Employment Law Ethics – Surreptitiously Recording Conversations

American Petroleum Labor Lawyers Association

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A. Ethical Rules Regarding Surreptitious Recording By A Lawyer

1. Texas

Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The question is whether a lawyer's failure to tell someone that they are recording a conversation with them inherently constitutes "dishonesty, fraud, deceit or misrepresentation." In 2006, the Professional Ethics Committee for the State Bar of Texas concluded that it did not. However, the committee found that secret recordings by lawyers were subject to other ethical limitations.

Specifically, Texas Ethics Opinion Number 575 (2006) concluded that the Texas Disciplinary Rules of Professional Conduct did not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that: (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client; (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05; (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded; and (4) the recording is not contrary to a representation made by the lawyer to any person. This opinion overruled prior Texas ethics opinions to the contrary, and cited to the ABA's 2001 opinion on the issue (described below) as partial justification for changing its position.

2. The ABA And Other States

a. The ABA

In 1974 the ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 337 prohibited secret recordings, reasoning that secret recordings would be tantamount to dishonesty or misrepresentation. The ABA affirmed this position a year later and stated that a lawyer was also ethically prohibited from directing an investigator to tape-record a conversation without the knowledge of the other party.

The ABA withdrew Opinion 337 in 2001. Its current position, set forth in Formal Opinion 01-422, is that "[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules." The ABA opinion advises that a lawyer may not make secret recordings in violation of the law "nor falsely represent that

a conversation is not being recorded." In reaching this new position, the ABA noted that its prior position relied in part on the prohibition against the appearance of impropriety, which does not appear in the Model Rules. Further, Model Rule 4.4, dealing with "respect for rights of third persons," proscribes "means that have no substantial purpose other than to embarrass, delay or burden a third person," and "methods of obtaining evidence that violate the legal rights of such a person."

b. Other States

Many states have followed the lead of the ABA, and removed the per se ethical bar against lawyers secretly recording conversations. *See, e.g.*, Alaska Ethics Op. No. 2003-1 (2003) (electronic recording of a telephone conversation by a lawyer without consent of the other participant(s) to the conversation is not per se unprofessional conduct if the recording is not prohibited by law or regulation); Ariz. Ethics Op. No. 2000-04 (2000) (attorney may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the attorney concludes that such taping is not prohibited by federal or state law); Ariz. Ethics Op. No. 90-2 (1990); D.C. Ethics Op. No. 229 (1992) (surreptitious tape recording not a violation where other party – government agency – reasonably should not expect that discussions were confidential and should expect that such discussions will be memorialized in some fashion by the investigated party's attorney); Haw. Formal Ethics Op. No. 30 (1995); Idaho Ethics Op. No. 130 (1990); Kan. Ethics Op. No. 96-9 (1997); Ky. Ethics Op. No. E-279 (1984); Me. Ethics Op. No. 168 (1999); Mich. Ethics Op. No. RI-309 (1998); Miss. Ethics Op. 203 (1992); *Netterville v. Miss. State Bar*, 391 So. 2d 878 (Miss. 1981); N.Y. City Ethics Op. No. 80-95; N.Y. County. Ethics Op. No. 696 (1993); Okla. Ethics Op. No. 307 (1994); Or. Formal Ethics Op. No. 2005-156 (2005) (attorney may tape record telephone conversations with an individual without consent, but may not record private, in-person conversations without informing individual of the recording; decision based on Oregon statutes); Tenn. Ethics Op. No. 81-F-14 (1986); Utah Ethics Op. No. 96-04 (1996); Va. Ethics Op. No. 1814 (2011) (lawyer representing a party may ethically surreptitiously record conversations with an unrepresented witness, provided that the witness is informed of the lawyer's role); Va. Ethics Op. No. 1738 (2000) (approving use of undisclosed taping for purpose of a criminal or housing discrimination investigation and noting that there may be other factual situations in which the same result would be reached).

Twelve states require, under most circumstances, the consent of all parties to a conversation. Those jurisdictions are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *See* www.rcfp.org/can-we-tape/introduction.

Other states take the view that, even if it is not a crime, it is inherently unethical for a lawyer to record any person, including adverse parties, without their consent. Ariz. Ethics Op. No. 95-03 (1995) (an attorney may not surreptitiously tape

record a telephone conversation with opposing counsel because such conduct involved an element of deceit and misrepresentation); *Nissan Motor Co. Ltd v. Nissan Computer Corp.*, 180 F. Supp. 2d 1089 (C.D. Cal. 2002) (recording conversations between counsel in normal course of civil litigation, without consent, is violation of California penal law and is inherently unethical); *People v. Selby*, 606 P.2d 45 (Colo. 1979) ("Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound."); *Anderson v. Hale*, 202 F.R.D. 548, 556 (N.D. Ill. 2001) ("Simply put, such tactics are not becoming of an officer of the court."); Ohio Ethics Op. No. 97-3 (1997); Va. Ethics Op. No. 1635 (1995) (lawyer may not tape record conversation without consent of other party, even if it is not prohibited by state or federal law); Wis. Ethics Op. No. E-9505 (undated); N.Y. City Formal Ethics Op. No. 1995-10 (1995); *Miano v. AC & R. Advert., Inc.*, 148 F.R.D. 68 (S.D. N.Y. 1993), *adopted and approved*, 834 F. Supp. 632 (S.D. N.Y. 1993).

Some jurisdictions have carved an exception for recordings made at the request or with the consent of a law enforcement agency or where disclosure of the recording would impair pursuit of a societal good. *See, e.g.*, *In re Attorney Gen.'s Pet.*, 417 S.E.2d 526, 527 (S.C. 1992). *See also* N.Y. City Ethics Op. No. 2003-2 (2004) ("Undisclosed taping smacks of trickery no less today than it did twenty years ago," so a lawyer may not, as a matter of routine, tape record conversations without disclosing that the conversation is being taped; a lawyer may, however, engage in undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that the disclosure of the taping would impair pursuit of a generally accepted societal good, such as situations involving investigations of misconduct, such as threats against the lawyer or possible perjury). Other jurisdictions, however, have found that secret recordings made by private attorneys for law enforcement purposes are still unethical in that circumstance. *See, e.g., Committee on Prof'l Ethics & Conduct of Iowa State Bar Ass'n*, 488 N.W.2d 168, 172 (Iowa 1992); *People v. Smith*, 778 P.2d 685, 687 (Colo. 1989).

When a recording is made in violation of an ethical rule, a court may sanction the party by refusing to admit the recording. For example, in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc*., 144 F. Supp. 2d 1147 (D.S.D. 2001), defense counsel hired investigators to go to plaintiff's store, pose as consumers, record any interactions and elicit evidence to be used in the pending case. *Id*. at 1152. The court found that the audiotaping of the salesman without his knowledge violated South Dakota Rules of Professional Conduct Rule 4.2 since the secret taping was an act of trickery. *Id*. at 1159. Even if the salesman was not a represented party under Rule 4.2, the court found there was a professional conduct violation under Rule 4.3 (prohibiting misrepresenting intentions to an unrepresented party), since the investigators engaged the salesman in conversation without disclosing their purpose. *Id*. at 1158. As a result, the court struck the recordings from being used as evidence in the case. *Id*. at 1159-60. *But see Hill v. Shell Oil Co*., 209 F. Supp. 2d 876 (N.D. Ill. Mar. 2002) (refusing to follow

Midwest Motor Sports, Inc. in a case where African-American customer accused the gas station owners of requiring African-Americans to pre-pay while other customers could pay after fueling, and plaintiffs' counsel had other African-Americans and whites go to the stations at the same time and secretly videotape the gas station owners' conduct, to determine if they were treated differently).

B. Other Ethical Issues Potentially Implicated By Surreptitious And Other Recordings

1. The Duty To Disclose And Produce

Virtually all cases dealing with the issue have held that clandestine recordings of conversations with potential fact witnesses, whether made by a party or by counsel, before or after counsel is consulted, are not shielded under the work product doctrine, and must be produced. *Smith v. WNA Carthage, L.L.C.*, 200 F.R.D. 576, 578 (E.D. Tex. 2001) (citing *Otto v. Box USA Group, Inc.*, 177 F.R.D. 698, 701 (N.D. Ga. 1997); *Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc.*, 172 F.R.D. 179, 183 (M.D.N.C. 1997); *Robertson v. Nat'l R.R. Passenger Corp.*, No. Civ. A. 98-1397, 1999 WL 199093, *2 (E.D. La. Apr. 8, 1999); *Pfeifer v. State Farm Ins. Co.*, No. Civ.A. 96-1895, 1997 WL 276085, *2 (E.D. La. May 22, 1997); *Giladi v. Albert Einstein Coll. of Med.*, No. 97 Civ. 9805(DC), 1998 WL 183874, *1 (S.D.N.Y. Apr. 15, 1998)) (internal citations omitted). *See also, Byrd v. Reno*, 1998 WL 429767 (D.D.C. Mar. 18, 1998) (attorney held in contempt for failing to produce in discovery, in a Title VII action, audiotapes of telephone conversations with her supervisors and a co-worker secretly tape-recorded by plaintiff, a Justice Department lawyer; the tapes were not protected as work product because plaintiff's unethical conduct in secretly taping the conversations vitiated the privilege), *appeal dismissed*, 180 F.3d 298 (D.C. Cir. 1999); *Gratton v. Great Am. Communications*, 178 F.3d 1373 (11th Cir. 1999) (trial court did not abuse discretion in dismissing action of individual who produced only two of four to six secretly recorded tapes of conversations with his supervisors and failed to comply with an order to explain this spoliation); *Robertson v. National R.R. Passenger Corp.*, 79 Fair Empl. Prac. Cas. (BNA) 1369 (E.D. La. 1998) (plaintiff who had produced 18 of 36 surreptitiously-made tape recordings of statements of co-workers ordered to produce remainder of tapes before co-workers' depositions were taken).

2. The Duty To Correct Representations To A Court That Are Later Proven To Be False By A Recorded Conversation That Comes To Light In Discovery

Texas Disciplinary Rule of Professional Conduct 3.03(b) provides that:

> If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take

> reasonable remedial measures, including disclosure of the true facts.

The commentary to this rule provides that:

> 7. It is possible, however, that a lawyer will place testimony or other material into evidence and only later learn of its falsity. When such testimony or other evidence is offered by the client, problems arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the tribunal. Under this Rule, upon ascertaining that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures.
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> 8. When a lawyer learns that the lawyer's services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that the lawyer must disclose the existence of the deception to the court or to the other party, if necessary rectify the deception. *See* paragraph (b) and Rule 1.05(h). *See* also Rule 1.05(g). Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal by the lawyer but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer would be aiding in the deception of the tribunal or jury, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.02(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

3. Lawyer As Witness

If a lawyer secretly records witnesses, he or she could become witnesses in the case. The Texas Supreme Court has adopted a seven-prong approach to the admissibility of audio recordings. In order for an audio recording to be admissible, the offeror must show or establish:

(1) that the recording device was capable of taking testimony;

(2) that the operator of the device was competent;

(3) the authenticity of the correctness of the recording;

(4) that changes, additions, or deletions have not been made;

(5) the manner of the preservation of the recording;

(6) the identification of the speakers; and

(7) that the testimony elicited was voluntarily made without any kind of inducement.

Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex.1980); *Thoma, In re*, 873 S.W.2d 477, 486–87 (Tex.Rev.Trib. 1994); *Interest of T.L.H.*, 630 S.W.2d 441, 447 (Tex. Civ. App.–Corpus Christi 1982, writ dism'd w.o.j.). The trial court may infer some of the above elements, and therefore, the proponent need not establish each of them in detail. *Seymour v. Gillespie*, 608 S.W.2d at 897. When a proper predicate is laid and there are no fundamental problems, the trial court can, in its discretion, admit tape recordings into evidence. *See In re Bates*, 555 S.W.2d 420, 423 (Tex. 1977); *Drake v. State*, 488 S.W.2d 534, 538 (Tex. Civ. App.–Dallas 1972, writ ref'd n.r.e.).

The Fifth Circuit U.S. Court of Appeals has set forth a similar test. It provides that the party seeking to introduce a sound recording into evidence carries the burden of "going forward with foundation evidence demonstrating that the recording as played is an accurate reproduction of relevant sounds previously audited by a witness." *United States v. Biggins*, 551 F.2d at 64, 66 (5th 1977); *see also United States v. Thompson*, 130 F.3d 676, 683 (5th Cir. 1997) ("The government has the duty of laying a foundation that the tape recordings accurately reproduce the conversations that took place, *i.e.*, that they are accurate, authentic, and trustworthy."). In meeting this authenticity requirement, the burden falls on the party seeking to admit the recording to show: "1) the operator's competency, 2) the fidelity of the recording equipment, 3) the absence of material alterations, and 4) the identification of relevant sounds or voices. *United States v. Green*, 324 F.3d 375, 379 (5th Cir. 2003) (citing *Biggins*, 551 F.2d at 66; *United States v. Stone*, 960 F.2d 426, 436 (5th Cir. 1992)). Further, the party seeking to establish authenticity is not required to satisfy all of the *Biggins* factors, if, "upon independent examination, the district court is convinced that the 'recording accurately reproduces the auditory experience.'" *United States v. Buchanan*, 70 F.3d 818, 827 (5th Cir. 1995) (quoting *Stone*, 960 F.2d at 436).

If a lawyer records a witness, and tenders the recording as evidence, the lawyer's testimony could be required to authenticate the recording in some cases. In other words, the lawyer could become a witness. Regarding lawyers as witnesses, the Texas Disciplinary Rule of Professional Conduct 3.08(a) provides that:

> A lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary

to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

4. Spoliation

In *Stevenson v. Union Pac. R.R. Co*., 354 F.3d 739, 747-50 (8th Cir. 2004), the Eighth Circuit District Court of Appeals found that the district court was within its discretion when it imposed the sanction of an adverse inference jury instruction against the defendant-railroad for its prelitigation destruction of tape recorded voice radio communications between train crew and dispatchers on the date of train's grade crossing collision with the plaintiff's car. The court held that, even though the railroad destroyed the tape recording before litigation pursuant to its document retention policy, the sanction was appropriate because: (i) it was unreasonable and in bad faith for the railroad to adhere to its retention policy in light of its knowledge of collisions and the high relevance of taped conversations in any potential litigation; and (ii) that the loss of such evidence was prejudicial to the plaintiffs.

On the other hand, in *Blangsted v. Snowmass-Wildcat Fire Protection Dist*., 642 F. Supp. 2d 1250, 1262-63 (D. Colo. 2009), the plaintiff in a wrongful termination case admitted tape recording a meeting with defendant, but claimed he "lost" the tape recording. The employer did not learn of all this until trial. The plaintiff won a substantial verdict at trial. The employer argued that the plaintiff's alleged spoliation entitled it to dismissal of his case, or a new trial. The court rejected the employer's argument, based on its conclusion that: (i) the degree of culpability of plaintiff was small, *i.e*., litigation was not imminent when plaintiff lost tape; (ii)

there was no evidence of bad faith; and (iii) and degree of prejudice suffered by defendant was minimal. The court did, however, state that, "nevertheless, Plaintiff should have disclosed the existence and subsequent loss of the tape during the discovery process and his failure to do so led to this particular dispute causing expenses for all. This reality will be taken into account when considering any claim for costs and attorney fees." *Id*. at 1263.

Finally, in *Doctor John's, Inc. v. City of Sioux City, IA*, 486 F. Supp. 2d 953 (N.D. Iowa 2007), an adult entertainment, sex toy, and sex shop business named Dr. John's Lingerie Boutique challenged a city ordinance. The city failed to retain tape recordings of the city council's closed-session meetings, in which the council considered the sex shop ordinances being challenged in pending litigation. The district court held that a $50,000.00 sanction was appropriate, but did not impose the sanction, colorfully stating:

> A first year law student should have – and most would have – known that a party must retain documents or records that are likely to be relevant in pending litigation. The City's claim that it was simply following state law in destroying key evidence is laughable and frivolous. No state or federal statute, rule, or common law allows a party to destroy critical evidence during the pendency of litigation, and the City policy that permitted destruction of certain documents after a specified period of time certainly did not require destruction of such documents.
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> * * *
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> In this case, the court finds that a monetary sanction in the amount of $50,000 is warranted for the City's destruction of plainly relevant records. *See Stevenson*, 354 F.3d at 745 (a court's inherent power includes the discretionary ability to fashion an appropriate sanction for conduct which abuses the judicial process).
>
> On the other hand, because of the City's ill-conceived, illegal, and unconstitutional actions in targeting and attempting to trample the plaintiff's First Amendment rights, the taxpayers have already paid dearly, to the tune of over $600,000. **No matter how you fry it, that's a ton of Sneaky's chicken.** Also, notwithstanding various City Council Members' attempts to save face by claiming that the City would have ultimately prevailed in this litigation—just how those City Council Members became such enlightened, sophisticated, and prophetic federal constitutional scholars remains a prodigious mystery—the City and Doctor John's have worked diligently to reach a settlement. In so doing, both sides engaged in substantial compromise from their equally unreasonable legal

> positions. Moreover, the City Council has voluntarily and wisely changed its record retention policy to prevent the destruction of such evidence in the future during pending litigation. Thus, having recognized the error of its ways, the City moved swiftly to correct its mistake.
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> Balancing all of these factors, the court finds that the scales of justice tip ever so slightly in favor of declining to impose sanctions against the City for destruction of relevant records. Any similar litigation misconduct in the future, however, will be dealt with severely, in light of the City's "get out of jail free" card here.

Id. at 954-56 (bold added).

By the way, for those of you wondering about it, Sneaky's Chicken is a Sioux City institution, known for fantastic fried chicken (http://sneakyschicken.com). A recent review on TripAdvisor.com raves:

> This is the best chicken I've ever had! The homemade soup was to die for, coleslaw was really yummy-very creamy! BUT, there is one thing you HAVE to try! "CRACK Salad." Yep, that's what they call it. . . . because after you taste it, you automatically become addicted. No joke.

So, thanks to this fifteen minute CLE, you learned – if absolutely nothing else – that you can go to Sioux City, Iowa, visit Dr. John's Lingerie Boutique, and then dive into a bucket of Sneaky's scrumptious fried chicken. Sounds like a perfect destination for your next romantic get away.