



## Illinois Supreme Court Strikes Down Illinois Eavesdropping Law

By: John Costello, Thomas J. Cunningham and Martin W. Jaszczuk

### Overview

In twin decisions handed down today, March 20, 2014, the Illinois Supreme Court has declared unconstitutional one of the nation's strictest eavesdropping laws, which prohibited the recording of any persons, even in public, unless both of those persons gave their consent. The decisions have broad implications for individuals and businesses, especially telemarketers. Businesses that engage in telemarketing in Illinois are no longer threatened with lawsuits for recording routine conversations when they notify the called parties of the intent to record. In addition, individuals who record public events and post to social media are no longer threatened with criminal penalty in Illinois.

### **People of the State of Illinois v. Melongo and People of the State of Illinois v. Clark**

In striking down the law on First Amendment grounds, the court held that "the recording provision is unconstitutional on its face because a substantial number of its applications violate the first amendment." Finding the statute to be overly broad, the court noted that "the statute as now written deems all conversations to be private and, thus, not subject to recording absent consent, even if the participants have no expectation of privacy." As examples of this overbreadth, the court commented that the statute would criminalize the recording of conversations that would never be considered to be private, including "a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others."

One of the two decisions involved Annabel Melongo, who spent nearly two years in prison for recording three telephone conversations she had with a court reporter supervisor at a state criminal court complex. Melongo called to correct an error in a court transcript, then posted audio of the phone calls on a website created to publicize her case. The other case involved DeForest Clark, who recorded conversations of himself along with an opposing attorney and a judge before whom they appeared in a contested child support matter. In both cases, the public nature of the proceedings was inconsistent with an invasion of privacy. Accordingly, the prosecutions under those statutes stretched the law too far and substantially burdened otherwise permissible public speech. The ruling from the Illinois Supreme Court comes more than two years after a federal appeals court in Chicago found this same law to be unconstitutional in its ban on recording police officers in public.



### Take Away

Federal law and the majority of state laws require one participant on a call to consent before the call may be recorded. While these statutes are content-neutral and advance important governmental and societal interests in privacy, today's decisions illustrate that the means to achieve those interests cannot substantially burden more speech than is necessary.

A minority of states like Illinois, however, require consent from all parties before a call may be recorded. The requirements in the other all-party states can typically be met simply by announcing that calls may be recorded for quality assurance purposes. While good arguments existed that this announcement eliminated any expectation of privacy, there was uncertainty in Illinois concerning whether such an announcement was sufficient to eliminate legal compliance risk. Today's decisions provide that clarity, and will likely serve as persuasive authority in the remaining minority states. Telemarketing companies in particular should take this as an opportunity to review their consent-to-record compliance procedures.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

**John Costello** | 312-443-0374 | [jcostello@lockelord.com](mailto:jcostello@lockelord.com)

**Thomas J. Cunningham** | 312-443-1731 | [tcunningham@lockelord.com](mailto:tcunningham@lockelord.com)

**Martin W. Jaszczuk** | 312-443-0610 | [mjaszczuk@lockelord.com](mailto:mjaszczuk@lockelord.com)