

The Legality Of Recording Conversations

(as of July 2008)

"My own view is that taping of conversations for historical purposes was a bad decision on the part of all the presidents. I don't think Kennedy should have done it. I don't think Johnson should have done it, and I don't think we should have done it."

Richard Milhouse Nixon

Technology has come a long way since the Watergate era. As recording devices have become smaller in size, their sound recording capabilities and storage capacities have increased. Sophisticated recording devices are inexpensive and conveniently available to any consumer at local electronics stores. Moreover, software for editing and transmitting recorded conversations is just as easily obtainable and affordable.

While technology has made it easier to record conversations today, the common question of the legality of recording conversations lingers.

I. Federal Law

The federal law governing the recording of conversations permits a person to record 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." 18 U. S. C. §2511 (2)(d). In other words, if you are part of the conversation, then you can legally record it.

The federal law does not allow for recording of communications if the recording is for the purpose of committing any criminal or tortious act, under either federal or state law.

II. State Law

The federal statute, which allows for one-party consent, is the basis for the majority of state laws concerning recording of conversations. Currently 38 states, and D.C., are one-party consent states, with Texas being among this group (Texas Penal Code §16.02). As long as one party consents to the recording, it is unnecessary to have the permission of the other party or parties.

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The remaining twelve states are commonly referred to as two-party consent states – this group consists of California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. The two-party distinction is somewhat misleading, in that these states require the consent of all parties. If the call consists of more than two parties, such as a conference call, then all participants must consent for the recording to be legal.

Recording a call between parties from states with differing consent laws can ultimately invoke the jurisdictions of both states, as well as federal law. Currently, there is no bright line rule regarding whether state law preempts federal law, and if so, would it be the laws of the state of origin or the receiving state that would control? The safest bet is to assume consent of all parties would be needed to legally record the conversation.

It is clear, however, that neither federal, nor any state law, condones the recording of conversations in which one is not a participant.

III. Business Telephone Exception

Federal law and most state laws, including Texas, allow for what is commonly known as the “business telephone” exception. This exception allows employers to monitor calls made on company telephones used in the ordinary course of business, without employee consent. For their own protection, it is advisable that employers engaged in monitoring have a clear written policy regarding this practice and have their employees sign a form acknowledging notification of the same.

Businesses (and individuals) should also consider that electronic recordings could be the subject of litigation discovery requests. Moreover, deleted files, including sound files, can often be recovered from hard drives via computer forensic techniques.

IV. Admissibility

Both federal and state rules of evidence allow for the admission of sound recordings in legal proceedings. However, to be admissible, the recording must first be authenticated by the submitting party. Federal courts recognize what is commonly referred to as the “seven-part” test, and most states, including Texas, have a similar foundation requirement.

Both the recording device and the operator must be shown to be competent and the recording must be shown to be true, unaltered, and properly preserved. The final two requirements of the test involve proper identification of the speakers and a showing that the conversation was voluntary (not compelled).

The opposing side often uses the same guidelines to discredit or deny the admission of a recording. Frequently, forensic experts are used to show a recording has been altered, or the opposition seeks to show that an appropriate chain of custody was not maintained.

V. What About The Lawyers?

In 2001, the American Bar Association (“ABA”) issued Formal Opinion 01-422, withdrawing its 1974 opinion stating that it was unethical for lawyers to record a conversation without the prior consent of all parties to the conversation. The ABA’s 2001 opinion stated that a lawyer who electronically records a conversation without the knowledge of the other party does not necessarily violate the rules of professional responsibility.

The ABA's ethics committee further opined:

"A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded. The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so."

State bar opinions are still divided on the issue of whether it is unethical for a lawyer to secretly record a conversation. Until recently, it was generally not permitted under disciplinary rules for Texas lawyers to make undisclosed recordings of their phone conversations, as this practice "offends the honor and sense of fair play of most people".

However, the Professional Ethics Committee for the State Bar of Texas addressed this issue in November 2006 via Opinion 575, essentially agreeing with the ABA's position.

The Ethics Committee stated that because all persons in Texas are generally not prohibited from making undisclosed recordings of their telephone conversations, a lawyer would not be in violation of Texas Disciplinary Rules of Professional Conduct by doing the same.

The Committee noted several qualifications to this ruling, including:

- There should be a legitimate reason to make the recording, in terms of protection of the client or the lawyer.
- The lawyer must take appropriate steps to safeguard the confidentiality of the recording.
- The recording should not be made if it will be subject to the laws of other states that would make it a criminal offense.
- The recording should not be made if it is contrary to representations made by the lawyer to any person.

While lawyers in Texas can advise a client as to the legalities of recording conversations, they probably should refrain from encouraging the actual recording.

VI. What If You Suspect Your Conversations Are Being Monitored?

It is not unusual for a client involved in a civil or criminal suit, a divorce proceeding, or a competitive industry to believe that his phone has been tapped or his office/home bugged. This is usually as a result of a combination of factors such as strange noises or static on the phone line, or the observance that others seem to know about confidential matters or personal activities. More often than not, any dissemination of personal information or breaches of confidentiality are a result of a violation of trust by an individual versus electronic surveillance.

The market is full of devices that claim to detect (or prevent) bugs, and there are a host of consultants claiming to provide "debugging" services. However, most of the devices are ineffective at best, and few of the firms/individuals offering services actually have the proper Technical Surveillance Counter Measures (TSCM) training or detection equipment necessary to provide an effective sweep.

If you suspect that you or your company is being monitored electronically, it is advisable to contact your attorney. Do not make contact via your office, home, or cell phone, or by e-mail or fax. Use a public phone or phone at a neutral location, or better yet, go to your attorney's office in person to discuss the matter. Your attorney will be able to arrange a TSCM inspection with a qualified specialist, and advise appropriate steps that should be taken in the event any covert recording or monitoring devices are discovered.

Looper Reed & McGraw would like to recognize attorney Michael A. Lillibridge for his contributions to this Guide.

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