwithstanding subsection (1) ... (a) of an emergency nature ... (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,



For SB455's (c) see the adopted concept and similarities in RCW 9.73.060 Violating right of privacy — Civil action — Liability for damages.

(c) Any person aggrieved by a violation of subsection (a) of this section may bring a civil action in the superior court to recover damages, together with costs and a reasonable attorney's fee.

STATEMENT OF PURPOSE: To prohibit the recording of a telephone conversation without the consent of all the parties thereto and to authorize a civil action for damages when an unlawful recording occurs.

[Proposed deletions are enclosed in brackets. Proposed additions are all capitalized or underlined where appropriate, except that when the entire text of a bill or resolution or a section thereof is new, it is not capitalized or underlined.]

See the pages below for sSB455 that replaced SB455 at the committee meeting where the JFS vote was: Yea 27 , No 1.

Note that the handwritten strikeout and the bill's nomenclature was edited. The original language was most likely augmented by adopting language from one or two sources, namely: 47CFR64.501 and/or Southern New England Telephone Company's tariffs A. General Provisions ... 4. Recording of Two-Way Telephone Conversations.

Between the public hearing and the JUD meeting, SB455's language was reworked integrate the language of 47CFR64.501 and SNET Tariffs. Then during the Senate proceedings Amendment A was incorporated. The relevant portions of each are set out here and continue to the page below. In most cases the verbiage is almost exact.



Senate, April 18, 1990. The Committee on Judiciary reported through SEN. AVALONE, 11th DIST., Chairman of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS.

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

- 1 (NEW) (a) No person shall use any instrument,
- 2 device or equipment to record an oral private
- 3 telephonic communication unless
- 4 ~~(1) Such instrument, device or equipment can~~
- 5 ~~be physically connected to and disconnected from~~
- 6 ~~the telephone line or switched on and off; and~~
- 7 ~~(2) The use of such instrument, device or~~
- 8 ~~equipment (a)(1) is preceded by consent of all~~
- 9 ~~parties to the communication and such prior~~
- 10 ~~consent either is obtained in writing or is part~~
- 11 ~~of, and obtained at the start of, the recording,~~
- 12 ~~or (a) is preceded by verbal notification which is~~
- 13 ~~recorded at the beginning and is part of the~~
- 14 ~~communication by the recording party, or (a) is~~
- 15 ~~accompanied by an automatic tone warning device~~
- 16 ~~which automatically produces a distinct signal~~
- 17 ~~that is repeated at intervals of approximately~~
- 18 ~~fifteen seconds during the communication while~~
- 19 ~~such instrument, device or equipment is in use.~~
- 20 (b) The provisions of subsection (a) of this
- 21 section shall not apply to:

47CFR64.501
Subpart E-Use of Recording Devices by Telephone Companies

§ 64.501 Recording of telephone conversations with telephone companies. {Although this rule regulates the telcos' behavior, the regulation and its parts flow to their tariffs. See FCC Reports Vol. 2 No. 2, 502, 505 at ¶ 27, (Adopted: 12/23/86 - Released 1/26/87) below the CFR. Note any cited document throughout is available on request from ljez@comcast.net of (860) 953-3909.}

No telephone common carrier, ... may use any recording device in connection with any interstate or foreign telephone conversation between any member of the public, on the one hand, and any officer, agent or other person acting for or employed by any such telephone common carrier, on the other hand, except under the following conditions:

- (a) Where such use shall be preceded by verbal or written consent of all parties to the telephone conversation, or
- (b) Where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party, or
- (c) Where such use shall be accompanied by an automatic tone warning device, which will automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use.
- ...
- (e) That no recording device shall be used unless it can be physically connected to and disconnected from the telephone line or switched on and off. {sSB455 Amendment A strikes (e) herein.}

From FCC Reports Vol. 2 No. 2, 505
27. In view of the foregoing and pursuant to the authority granted in Sections 2(a), 4(i), 4U), 201, 205, 303(r), and 403 of the Communications Act, 47 U.S.C. §§ 152(a), 154(i), 154(j), 201, 205, 303(r) and 403, IT IS ORDERED, that all common carriers subject to Title II of the Communications Act, 47 U.S.C. 151 et seq., shall revise any tariff regulations on file with this Commission which provide for the use of recording devices in connection with interstate and foreign message toll telephone service and wide area telephone service, to comport with this Order. [Emphasis added.]

See opposite for the applicable SNET tariffs.

SNET Tariffs A. General Provisions 4. Recording of Two-Way Telephone Conversations {There are three significant facts that bear on how sSB455's operation must be construed. (1) Note the tariff's caption and introductory paragraph address "Two-Way" and that the JUD DID NOT adopt that language with the result that telephones with a message answering system that DO NOT integrate a verbal consent/notification within the recording itself that can be heard after the fact, do in fact create and illegal recording pursuant to the language set out in sSB455 and codified as §52-570d. See House Proceedings at tcc 245 (CT State Lib marked 10525-10526). (2) Note that the JUD favored the tariffs when adopting language. Compare 47CFR64.501(a) to SNET A.4. where the former does not address verbal consent as part of the recording but the tariff does and the JUD opted to include. (3) That the sSB455 hand marked Amendment A struck the physical connection and on/off language from the tariff's introductory paragraph.}

4. Recording of Two-Way Telephone Conversations
Telecommunications services are not represented as adapted to the recording of two-way telephone conversations. However, Customer-provided voice recording equipment may be directly, acoustically or inductively connected with telecommunications services. When such connections are made, the Customer provided voice recording equipment shall be so arranged that at the will of the user it can be activated or deactivated. In addition, one of the following conditions must apply:
- All parties to the telephone conversation must give their prior consent to the recording of the conversation, and the prior consent must be obtained in writing or be part of, and obtained at the start of, the recording;
- A distinctive recorder tone, repeated at intervals of approximately fifteen seconds, is required to alert all parties when the recording equipment is in use. The distinctive recording tone can be provided as part of (1) the recording equipment, or (2) Customer-provided registered or grandfathered protective circuitry or
- where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party. [Emphasis added.] {It should be noted that strictly construed the words "all parties" coupled with the word "consent" effectively makes the paragraph operate in a manner that only permits the recording to be made be a non-party. For authorities see 47 Conn. APP. [HN9] for "strictly construed;" and the text box at the top of page 1 of this document.} See next page below for a continuation.

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

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

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

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

38 (5) Any officer, employee or agent of any
39 communication common carrier who in the lawful
40 performance of his duties records telephonic
41 communications or provides facilities to an
42 investigative officer or criminal law enforcement
43 official authorized pursuant to chapter 959a of
44 the general statutes to intercept a wire
45 communication;

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

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

56 (8) Any officer, employee or agent of a
57 Federal Communications Commission broadcast
58 licensee who records a telephonic communication as
59 part of a broadcast network or cooperative
60 programming effort solely for broadcast over the
61 air by a licensed broadcast station.

62 (c) Any person aggrieved by a violation of
63 subsection (a) of this section may bring a civil
64 action in the superior court to recover damages,
65 together with costs and a reasonable attorney's
66 fee.

67 Committee Vote: Yea 27 Nay 1

a. The FCC has established the following exceptions to the foregoing requirements:

(1) When used by a Federal Communications Commission licensed broadcast station Customer for recording of two-way telephone conversations solely for broadcast over the air.

{See sSB455 (b)(6).}

(2) When used by the United States Secret Service of the Department of Treasury for recording of two-way telephone conversations which concern the safety and security of the person of the President of the United States, members of his immediate family, or the White House and its grounds. {See sSB455(b)(7).}

(3) When used by a broadcast network or by a cooperative programming effort composed exclusively of Federal Communications Commission broadcast licensees to record two-way telephone conversations solely for broadcast over the air by a licensed broadcast station. {See sSB455(b)(8).}

4) When used for recording at United States Department of Defense Command Centers of emergency communications transmitted over the Department of Defense's private line system when connected to telecommunications service.

(5) When used by a municipal fire or police department for recording on central office lines assigned exclusively for the receipt of fire calls or police emergency calls and attended at all times for such purpose, provided, further, that the Fire Department or Police Department certifies these conditions will be observed. {May be associated with sSB455(b)(1)(2) but also see Revised Code of Washington 9.73.030.}

Rules for Analysis - page 1 of 5 (Rev 2 - Oct 2011)

Title: Intercepting a Wire Communication: An Analysis – Who* (See page 2 of 5 below.) is Authorized to Intercept under the Federal Code or Another Jurisdiction's Laws?

The Parameters:

Key Question: Does one ask for or obtain consent to intercept a wire communication from oneself? (See (1) **Key Terms:** at **Consent** next and (2) **Background and Rationale re Key Question:** section on pg. 2 of 5 below.) The preceding questions are meant to apply within the context of a given jurisdiction's wire communication intercept law only when the enacted language (or lack thereof) dictates that the question be asked.

Here, it must be noted that the concept of "free will" has not been cast aside for it may be exercised at any time. When a given jurisdiction's laws (criminal and/or civil) govern ones (either a party or non-party or both) conduct in the matter of intercepting any given wire communication, the exercise of free will and recording of a wire communication may be judged accordingly. When a jurisdiction's laws are silent with regard to said matter of ones (either a party or non-party or both) conduct, the exercise of free will is merely a **willful act**, i.e., voluntary and intentional. As such, any use or consideration of the term "consent," in any of its forms - express, informed, or implied - necessarily **would not** apply.

Key Terms:

Consent. As used in the Analysis section, (1) the context of its use within any given statute dictates the applicable form, i.e., *noun* or *verb* and (2) the perspective, i.e., a particular evaluation of the context in conjunction with the facts of the statute's language, especially from one person's point of view, must be compatible with the outcome of who has obtained the consent. As an example, consider 18USC2511(2)(d) because its two clauses demonstrate the source of the consent.

18USC2511(2)(d) **clause one** as a separate sentence reads: (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication ... **Note that here the Congress is in effect making a definition for the term "Party." That is two elements where (1) 18USC2510(6) AND (2) where said person is calling/sender and/or called/receiver.** Within clause one, **consent is given by the U.S. Congress to "a party to the communication"** and the resulting intercept (recording) is a willful act.

18USC2511(2)(d) **clause two** as a separate sentence reads: (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication ... where one of the parties to the communication has given prior consent to such interception ... **Note that here the Congress is in effect differentiating between a person and a party where a person is a non-party.** Within clause two, **consent is given by "a party to the communication"** and the resulting intercept (recording) carried out by a non-party is a permitted act pursuant to a proposal by either a party or the non-party.

Further, the misnomer "one party consent" and the associated explanatory text when applied to a statute that is or is patterned after the federal scheme at best offers a partial and incorrect analysis of such statute because "one party consent" has total disregard for the lawful willful act by a party. Likewise, the misnomer "all party consent" and the associated explanatory text when applied to the statute of FL or MA or NH or PA ignores the fact that only a non-party intercept would be lawful. (See page 4 of 5 below for further discussion and cited authority for meaning of "all.") The misnomer "all party consent" and the associated explanatory text when applied to the statute of CA or CT or DE or IL or MI or MT is far afield from being correct but each state's statute/s set out unique situations that are too complex to detail here.

"Consent" must be perceived as ensuring that one has permission to intercept (record) a "wire communication" before the fact or at the beginning of the intercept and the consent must be in at least one of the following forms as defined in a generally accepted legal dictionary: express, implied or informed.

Common meaning: con·sent, intr.v., -sent·ed, -sent·ing, -sents. To give assent, as to the proposal of another; agree. n.1. Acceptance or approval of what is planned or done by another; acquiescence. See synonyms at permission. 2. Agreement as to opinion or a course of action: She was chosen by common consent to speak for the group. (American Heritage Dictionary)

Legal definition: consent, n. 1. Agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent. (Black's Law Dictionary, Ninth Edition; 346)

Authorities: Consent, in law, means an agreement to do something proposed by another; an assent to some proposition submitted by another. (*van Beuren v. McLaughlin* 161 F.Supp. 944, 948 1958)) A waiver is different than a consent. A waiver, as defined by Webster as well as Black's Law Dictionary and others, constitutes an abandonment of a right, with no reservations for future use, which is a unilateral thing. *Panoualias v. National Equipment Co.*, 269 F. 630 (2nd Cir. 1920). **A consent, on the other hand, is not unilateral but requires two parties, the one giving the consent and the one to whom the consent is given.** *Alaska Airlines v US* 399 F.Supp. 906, 910 [Emphasis added.]

Wire Communication (by another name): One must take into account that the term "wire communication" is a defined term under 18USC2510(1). However, other jurisdictions may have coined another term to serve that same purpose, e.g., Alabama uses "private communication" in conjunction with the definition "Eavesdrop," California defines a "confidential communication," and in one "Civil Actions" section Connecticut uses an undefined term "private telephonic communication" but also defines "wire communication" within a "Criminal Procedure" section.

Rules for Analysis - page 2 of 5

Restricted Analysis:

(1) Title III of Public Law 90-351, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, enacted 18USC2510 Definitions. Title I of Public Law 99-508, ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986 enacted amendments to 18USC2510 by modifying and adding definitions. Although there have been subsequent amendments, from 1986 forward, there were and are in existence three defined types of communication – wire, oral and electronic. The analysis in this document focuses on “wire communication” that would also be popularly known as a “phone call.” 18USC2510’s history is set out below and is current through December 31, 2010.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 212;
amended Pub. L. 99–508, title I, § 101(a), (c)(1)(A), (4), Oct. 21, 1986, 100 Stat. 1848, 1851;
Pub. L. 103–414, title II, §§ 202(a), 203, Oct. 25, 1994, 108 Stat. 4290, 4291;
Pub. L. 104–132, title VII, § 731, Apr. 24, 1996, 110 Stat. 1303;
Pub. L. 107–56, title II, §§ 203(b)(2), 209(1), 217(1), Oct. 26, 2001, 115 Stat. 280, 283, 290;
Pub. L. 107–108, title III, § 314(b), Dec. 28, 2001, 115 Stat. 1402;
Pub. L. 107–273, div. B, title IV, § 4002(e)(10), Nov. 2, 2002, 116 Stat. 1810.)

(2) In order to reduce the complexity of the analysis that is documented within the Analysis section, laws that operate to permit an interception by law enforcement personnel (including foreign intelligence gathering), emergency services notifications, communications available to the public, first amendment right, e.g., reporting news, official acts of wire communication service providers or official acts of the Federal Communications Commission were bypassed.

(3) As indicated in the Title section above, the word **Who*** has been “flagged” for the purpose of signifying an association with the ***Word Aids:** section. (If you are using Excel 2007 or later version, select the **Analysis** tab.) See the top row that contains the words: intent, knowing, willful and proviso. The analysis of each jurisdiction's intercept laws was intended to be performed with a mindset of **not including** those instances of a wire communication intercept where the intercept would have been done contrary to a law's element that accounts for conduct that would be found to be “intentional,” “knowingly,” “willfully,” etc. In other words, an intercept done “unintentionally” could, in the strictest sense, be considered as “authorized by the Legislature” but it will not be listed. However, [**Proviso**] may be used to indicate that an element such as “secretly” or “privately” is accounted for within the analysis.

Background and Rationale re Key Question: Of necessity, to complete a somewhat detailed analysis of each of the fifty-two jurisdiction's wire communication intercept laws and then enumerate who was permitted to complete such intercept, it was determined that there must be a reasonable benchmark that would offer a simple “yes-no” answer to any scenario encountered during the analysis when a party to any given wire communication was a factor to the intercept.

There exists a general theme that has been adopted by academics and others who study, practice law, write about or report on the subject of wire communication intercepts. In general, the theme classifies a jurisdiction's wire communication intercept laws as being either “one-party” or (“two-party” or “all-party”) consent. At best the set of “coined terms” offer an undefined concept open to interpretation by anyone who uses them. Most likely, there is no authoritative definition for or set of associated rules that would be suitable to use to accurately designate who was permitted to intercept any given wire communication. Unfortunately, some caselaw has taken the step of elevating a coined shorthand phrase into an imprecise “rule,” which in turn adds false credence to myth. See *Lane v. Allstate* 969 P.2d 935, 944 NV S. Ct. (1998); *Lucas v. Fox Network News* 1:99-cv-2638-CAM 1, 19; 2000 U.S. Dist. LEXIS 22834 1, 7. For all practical purposes trying to fit a wire communication intercept law into the one-party v. two/all party scheme results in a confused and an irrational outcome. Of all the designated so called “all-party consent” jurisdictions only Maryland allows a party to intercept and, in general, those remaining only allow a non-party to intercept. See **Rationale to substantiate why a so called “all party consent state” permits a non-party intercept only:**... below.

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Those who are familiar with wire communication intercept caselaw know that it is not infrequent to find that opinions within that caselaw have incorporated those terms ("one party" and "all party"). Various opinions have also coined the use of "third party" in an attempt to describe who intercepted or who was permitted to intercept any given wire communication. As an example, see *Sullivan v. Gray* 324 N.W. 2d 58, 60 (1982).

After some consideration, it was concluded that the "one-party" or ("two-party" or "all-party") classification is inadequate. Then after gaining a general understanding of the federal and each jurisdiction's wire communication intercept laws, it was determined that the hierarchy of the U. S. legislative system should be used as the framework to answer the "Key Question." (See page 1 of 5 above under The Parameters:.) The answer is NO! One does not ask for consent from oneself to intercept a wire communication. Under the U.S. Code, Congress has: (1) legislatively bestowed consent for a party to intercept any given wire communication and (2) legislatively bestowed its authority to a party to give consent to a non-party to intercept any given wire communication. (18USC2511(2)(d)) The principle of legislatively bestowed consent to a party has flowed directly to at least 25 states that, in general, have used the federal language within the statutes enacted by each respective state's legislature. To name some, see AR, GA, HI, ID, IA, LA, MN, MS, MO in the Analysis section.

The rationale is that the Congress answered the question when it enacted 18USC2511(2)(d) that reads in relevant part: (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....** [Emphasis added.]

Congress's intent was set out in §801 of P.L. 90-351. Of the section's four subsections, subsection (b) provides the most insight into why Congress chose to regulate the conduct of a party to a wire communication. Subsection (b) follows: (b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, **it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized**, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings. [Emphasis added.]

Additionally, Senate Report 90-1097 explains Congress's intent and enumerates caselaw citations as the source that justifies the language of what was to be enacted, i.e., 18USC2510 et seq. and more specifically 18USC2511(2)(d). The relevant text of Senate Report 90-1097 follows: Paragraph (2)(c) provides that **it shall not be unlawful for a party to any wire or oral communication or a person given prior authority by a party to a communication to intercept such communication**. It largely reflects existing law. **Where one of the parties consents, it is not unlawful.** (*Lopez v. United States*, 83 S.Ct. 1381, 373 U.S. 427 (1963); *Rathbun v. United States*, 78 S.Ct. 161, 355 U.S. 107 (1957); *On Lee v. United States*, 72 S.Ct. 967, 343 U.S. 747 (1952)). **Consent may be expressed or implied.** 1968 U.S.C.C.A.N. 2112, 2182 [Emphasis added.]

In conclusion, when analysis is being conducted on any applicable element of a jurisdiction's wire communication intercept law, the "Key Question" is asked for the purpose of determining the "Entity Authorized to Intercept."

Rationale to substantiate why a so called "all party consent state" permits a non-party intercept only: Key Question: (Does one ask for or obtain consent to intercept a wire communication from oneself?) Answer: No, one does not. Therefore, if one does not ask oneself for consent to record the wire communication to which one is a party and if all parties must consent, then it can only follow that the one who obtained consent from all parties must not be a party, i.e., a non-party.

Authorities to substantiate the meaning of the word/term "all:" (It should be noted that most states include general provisions in law that statutes are to be construed using plain meaning.)

A more comprehensive and all-inclusive word than "all" can hardly be found in the English language. **There is a totality about it that few words possess. It is the whole, the sum of all the parts, the aggregate.** Unless there is evidence, extrinsic or intrinsic, to show that the parties intended to give it a lesser meaning it should be construed as covering the entire lands owned by the railway. (*In re CENTRAL OF GEORGIA RY. CO.* 58 F.Supp 807, 813 (1945)) [Emphasis added.] There is no restrictive meaning to be gathered from the use of the word 'any' instead of 'all'. The phrases 'any patent case' and 'all patent cases' are interchangeable. 'Any' means that we are free to choose for consideration each patent case one by one until we have ended by choosing 'all'. It, therefore, implies totality as plainly as does 'all'. The only difference is that 'any' arrives at totality by a series of choices for consideration, whereas **'all' arrives at totality in a single leap.** (*FISCHER & PORTER CO. v. BROOKS ROTAMETER CO. et al.* 86 F.Supp. 502) [Emphasis added.] The italicized phrase "all issues of law and fact" in the above excerpt defines the minimum scope of issues that a request for trial de novo must contain following an arbitration. Terms that are not defined by the statute in question must be accorded their plain and ordinary meaning unless a contrary intent appears.⁷ **The word "all" is undefined by the statute. The plain and ordinary meaning of that word is "being or representing the entire or total number, amount, or quantity."**⁸ No contrary intent appears in this statute. RCW 7.06.050 is plain on its face and is not susceptible to more than one reasonable interpretation. ... Our reading of the statute is consistent with the Legislature's clear statement of policy. Requests for modification of that policy should be directed to the Legislature, not this court.⁹ ...⁸ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 47 (3d ed. 1992).⁹ *State v. Givens*, 74 Wn. 2d 48, 49, 442 P.2d 628 (1968). (*PERKINS COIE v. STEPHANIE WILLIAMS, ET AL.* 84 Wn. App 733, 736-737 (1997))

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As an example, an analysis of §§ 5704(4) of the Consolidated Statutes of Pennsylvania proves that the Consolidated Statutes of Pennsylvania provide for a non-party intercept only and would in turn be SILENT with regard to whether or not a party is permitted to intercept a wire communication. (Note that Pennsylvania's law was most likely sourced from 18USC2511's language.)

As documented above, "consent" means consent and "all" means all and neither is a technical word nor has either acquired a peculiar meaning. For those who are of a mind that tends to favor a "presumptive and self preferred" method for construing a statute, please be informed that Pennsylvania's Legislature has anticipated such approaches and have enacted the following, which is applicable to the layperson, the attorney as well as the tribunal: TITLE 1 GENERAL PROVISIONS ... PART V. STATUTORY CONSTRUCTION ... Chapter 19. Rules of Construction ... SUBCHAPTER A CONSTRUCTION OF WORDS AND PHRASES ... § 1901. Rules of interpretation. In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed, ... § 1903. Words and phrases. (a) General rule.--Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; ... Subchapter B CONSTRUCTION OF STATUTES ... § 1921. Legislative intent controls. ... (b) Unambiguous words control construction.--When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. [Emphasis added.]

The subsection operates in a manner that requires all parties to consent, which then permits a "person" who is a non-party to intercept. Therefore, the Consolidated Statutes of Pennsylvania are silent with regard to whether or not a party is permitted to intercept the wire communication. To some extent a similar analysis may also apply to California's §§632(a), Connecticut's 52-570d(a)(1), Delaware's §§1335(a)(4), Florida's §§934.03(2)(d), Illinois §14-1 and §§14-2(a)(1)(A), Massachusetts §§99.B.4., Montana §§45-8-213(2), New Hampshire §§570-A:2.l(a), and Washington §§9.73.030(1)(a) but other provisions within a state's laws may speak to a party's conduct with regard to intercepting a wire communication.

§ 5703. Interception, ... of wire, ... communications.

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

(1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;

...

§ 5704. Exceptions to prohibition of interception and disclosure of communications.

...

It shall not be unlawful and no prior court approval shall be required under this chapter for:

...

(4) A person, to intercept a wire, ... communication, where all parties to the communication have given prior consent to such interception.

NOTE: The purpose of this NOTE is to demonstrate that the language of PA's § 5704 is the exact same language as that of the federal law (18USC2511(2)(d) and that PA's § 5704 was sourced from same except that the word "all" replaced the word "one" and that the word "has" was replaced by the word have "have" in order to achieve the correct tense - past tense. It is important to understand that PA's § 5704 is sourced after 18USC2511(2)(d)'s disjunctive "or" that separates the federal's language into two distinct and separate clauses where the first clause operates as Congressionally bestowed consent to a party and the second clause operates as a party's bestowed consent to a non-party. The word "consent" is found only in the second clause of 18USC2511(2)(d). The conclusion is that PA's § 5704 speaks to and operates on non-party intercepts only and that the Consolidated Statutes of Pennsylvania are silent with regard to a party's interception of a wire communication. Additionally, the language can only come from the second clause because of the plural of the word "party." Compare the underlined language of PA's § 5704 (above) to the underlined language of 18USC2511(2)(d) (below).

18USC2511(2)(d): (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception 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

It is absurd to believe that a party gives consent to oneself. To illustrate, consider that a given wire communication is established between two (2) persons – thus two parties. One party seeks and receives consent to intercept from the other party. It is absurd to believe that the intercepting party will give or has given oneself consent and to make it more bizarre suppose that the intercepting party denied giving consent to oneself. On the other hand it makes perfectly good sense that a non-party must obtain consent from one then the other – that is all parties; the plural.

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Had the PA Legislature inserted the word "other" after the word "all" and before the word "parties" then it would be unambiguously clear that the section operated on the parties. Had the PA Legislature used the words "every other party" in lieu of the words "all parties" then the language would be precise and would read: § 5704 It shall not be unlawful and no prior court approval shall be required under this chapter for: ... (4) A person, to intercept a wire, ... communication, where [every other party] to the communication ha[s] given prior consent to such interception. Had such language been adopted, then the goal of achieving ones privacy could have been met because such language would prohibit any undisclosed intercept among the parties and would exclude any non-party from intercepting any wire communication. Even better; strike the word "person" and use the word "party" and incorporate a definition for the word "party."

As further proof, compare and contrast Maryland's relevant subsection to the federal 18USC2511(2)(d) and Pennsylvania's language. Pay particular attention to the fact that the Maryland Legislature merely replaced the disjunctive "or" with a conjunctive "and" and then substituted the word "all" for the word "one" in the second clause of the federal language. The Maryland subsection is set out below: (Note that Maryland prohibits a non-party intercept.)

§ 10-402. Interception of communications generally; divulging contents of communications; violations of subtitle.

...

(c) Lawful acts.-

...

(3) It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the 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 this State. [Emphasis added.]

Compare MD to the other "all-party consent" states: California, Connecticut, Florida, Illinois, Massachusetts, New Hampshire and Washington.

And, the Washington Legislature's scheme seems to make it apparent that a party does not give oneself consent because the Legislature enacted a separate subsection that bestows consent to a party for an intercept while at the same time providing a means of maintaining the privacy of the other party or parties.

§§9.73.030 ...

(3) Where consent by all parties is needed pursuant to this chapter [9.73], 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 [Emphasis added.]

To reiterate, this language provides additional proof that a party does not give oneself consent. Here the Legislature recognized the fact that a party may choose to intercept and provided for that by requiring prior disclosure through "any reasonably effective" announcement "to all other parties engaged in the communication." As a result, any other party that remained engaged in the communication gave an implied or informed consent.

Furthermore, there is additional rationale to substantiate the NO answer to the Key Question: Does one ask for or obtain consent to intercept a wire communication from oneself? The Federal Communications Commission (FCC) was the first federal entity to consider and regulate the use of recording devices as it related to matters under its jurisdiction, namely interstate and foreign message toll service and facilities. The FCC's proceedings concerning recording devices has a history starting after WWII and it has been revisited and amended over time through 1986 when its last major proceeding was concluded pursuant to FCC 86-570 that is chronicled in the Federal Communications Commission Report Vol. 2, No. 2, 502. During one of its reviews, Docket No. 20840 In the Matter of Use of Recording Devices in Connection with Telephone Service, the FCC wrote the following: (See 67 FCC 2d 1392, 1399 ¶25.) 25. We conclude that the privacy interest to be protected in this matter is the prevention of the recording of telephone conversations by one party to the conversation without the prior knowledge and consent of all other parties.

It is clear the FCC did not envision that, beforehand, the recording party would ask oneself for consent to record.