



Angel J. Horacek
LAW OFFICES OF ANGEL J. HORACEK, PC

Off the record and on the QT

DEALING WITH UNAUTHORIZED RECORDINGS OF PRIVATE CONVERSATIONS

A client comes to you, with a great case. Then they tell you, “I used my phone recorder at work. I have an audio recording [of the defendant engaging in the unlawful behavior]. They didn’t know I was recording.” What should you do?

What is the law? Consent rules in the state of California

Since 1972, “privacy” has been determined to be an inalienable right under the California Constitution. (Cal. Const. Art I, §1; see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 16.) Consistent with state interests in enforcing those privacy rights, California enacted the California Invasion of Privacy Act, as Penal Code sections 630 et seq., that forbid making an audio-recording of a person when that person has not consented.

Penal Code section 632 provides that a “person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.” (Pen. Code, § 632, subd. (a).) If such a person has been previously convicted, repeat offenses warrant a fine “not exceeding ten thousand dollars (\$10,000) per violation.” (*Ibid.*)

A “person” in this context can mean an individual, business association, partnership, corporation, LLC or other legal entity, and an individual acting or claiming to act on behalf of any level of government. (Pen. Code, § 632, subd.(b).) Similarly, recording landline, cordless, or cellular phone conversations without consent is also unlawful. (Pen. Code, §

632.7, subd. (a).)

Other jurisdictions do not require that all parties to a confidential conversation consent. Those are “one-party” jurisdictions. California is a “two-party” jurisdiction. (See *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95 (analyzing differences between “one-party” and “two-party” consent jurisdictions).)

Although the provisions above are criminal statutes, civil liability can attach. If a person can prove that another person intentionally recorded their confidential conversation using an electronic device, and consent was not provided, the person who recorded without consent may be liable for \$5,000 for each violation, or treble damages. (Pen. Code, § 637.2, subd. (a).)

Was the conversation confidential?

A “confidential communication” means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

In *Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, a bank employee who began having problems with supervisors and coworkers secretly began audio-recording his face-to-face and telephone conversations with other bank employees. He recorded 160 conversations, and used these recordings when he filed his lawsuit against the bank. The bank filed a cross-complaint for violation of privacy.

While Coulter admitted that the employees whose conversations he recorded did not give permission, “Coulter’s primary argument is that there was a material issue of fact as to whether the conversations were confidential. Each employee submitted declarations detail-

ing the circumstances surrounding the conversations, the topics discussed and their own belief and expectation that the conversations were confidential. Coulter contends since he never intended the conversations to be confidential, they were not. The test of confidentiality is objective. Coulter’s subjective intent is irrelevant. (citation omitted) It is sufficient that the bank employees who were secretly recorded expected the conversations to be private.” (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929.)

What would drive someone to have an expectation that a conversation is confidential? In other words, is there a reasonable expectation of privacy? Assuming the existence of a legally cognizable privacy interest, the extent of that interest is not independent of the circumstances, and other factors (including advance notice) may affect a person’s reasonable expectation of privacy. (*Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 36.)

A “‘reasonable’ expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms,” and “the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant. (*Ibid.* (emphasis added).)

In practice, this is a question of fact. A busy restaurant dining area during dinner service might be an area where conversations are expected to be overheard, but a *subtle* discussion in the alley behind the restaurant on break might not. What were the circumstances in the case of this particular conversation? For instance, did the participants say that they would like to keep the conversation confidential? Was the subject of the type that would normally be confidential, such as private health information or a trade secret? Did it occur in an office, with the door closed? Or was it in public in the lobby with several people walking by? Was anyone else present other than the

speakers on the recording? It is advisable to learn about the circumstances of the creation of any audio recording a client might have to determine if any expectation of privacy was unreasonable.

Some employers even have policies that expressly disclaim that any employee has a right to privacy at all. Notice of and consent to an impending intrusion can “inhibit reasonable expectations of privacy.” (See *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 293 [affirming grant of summary judgment on invasion of privacy claim where employer had policy stating “no reasonable expectation of privacy” in its systems].) If an employee handbook states that the employee has no expectation of privacy in workplace systems, locations, or communications, this militates against any employee having a reasonable expectation of privacy.

Tech, tech, and more tech

Technological advances have decreased the size of the recording devices and changed the nature of the devices. Where decades ago, an employee might have a tape recorder in a chest pocket, an employee now might have smart glasses that allow her to stream live via her mobile phone, which itself could be in another room. The last time there was an update to the Penal Code sections 632 and 637.2 was on January 1, 2017, well before people would regularly “go live” on their social media or record “day in the life” videos. These laws also predate the use of consumer-available generative artificial intelligence.

However, the basic law has not changed although the methods may have. Because many new entrants into the workforce are regularly used to recording their day or streaming to live platforms, they may be unaware that others in the workplace might have an expectation of privacy.

Another wrinkle is that many individuals no longer have a clear separation between work and home, between public and private. Workers are used to working remotely, taking video and audio calls from the comfort of their home, or even video and audio calls from public spaces such as coworking offices or coffee houses. As such, they may not expect any

privacy for themselves, nor expect that privacy for others is warranted.

In *TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, the court held that there was no reasonable expectation of privacy where the employer provided a policy in advance placing employees on notice of diminished privacy rights in work telephone calls and computer usage. “[T]he use of computers in the employment context carries with it social norms that effectively diminish the employee’s reasonable expectation of privacy with regard to his use of his employer’s computers.” (*Id.* at 452.)

There necessarily arises the question of whether consent to one type of recording is consent to all types of recording. When employees are being recorded on videoconference at work, is that same employee authorized to record the videoconference on his own device? The issue of who is making the recording might be relevant to providing consent: An employee might agree to his employer recording a performance meeting, but might not consent to his supervisor recording the meeting on his mobile phone.

Can you use the recording even if it was unauthorized?

Generally, evidence obtained as a result of eavesdropping upon or recording confidential communication in violation of this section is not admissible in any judicial, administrative, legislative or other proceeding. (Pen. Code, § 632, subd. (d).) Compare this with unauthorized video, including still image and moving images, which is not protected as a “confidential communication.” (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1353 [Does “the prohibition on eavesdropping upon a confidential communication, contained in section 632, subdivision (a), extends to the taking of timed, still photographs, without accompanying sound. We conclude it does not, nor does section 632 protect a general right of privacy from unconsented videotaping”].) (Certain specific instances of videorecording or imagery, such as in connection with lewd behavior, or of changing rooms, are expressly made unlawful in Pen. Code, § 647.)

This means that if a supervisor tells

an employee that she is fired for an unlawful reason, and the employee audio-records that conversation, generally that evidence is inadmissible.

However, Penal Code sections 632 and 632.7 do not prohibit “one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, *any felony involving violence against the person*, or domestic violence. (Pen. Code, § 633.5.) If a person is a victim of physical sexual harassment or assault at work, conversations evincing that could be recorded and used as evidence.

An unauthorized recording may also lead to documents to be used as impeachment evidence. “[T]he evidentiary sanction of section 632, subdivision (d), cannot be construed so as to confer upon a testifying witness the right to commit perjury. The truth finding function of trial, already strained by exclusion of the writings themselves, should not be burdened further by the presentation of evidence through witnesses who may lie with impunity.” (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1497, *as modified* (Sept. 22, 1988).)

Best practices?

Upon initial discussions with a client, advise that unauthorized audio recordings are unlawful and can subject the client to criminal prosecution or civil claims. Although criminal prosecution may be unlikely, attorneys must act with reasonable diligence and not neglect to advise the client of the risk of liability. (Rules Prof. Conduct, rule 1.3.) Once an unauthorized audio-recording is disclosed, find out the facts and circumstances surrounding its creation.

An attorney also “shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” (Rules Prof. Conduct, rule 1.2.1.) For this reason, attorneys should dissuade a client from making an unauthorized recording. If the client insists on recording, advise them to obtain consent first.

Attorneys have a duty of candor to the court. (Rules Prof. Conduct, rule 3.3.) If a client has disclosed a confidential recording, the attorney has an obligation to disallow that client from testifying falsely that they did not make such a recording. Similarly, because such a recording would be relevant and likely responsive to a request for production, an attorney would have an obligation to produce such a recording.

Therefore, a best practice would be to obtain sworn testimony, either by written discovery or in deposition, by the person who was in the unauthorized

recording to determine whether they will simply admit to the conversation that was recorded, or restate the words that they said in the conversation. If they admit the information stated on the recording, then you do not need to use the recording to prove any facts.

The use of audio recordings is increasing with advances that make technology smaller and simpler. Thinking ahead to obtain consent and respect privacy will ensure that your client has the best chance to use those audio recordings in support of their case. 

Angel J. Horacek is the managing attorney at Law Offices of Angel J. Horacek, PC in Culver City. The firm represents employees who experience harassment, discrimination, retaliation, or who are whistleblowers. Luca Motivala, law clerk, provided research support.