This memorandum responds to your inquiry on behalf of Land Trust Alliance regarding the privacy-related legal issues raised by the placement of video only or audio and video recording devices on land trust property that might capture images and/or audio. We limited our review to U.S. federal law and a high level sample of state law, using Michigan as a model state. We note that we have not conducted a state-by-state review and any land trust seeking to use recording devices should review the laws of the state in which the recording would take place.

SHORT ANSWER

Recording audio and/or images on land trust property is governed by federal and state audio and visual recording statutes. Statutes covering audio recording, sometimes known as wiretap statutes and sometimes referred to as eavesdropping statutes, are usually separate and distinct from the statutes governing recording of visual-only material. Violation of the audio or video recording statutes may give rise to one of four standard invasion of privacy torts. The privacy torts are all state law based and most frequently arise out of common law, further developed by case law, but occasionally come from statutes. Consent is usually a defense to violations of these various state and federal laws, and often these laws are not violated if the subject of the recording or privacy violation has no reasonable expectation of privacy. Notice of the presence of the recording devices can create both implied consent and may negate an otherwise reasonable expectation of privacy.

VIDEO RECORDING

Federal Law

There are few federal laws that specifically address recording and transmission of images. The Video Voyeurism Prevention Act of 2004\(^1\) prohibits the capture of images of the naked or undergarment clad private parts of an individual, captured without their consent and under circumstances where the individual could reasonably believe that they could disrobe in privacy.

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\(^1\) 18 U.S.C.A. § 1801.
To ensure compliance with the Video Voyeurism Prevention Act, cameras generally should not be placed in locations where someone could reasonably believe that they could disrobe in privacy, like secluded camping grounds or in restrooms. Land trusts could still place video recording devices in areas where people might believe that they could reasonably disrobe in privacy, as long as there were prominent notifications of the recording, as then no individual could reasonably believe that they could disrobe in privacy.

State Law

Most states also have some form of either video voyeurism statute, or video recording statute. The majority of states prohibit the installation or use of cameras, or similar imaging devices, when the recording takes place in a location where the subject of the recording has a reasonable expectation of privacy and has not consented to being taped. Such locations might include a public bathroom, locker rooms, changing areas, hotel rooms and private residences. Many of these state laws are video voyeurism laws that govern surreptitious recording. Depending on the state, violations of a video voyeurism or video surveillance law may be a misdemeanor or a felony, carry monetary fines of up to $30,000 and can carry a prison term of up to 6 months to 3 years.

Many state video recording statutes prohibit video recording (1) without consent and (2) in places outside of the public view or in private places. While the “consent” and “private place” elements are different, they may both be defeated by the placement of clear and conspicuous notification that recording is occurring.

A “private place” is generally one where a person may reasonably expect to be safe from surveillance, or, in other words, where a person has a reasonable expectation of privacy. Whether or not a recording occurring on land trust property is a violation of a state video recording statute could turn on whether the person being recorded had a reasonable expectation of privacy in the place in which they were being filmed. Even if the person being recorded was trespassing, an argument could be made that a reasonable person could expect to be free from surveillance on secluded land trust property. However, if the land trust were to place clear and prominent notices of the presence of the recording devices, it would be hard to argue that anyone

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4 Alabama, California, Florida, Hawaii, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin.
7 Georgia Code § 16-11-62; 720 Illinois Compiled Stat. 5/26-4. Some states, such as Florida and Mississippi, have video voyeurism statutes that more specifically seek to prohibit and penalize surreptitious recording with lewd intent or for sexual gratification. Fla. Stat. Ann. § 810.145; Miss. Code Ann. § 97-29-63.
in the area could expect to be safe from surveillance, thus defeating the reasonable expectation of privacy. Courts in both Texas and Michigan have found that a notice displayed on a dressing room mirror that the fitting room is under surveillance negates the occupant’s reasonable expectation of privacy in what is otherwise generally considered a private space.8 Once informed of the surveillance, no reasonable person could expect to maintain privacy inside the fitting room.

Notice will also likely defeat the consent element. “Consent” is generally not defined or clarified under state video recording laws. Express written consent prior to making the recording is the most effective form of consent, but probably not practical on most land trust property. However, notice may create implied consent. Not every state has considered implied consent, and few have considered it in relation to video recording, but some state courts have determined that clear notification prior to recording a telephone conversation creates implied consent if the person so notified remains on the line.9 Extrapolating to the video recording context, placing notification in areas where recording may occur could create implied consent.

In addition to this common formulation of video recording laws some state statues also specifically prohibit making a video recording of another person in that person’s residence without their consent.10 Land trusts using video recording devices should be careful not to place them in locations where they might capture images of people in their own homes.

**Michigan**

Michigan law prohibits an individual from installing in a private place, “any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place” without the consent of the person entitled to privacy in that place.11 A first-time violation is a felony, punishable by up to two years imprisonment and a fine of up to $2,000.00.12 It is also a felony to distribute or transmit images recorded in violation of the law if the distributor knows or has reason to know that the image was obtained in violation of the law.

Michigan courts have defined “private place” as one where a reasonable person would not expect to be disturbed by others or be subject to surveillance, and have pointed out that whether or not a place is “private” is a question of fact.13 In Michigan, courts have found public restroom stalls to be private places14, as well as private bedrooms, even when a non-occupant exposes herself to

10 See, e.g., 720 Illinois Compiled Stat. 5/26-4(a-6), which specifically prohibits such recordings if they are made from outside the person’s residence.
the occupant in that bedroom. In these cases, recording devices violated the Michigan statute. In none of these cases, however, was notice provided of possible surveillance. Michigan courts have not specifically considered whether notice negates an expectation of privacy under the video recording statute, but in considering a privacy law violation the Michigan Court of Appeals said that notification of surveillance in a dressing room negates any reasonable expectation of privacy of the dressing room occupant. Moreover, Michigan courts do recognize that consent under the recording statute can be either express or implied. Michigan courts have not considered whether notification creates implied consent with respect to video recording. Whether or not express or implied consent has been given is a question of fact to be determined by a jury.

It is likely that if a land trust were to install a video or image recording device on property in Michigan with clear notice to the public that such recording devices were in use, they would not violate the Michigan video recording statute.

**AUDIO RECORDING**

**Federal Law**

Under the federal wiretap statute (the “Wiretap Act”) it is illegal to record and transmit oral communication without the consent of at least one party to the communication. If oral communication is recorded in violation of the law, any party to the intercepted communication may recover civil damages for actual damages suffered or statutory damages of up to $10,000, plus punitive damages and attorney’s fees. It is also illegal to intentionally disclose the communication if the person knows, or has reason to know, that the information was obtained in violation of the law. Further, communication recorded in violation of the Wiretap Act cannot be used in evidence in a state or federal proceeding. Finally, even if one party consents to the conversation, the Wiretap Act does not protect recording that is done for a tortious or illegal purpose, like recording with the intent to use the recording to blackmail.

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15 670 NW 2d 675. In *Lewis v. Legrow*, the court rejected the plaintiff’s claim that surreptitiously filming a sexual encounter in his bedroom was not a violation of § 750.539d. Plaintiff had claimed that his bedroom was not a “private place” with respect to the woman he had recorded, since he was present and was only filming that which he himself could see.


17 *Lewis v. Legrow* at 686.


20 18 U.S.C. 2511(2)(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 an 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.”).

However, even without consent of either party, it is only illegal to record oral communication that is made with the expectation that the communication is not subject to interception. If the recording devices are in plain view and there are signs indicating that recording or transmission is occurring, two arguments can be made: first, that there can be no reasonable expectation that oral communication will not be intercepted and no additional consent is necessary; second, that because the parties to the conversation have been informed of the recording, continuing communication indicates implied consent to the recording.

State Law

Most state recording statutes, like the federal law, only require the consent of one party to a communication to be able to record the communication. Approximately a dozen state statutes\(^{22}\) specifically require the consent of all parties to a conversation for the recording to be legal. Where land trusts are placing recording devices on land trust property the one- or all-party consent distinction is probably irrelevant as it is unlikely that any land trust representative is a party to the communication, so no party has given clear, prior consent to the recording.

Although “consent” is not defined under most state laws, it is likely that clear and conspicuous notification that recording is taking place is sufficient to constitute consent. Not every state has visited the issue of implied consent, but some state courts have determined that clear notification prior to recording a telephone conversation creates implied consent.\(^ {23}\) The recorded party has the ability to leave the conversation after the notification, so to remain would indicate implied consent. If notices are placed at common entrances to the property, like roads or trails, and periodically in prominent places on the property, particularly where the recording device is located, visitors would have the option to leave after viewing the notification that recording might occur, creating implied consent.

Illinois

Most state laws banning audio recording, like the federal Wiretap Act, extend only to private conversations. Some, however, prohibit recording without consent regardless of whether the conversation is a private one. Most of these state statutes would not extend to open recording, or recording with notice. At the far end of the spectrum, Illinois prohibits recording of a conversation without consent even if the conversation is not private, and may even prohibit recording that is open and obvious.\(^ {24}\) In recent years Illinois State’s Attorneys have brought a number of charges under the Illinois eavesdropping statute for making audio recording of police officers performing their public duties in public spaces. Because the Illinois law is so broad, audio recording devices should not be used on Illinois property without conducting a comprehensive review of Illinois statutory and case law.

\(^{22}\) California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington are two-party consent states. The Nevada statute appears to be a one-party consent statute, but case law indicates that courts may interpret the Nevada statute to have an all-party consent requirement, and the Delaware wiretap statute only requires consent of one party, but the state also has a privacy law that makes it illegal to intercept any “means of communicating privately” without the consent of all parties.


In Michigan, any person who uses any device to overhear or record a private conversation without the consent of all parties is guilty of illegal eavesdropping. “Eavesdropping upon private conversation” is a felony, punishable by up two years in jail and a fine of up to $2,000. Further, divulging information obtained in violation of the above is a felony and Michigan law also provides a civil remedy, including actual and punitive damages.

Unlike Michigan’s video recording statute, this eavesdropping does not require that the parties be in a private place, just that the conversation be private. “Private conversation” is not defined in the statute but the state Supreme Court determined that the courts should look at whether the parties “intended and reasonably expected that the conversation was private.” Whether or not a conversation is private is generally a question of fact. Although it might be reasonable for people on secluded land to believe that their conversation would be private, clear and conspicuous notification that recording may take place should eliminate a person’s reasonable expectation that a conversation would be private. In 2011, the Michigan Supreme court determined that no reasonable juror could believe a conversation was private where the plaintiffs were aware that there were camera crews in the vicinity and evidence of at least one camera openly filming in the room where the supposedly private conversation took place.

In addition to the eavesdropping and recording statute, Michigan law also prohibits the installation or use, in any private place and without the consent of those entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place, and the distribution of a recording or visual image from such installation. This statute implicates both audio and video recording devices. As the statute only applies to devices in a “private place” where the individual is “entitled to privacy,” clear and conspicuous notification should also eliminate the expectation of privacy. Notice may also create implied consent in Michigan. Michigan courts do recognize that consent may be implied, although whether consent was given is a question of fact.

Recording audio and video together implicates at least two different sets of state statutes, compounding the possible legal issues. Because federal and state audio recording laws are generally stricter than video recording laws, it is preferable to use video-only recording if the purpose of the recording can be accomplished without recording audio.

**INVASION OF PRIVACY TORTS**

26 Mich. Comp. Laws § 750.539e.
27 Mich. Comp. Laws § 750.539h.
30 *Bowens v. Ary*.
31 Mich. Comp. Laws § 750.539h.
32 *Lewis v. LeGrow* at 686.
Case law or state statutes generally recognize four standard invasion of privacy torts: (1) intrusion upon another’s seclusion or into his private affairs, (2) public disclosure of embarrassing private facts, (3) publicity that places someone in a false light in the public eye, and (4) appropriation of another’s likeness for the defendant’s advantage.\(^{33}\) Intentional infliction of emotional distress, although not a privacy tort per se, is often used as a remedy for certain invasions of privacy. It usually requires proof of “extreme and outrageous conduct,” which limits its scope.

Where they exist, the common privacy torts are state causes of action; there are no federal laws recognizing them. The vast majority of states recognize some form of right to privacy, although a state may not recognize all four torts.\(^{34}\) By 1998, North Dakota and Wyoming were the only states not to recognize any invasion of privacy cause of action.\(^{35}\) In some states, like Minnesota, the privacy torts arise from common law and are recognized by the courts. Courts in New York and Nebraska have declined to acknowledge common law privacy torts, and instead those states have passed statutory protection for certain invasions of privacy.\(^{36}\) Although states generally recognize certain common elements to these torts, the specific formulation of the tort and how courts apply that formulation to the facts at hand vary from state to state.

**Intrusion Upon Seclusion**

This tort recognizes a cause of action against someone who intrudes upon the solitude of another without consent, regardless of whether that intrusion is physical or not, if that intrusion would be highly offensive to a reasonable person. In California the action for intrusion has two elements: (1) intrusion into a private place or conversation, (2) in a manner highly offensive to a reasonable person.\(^{37}\) An intrusion claim turns on the way private information is gathered and does not require publication of the private information. Consent is a defense to intrusion upon seclusion claims.

**Public Disclosure of Private Facts**

The public disclosure tort imposes liability for (1) making public (2) a matter concerning the private life of another if the matter publicized is of a kind that (3) would be highly offensive to a reasonable person and (4) is not of legitimate public concern.\(^{38}\) Most states recognize this tort, but Nebraska, New York, North Carolina, North Dakota, Rhode Island, Utah and Virginia do

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\(^{34}\) Minnesota, for example, recognizes all of the privacy torts except false light, all stemming from common law.

\(^{35}\) *Lake v. Wal-Mart Stores*, 582 N.W.2d 231 (Minn. 1998).

\(^{36}\) N.Y. Civil Rights L. § 50-51.

\(^{37}\) *Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998).

Liability stems from disclosure of facts, even if those facts are true. In some states a plaintiff must show that a matter is not of public concern; in others this is a defense to the tort that must be raised by the defendant. Consent is a complete defense to a public disclosure of private facts claim.

False Light

Generally speaking, a false light claim requires (1) public disclosure (2) of a matter that places another in a false light (3) that is highly offensive to a reasonable person. As falsehood is a required element for a successful false light claim, it is unlikely that the publication or use of recorded content would give rise to a false light cause of action unless the recorded content was truncated, edited or presented in a way that falsely attributed certain words or deeds to those recorded. If recorded content is made public, it should not be accompanied by commentary about the subjects that could possibly be untrue.

Appropriation

Appropriation occurs from the use of another’s name, likeness or other personal attribute for an exploitative purpose. Generally appropriation only occurs when another’s name or likeness is used for advertising or trade purposes. Some states also recognize that appropriation can occur where the use provides a noncommercial benefit. The Indiana Supreme Court found that a professor who created websites and email accounts containing the names of rivals and used them to hurt the reputation of his rivals had appropriated their likeness for his own benefit because the appropriation allowed him to pursue a personal vendetta. A Massachusetts district court, however, found that criticizing a real estate agent on a web site and posting his photograph to that site was not misappropriation, as the photo was not published in order to take advantage of the real estate agent’s reputation for purposes of publicity. Some states, on a right of publicity theory, either only or additionally recognize an appropriation tort when the plaintiff has significant commercial value in their name or likeness, value which has been exploited by the party appropriating their name or likeness.

Consent

Consent is generally a complete defense to invasion to privacy torts. Notification of surveillance may also negate the subject’s reasonable expectation of privacy, leaving them no privacy claim. Consent here can be express or implied. Notice may provide implied consent. In Gillett v.


See, e.g., N.Y. Civil Rights L. § 50 (provides civil and criminal remedies for appropriation when a “name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade” without the person’s consent); Cal. Civ. Code § 3344 (damages available where someone knowingly uses another’s “name, photograph or likeness for purposes of advertising … or for purposes of solicitation of purchases of products” without consent).


Texas, a fitting room wall displayed a notice stating “these fitting rooms are under constant surveillance.” The Texas Court of Criminal Appeals ruled that a security guard peering into the stall to observe the plaintiff trying on a sweater and then concealing it in her bag and leaving the store was not an invasion of the plaintiff’s right to privacy. The notice relieved the store of liability because no reasonable person would have an expectation of privacy inside the fitting room.

**Michigan Privacy Torts**

Michigan recognizes a common law right of privacy, and through it all four of the invasion of privacy torts. Violation of the Michigan audio and video recording statutes gives rise to criminal and civil invasion of privacy causes of action.

Consent, either express or implied, can waive the right of privacy in Michigan. A waiver of the right, however, may be limited in scope. Moreover, although waiver or consent may be implied, an implied waiver requires “clear, unequivocal and decisive act of the party showing such purpose,” although Michigan courts are not clear on what such “clear” or “decisive” act is required. The scope and existence of a waiver is a question of fact for a jury unless reasonable minds cannot disagree about the consent. Michigan courts have found that consent existed for a specific public use of private information in church activities where the plaintiff had generally consented to accept the discipline of the church. However, they have also found that consent may be limited, particularly where consent is provided based on deceit. Although not defined as a consent issue, a Michigan Court of Appeals determined that placing prominent notices on a dressing room mirror notifying the occupant that the dressing room was under surveillance negated the reasonable expectation of privacy of the occupant and found no privacy violation. The use of clear and prominent notices near recording devices would likely negate a right of privacy in Michigan, either by creating implied consent or by defeating the subject’s reasonable expectation of privacy in the subject matter of the action or conversation.

**Intrusion Upon Seclusion**

There are three necessary elements to the Michigan intrusion tort: (1) the existence of secret and private subject matter, (2) a right of the plaintiff to keep that subject matter private, and (3) information collection methods that are objectionable to a “reasonable man.” Publication is not a necessary element for an intrusion claim in Michigan. Rather, the action focuses on the manner in which the information was obtained. Additionally in Michigan, privacy is not

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43 588 S.W.2d 361 (1979).
47 *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881).
49 *Lewis v. Legrow* at 687.
absolute and is subject to the legitimate interests of others. If the intruder has a legitimate interest in the subject matter, the plaintiff does not have the right keep the subject matter private. For example, an employer has a right to investigate an employee accused of illegal conduct in the course of employment, a legitimate interest that negates the privacy interest of the employee. In investigating an employee’s claim of on-the-job injury, the employer used a telephoto lens to take pictures of the employee inside his home. Although the Michigan Court of Appeals agreed that the use of the camera was an intrusion that might be objectionable to a reasonable person, the matter was not one which the plaintiff had the right to keep private because of the employer’s legitimate interest in investigating the matter. The argument could be made that a land trust has a legitimate interest in capturing images of activity on the property, particularly if the recording devices are in response to prior evidence of such activity. Moreover, notification of recording devices, could give rise to implied consent.

Public Disclosure of Private Facts

In Michigan the cause of action for public disclosure of private facts requires the (1) disclosure of private information not already open to the public, (2) regarding an issue of no legitimate concern to the public and (3) the publication of the private fact would be highly offensive to a reasonable person. Michigan courts have determined that certain newsworthy events and subject matters are matters of legitimate public concern, repudiating this privacy right. In other situations Michigan courts have found that while a general topic, like abortion, might be of legitimate public interest, disclosing the identities of specific patients undergoing the procedure were not. Regardless of whether the matter publicized is of legitimate public concern, consent can be used as a defense to a public disclosure of private facts claim.

False Light

Michigan recognizes the false light tort. To win on a false light claim, a plaintiff must show that the defendant made statements that create unreasonable and highly objectionable publicity, attributing to the plaintiff characteristics, conduct or beliefs that are false, and that the defendant presented these statements to the public. Falsity is a required element for a successful false light claim, so it is unlikely that that the publication or use of recorded actual events would give rise to a successful false light cause of action unless the recorded content was presented in a way that falsely attributed certain words or deeds to those recorded.

Appropriation

Michigan precedents recognize the appropriation theory of liability, but few provide guidance on how it should be applied in Michigan. Michigan courts recognize that if the matter is newsworthy or of legitimate public concern, the First Amendment bars appropriation liability for

the use of a name or likeness.\footnote{Battaglieri v. Mackinac Ctr. for Pub. Policy, 680 N.W.2d 915 (Mich. Ct. App. 2004).} Whether a matter is of sufficient public interest to be protected from appropriation liability is generally decided by the court as a matter of law. The court will consider whether the publication was made predominantly for commercial purpose, but a commercial purpose will not necessarily establish appropriation.\footnote{Battaglieri v. Mackinac Ctr. for Pub. Policy at 920-21.} For example, the use of the name and likeness of the head of an education union by an education policy organization was found to be a matter of public interest protected from the appropriation tort despite also containing a clear request for charitable contributions because it discussed important public policy questions.\footnote{Battaglieri v. Mackinac Ctr. for Pub. Policy.}

**USE IN LEGAL PROCEEDINGS**

The rules regarding the admissibility of audio or video recordings in a court procedure will vary by state. Unless protected or privileged, generally material recorded lawfully is admissible in civil proceedings, although using it opens up the strong possibility that the subject will claim that the material was recorded in violation of the law. The federal Wiretap Act prohibits disclosure of material if the person disclosing the information knows that it was recorded in violation of the act. Under the Michigan statutes, even material recorded unlawfully may be admissible in court. Unlike the Wiretap Act, Michigan law does not specifically prohibit the use of material obtained in violation of the eavesdropping statute. Michigan courts have not specifically addressed the question of whether a recording obtained in violation of the state eavesdropping statute is nevertheless admissible in civil court, but Michigan courts have generally refused to suppress evidence where the statute does not contain a specific suppression remedy.\footnote{Turkel, When Words Come Back to Haunt You, Michigan Bar Journal (Oct. 2008), available at http://www.michbar.org/journal/pdf/pdf4article1421.pdf.} Although the evidence may be admissible in Michigan state court, the use of such evidence is limited by the practical considerations of having to admit to a violation of the law in order to use it.
PRACTICAL GUIDELINES

1. **Provide clear and prominent notice.** Notice can create implied consent and it can also negate a reasonable expectation of privacy, both of which are defenses to many possible recording and privacy violations. Additionally, placing the recording devices in the open, rather than hiding them, may put those being recorded on additional notice that may imply consent or negate a reasonable expectation of privacy.

2. **Placement of notices:** Notice of recording devices should be clear and conspicuous. Ideally such notices would be placed in areas where audio or visual recording devices are located. If there are any areas on the property where rules or notices are placed, such as a list of rules or notices at the entrance to the property or on a public map, notification of the recording device should be included there as well. Notice could also be placed at known entrances to the property like roads or trails. If the land trust has a website, or there is a website dedicated to the property, notice should also be placed on the website.

3. **Do not provide notification that recording is for one purpose when it may be used for another.** Do not provide notification that recording will only be used for one purpose, such as for documenting animal behavior, if you intend to use the recording for other purposes, like monitoring and prosecuting trespassers. While notification will likely create implied consent, some courts have held that consent can be limited to the purpose for which it was given.

4. **Pay particular care to placement of video or imaging devices near areas of heightened expectation of privacy,** such as public restrooms, campground changing areas or secluded camping areas. Under most state laws it is still probably fine to place cameras in these areas as long as notice is provided. If cameras are placed in these areas, additional care should be taken to ensure that appropriate and conspicuous notice is provided, such as placing the notice prominently on the door to the restroom.

5. **Do not use audio recording devices if visual-only devices will suffice.** Audio recording laws tend to be separate and distinct from image-only recording devices, and they tend to be stricter. If using non-audio recording devices serves the intended purpose, it is preferable to avoid compliance with wiretap laws by not recording audio.

6. **Do not use audio recording devices in Illinois.** The Illinois eavesdropping statute is quite broad and audio recording devices should not be used in Illinois without conducting a comprehensive review of Illinois statutory and case law.

7. **Do not use recorded material for commercial gain,** such as using images of poachers or dumpers in a fundraising appeal.

8. **Limit publication.** While notification may eliminate any liability under recording statutes or privacy torts, consent and other elements of these laws are generally questions of fact. To avoid protracted and expensive legal conflicts, publicize recordings only as necessary.

Check your state laws. Any land trust seeking to use recording devices should review the laws of the state in which the recording would take place and take care to craft a recording device policy and procedure that complies with relevant state laws. Illinois, for example, prohibits recording of a conversation without consent even if the conversation is not private, and may even prohibit recording that is open and obvious.