

Summary of Research Related to Use of Ambient Intelligence Tools in Clinical Settings

There is no New York law or regulation addressing the use of ambient intelligence tools generally or in clinical settings, specifically. New York regulates the recording of conversations under the NY Penal Law provisions eavesdropping, which makes it a felony to “unlawfully engage[] in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.”¹ Each of these constitutes “eavesdropping” and each is defined to apply to situations in which *at least one party to a conversation does not consent* to the overhearing or recording of the conversation, meaning New York is generally a “one-party consent” state.² Thus, if a provider consents to the use of ambient intelligence tools in their clinical encounters, any overhearing, recording, transcription, or other collection of the provider’s conversations with patients would not violate New York’s eavesdropping laws.

- “**Wiretapping**” means “the intentional overhearing or recording of a telephonic or telegraphic communication 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.”³ “Telephonic communication” requires a transfer containing a “human voice” by use of “wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications” and “any electronic storage of such communications.”⁴ This includes transfers made only in part through wires, cables, or similar connections.⁵

When ambient intelligence tools are used in a clinical setting, the prohibition on wiretapping would be most applicable in the context of a telehealth visit during which neither the patient or provider has consented to the use of such tools. In-person encounters in which wires, cables, or other connections are not used to transmit a conversation would not be subject to the wiretapping law.

- “**Mechanical overhearing of a conversation**” means “the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.”⁶ This type of eavesdropping also would not apply in the context of a clinical encounter involving ambient intelligence tools as the provider (one party to the conversation) is present for and involved in the conversation.
- “**Intercepting or accessing of an electronic communication**” means “the intentional acquiring, receiving, collecting, overhearing, or recording of an electronic communication, without the consent of the sender or intended receiver thereof, by means of any instrument, device or equipment, except when used by a telephone company in the ordinary course...”⁷ “Electronic communication” means “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system,” subject to various exceptions not applicable here.⁸

¹ N.Y. Penal Law § 250.05.

² N.Y. Penal Law § 250.00; *Flagler v. Trainor*, 663 F.3d 543 (2d Cir. 2011).

³ *Id.* at (1).

⁴ *Id.* at (3).

⁵ *Sharon v. Sharon*, 558 N.Y.S.2d 468 (Sup. Ct. 1990).

⁶ N.Y. Penal Law § 250.00(2).

⁷ *Id.* at (6).

⁸ *Id.* at (5).

Restrictions on intercepting or accessing of an electronic communication would have limited application regarding use of ambient intelligence tools in the clinical context, similar to wiretapping above. This law would also most logically apply in the case of a telehealth visit during which neither the patient or provider has consented to the use of such tools and recording of conversations during in-person encounters would not fall within this provision's scope.

A number of legislative and administrative policies regarding the use of AI have been proposed or implemented over the past few years in New York, none of which directly address ambient intelligence tools. For example:

- New York City Department of Consumer and Worker Protection finalized a rule implementing legislation that requires employers who use automated employment decision tools for hiring, firing, and promotion decisions to, among other actions, conduct “bias audits” targeted at their use of such tools.⁹ Compliance with and enforcement of the rule has been limited to date.¹⁰
- The New York Assembly considered but did not pass A.8129, the “New York Artificial Intelligence Bill of Rights,” during the last legislative session. This bill would generally require consent to the use of automated systems that collect data, where possible, as well as requiring transparency with respect to New York residents’ interactions with AI-enabled systems.¹¹
- New York’s Office of Information Technology Services issued a policy, NYS-P24-001, titled “Acceptable Use of Artificial Intelligence Technologies,” in January 2024. The policy applies to “State Entities” and “State Agencies,” including third parties (such as consultants, vendors, and contractors) that use or access any information technology resource for which the entity has administrative responsibility and requires that the use of AI technology be disclosed by the State Entity where members of the public interact with its systems employing such technology.¹²

Until more substantial legislation is passed that addresses ambient intelligence, use of AI specifically in clinical settings, or consumers’/patients’ affirmative consent to or rights to opt-out of the use of AI-enabled tools and systems with which they interact or to which they are exposed, clinical entities and providers need not affirmatively obtain patient consent for the use of ambient intelligence tools under applicable law. Nonetheless, due to the sensitivity and generally confidential nature of personal health information and other information discussed during clinical encounters between patients and providers, as well as the increasingly prevalent cybersecurity threats to organizations that operate in the healthcare sector, it may be advisable that informed consent be obtained for each patient regarding, or that each patient be given the opportunity to opt-out of, the use of ambient intelligence tools during such encounters.

⁹ <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=Advanced&Search>; <https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf>. There is a parallel bill pending in the New York Assembly, A. 9314, that would apply similar requirements throughout New York State. <https://www.nysenate.gov/legislation/bills/2023/A9314>.

¹⁰ https://www.wsj.com/business/new-york-city-passed-an-ai-hiring-law-so-far-few-companies-are-following-it-7e31a5b7?st=vrech7k55lxweiy&reflink=desktopwebshare_permalink

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[https://www.nysenate.gov/legislation/bills/2023/A8129#:~:text=2023%2DA8129%20\(ACTIVE\)%20%2D%20Summary,properly%2C%20and%20with%20meaningful%20oversight](https://www.nysenate.gov/legislation/bills/2023/A8129#:~:text=2023%2DA8129%20(ACTIVE)%20%2D%20Summary,properly%2C%20and%20with%20meaningful%20oversight).

¹² https://its.ny.gov/system/files/documents/2024/01/nys-p24-001-acceptable-use-of-artificial-intelligence-technologies-_1.pdf.

In light of the foregoing and the recent increased scrutiny of AI by lawmakers and regulators, CHCANYS members who desire to employ ambient intelligence tools in clinical encounters may decide to implement procedures through which they can obtain consents from both providers and/or their patients prior to a clinical encounter.

- ***For providers***, consents can be most readily obtained at annual trainings (for existing providers) or during initial onboarding (for new providers). Obtaining from each provider a blanket consent for the use of ambient intelligence tools in all of the provider’s clinical encounters with patients would be the easiest to administer, collect, and maintain for CHCANYS members. If providers consent to the use of ambient intelligence tools, such consent would satisfy New York’s one-party consent rule to guard against potential violations of eavesdropping laws, to the extent applicable (i.e., patient consent to the use of the tool would not be required under current law). A form of blanket consent to the use of ambient intelligence is attached hereto as ***Exhibit 1***.
- ***For patients***, informed consents, while not required under current law if the provider has already consented to the use of ambient intelligence tools, may still be appropriate in the clinical setting and can be most readily obtained during the intake process or upon the provider first entering the exam room. A form of patient consent to the use of ambient intelligence is attached hereto as ***Exhibit 2***.