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# Wisconsin Legislative Council



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Director

TO: SENATOR ANDRÉ JACQUE

FROM: Tom Koss, Staff Attorney, and Melissa Schmidt, Principal Attorney

RE: Legality of Recording Conversations in a Government Building

DATE: October 25, 2022 (revised February 7, 2023)

You asked about the legality of a municipality’s use of a device to record conversations in a governmental building under Wisconsin’s Electronic Surveillance Control Law (WESCL). This memorandum was updated to discuss relevant facts that you provided. Specifically, you said that a municipality installed cameras and microphones in various places throughout its city hall building and uses those devices to record conversations without informing visitors of the recording.

In short, the answer to your question depends on two factors: first, whether the parties to the conversation have a reasonable expectation of privacy, which is required for the communication to be considered an “oral communication” and gain the protections of WESCL; and second, whether any party to the conversation consented to the recording. If the parties to the conversation have a reasonable expectation of privacy and no party has consented to the recording, then recording the conversation is unlawful. If there is no reasonable expectation of privacy, or at least one party consented to the recording, either expressly or impliedly, then the recording is not in violation of WESCL.

## WISCONSIN’S ELECTRONIC SURVEILLANCE CONTROL LAW

WESCL generally prohibits various activities relating to intercepting (or recording),<sup>1</sup> or using a device to intercept, any “oral communication,” as defined by the WESCL, if an exception does not apply.<sup>2</sup> As is

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<sup>1</sup> To “intercept” a communication means to acquire “the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.” [s. [968.27\(9\)](#), Stats.] Therefore, using an electronic device to record an oral conversation is considered to be “intercepting” the communication.

<sup>2</sup> Specifically, WESCL prohibits the following: (a) intentionally intercepting, attempting to intercept or procuring any other person to intercept or attempt to intercept, any wire, electronic, or oral communication; (b) using, attempting to use, or procuring any other person to use or attempt to use any electronic, mechanical, or other device to intercept any oral communication; (c) disclosing or attempting to disclose the contents of any wire, electronic, or oral communication with the knowledge that the information was illegally intercepted; (d) using or attempting to use the contents of any wire, electronic, or oral communication with knowledge or reason to know that the information was illegally intercepted; (e) intentionally disclosing the contents of any oral, electronic, or wire communication obtained through a court order, unless otherwise allowed; or (f) intentionally altering any wire, electronic, or oral communication intercepted on tape, wire, or other device. [s. [968.31\(1\)](#), Stats.]

relevant to your question, one such exception allows a communication to be intercepted if at least one party to the communication consents.

Unless an exception applies, a person who intentionally intercepts or attempts to intercept an oral communication, or intentionally uses a device or attempts to use a device to intercept an oral communication, is guilty of a Class H felony. [s. [968.31 \(1\) \(a\) and \(b\)](#), Stats.]

## **“Oral Communication” and a Reasonable Expectation of Privacy**

An “oral communication” is defined as:

[A]ny oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation. “Oral communication” does not include any electronic communication. [s. [968.27 \(12\)](#), Stats.]

The Wisconsin Supreme Court has interpreted this definition to mean the statement must be uttered under circumstances in which the speaker has a reasonable expectation of privacy. In *State v. Duchow*, the Court opined, “An individual has a reasonable expectation of privacy when he or she has both (1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable.” [*Duchow*, [2008 WI 57](#), ¶ 20.]

The Court explained that ascertaining whether a person has such an expectation of privacy requires “an examination of the totality of the circumstances.” When applying this test, courts look at the following factors:

- The volume of the statements.
- The proximity of other individuals to the speaker.
- The potential for the communications to be reported.
- The actions taken by the speaker to ensure his or her privacy.
- The need to employ technological enhancements for one to hear the speaker’s statements.
- The place or location where the statements are made.

[*Duchow*, ¶ 22.]

## **Consent by One Party to the Communication**

As was mentioned, the WESCL allows for several exceptions to the general prohibition against intercepting oral communications. These exceptions are similar to those under the federal Wiretap Act. The exception that is potentially relevant to your question allows oral communications to be intercepted where one party consents to the interception. Specifically, WESCL provides that it is not unlawful: “[f]or a person acting under color of law (i.e., a public official) to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.” [s. [968.31 \(2\) \(b\)](#), Stats.]

Wisconsin courts have found that consent may either be expressly given or implied, based upon the surrounding circumstances, which indicate that the person knowingly agreed to the interception. For example, in *State v. Riley*, the Wisconsin Court of Appeals found that a prison inmate had been given

“meaningful notice” that his telephone calls over the institutional phones were subject to surveillance through a recorded warning before each telephone call, so his decision to engage in conversations over the telephone constituted implied consent to the interception. [*Riley*, [2005 WI App 203](#).] Specifically, the court stated:

Meaningful notice may include a signed acknowledgement form, an informational handbook or orientation session, a **monitoring notice posted** by the outbound telephone, or a recorded warning that is heard by the inmate through the telephone receiver, prior to his or her making the outbound telephone call.

[*Riley*, at ¶ 13 (citations omitted, emphasis added).]

## **ANALYSIS**

As noted above, for the WESCL to prohibit the interception of oral communications, the communication must be an “oral communication” as defined by the WESCL and an exception, such as the consent exception, must not apply.

### **Whether a Communication is an “Oral Communication” With a Reasonable Expectation of Privacy**

As was mentioned, whether a conversation can be legally recorded depends in part on whether the conversation was an “oral communication,” which is a communication in which the parties had a reasonable expectation of privacy.

The test to determine whether an expectation of privacy is reasonable is fact-specific. In the *Duchow* case, the Court found that a person who made bullying statements on a public school bus did not have a reasonable expectation of privacy in those statements because the statements were made in a public setting and the statements made were likely to be reported.

In a setting like a governmental building, it is possible for a person to engage in a public or private conversation. For example, it is likely that a private conversation meets the factors described in *Duchow* and provides the parties with a reasonable expectation of privacy if the conversation is at low volume, away from passersby, and between a small group of people with the expectation that no one will report what was said. In particular, a person is more likely to have a reasonable expectation of privacy if he or she takes steps to maintain privacy but a device is still able to record the conversation. On the other hand, a person engaging in a loud conversation with strangers or a large group of people is unlikely to have a reasonable expectation that the conversation will remain private.

### **Whether There is Consent by a Party to the Communication**

As previously described, even if statements are considered “oral communications,” the statements may nevertheless be lawfully intercepted if at least one party to the communication consents to the recording. Conversely, if no party to the conversation consents, then the recording is unlawful. This consent could either be expressly given or implied, based upon the circumstances.

In a governmental building, for example, a conversation could be legally recorded if one of the parties expressly consents to the recording, such as through a municipal employee’s receipt of an employee handbook that notifies employees of the recording.

A court may also look at the circumstances and find that a party to the recording has provided implied consent after being provided with “meaningful notice” of the recording. As the Wisconsin Court of Appeals noted in *Riley*, a court may consider circumstances such as the posting of a monitoring notice or the use of a signed acknowledgement form to determine whether a party had “meaningful notice.” In comparison to the Court’s decision in *Riley*, the failure to post a sign notifying people of the recording may lead a court to conclude that the parties were not provided with “meaningful notice” and thus did not impliedly consent to the recording. Without any sort of “meaningful notice” that recording may take place, a party has not provided implied consent.

## **CONCLUSION**

Wisconsin law generally prohibits intercepting, or recording, oral communications, unless an exception applies. If a person has a reasonable expectation of privacy in the communications and an exception does not apply, such as a party to the communications providing consent, then recording is unlawful. In a setting like a governmental building, factors that are likely to provide a person with a reasonable expectation of privacy include speaking at a low volume, away from passersby, and in a small group of people who are unlikely to report what was said. Consent may be expressly given or implied. Whether a party has given implied consent is a fact-specific determination and requires that at least one party was provided with meaningful notice of the surveillance. Without a sign or other form of monitoring notice, it may be difficult for a person recording a communication to claim that the parties to the communication impliedly consented to the recording.

Please let us know if we can provide any further assistance.

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