

Secret recordings: What if your client already has one?

By Mark H. Wagner

California's Invasion of Privacy Act (Penal Code Sections 630-637.9) prohibits anyone from tape recording confidential communications without the knowledge and consent of all parties to the communication. The violation of the act is a crime. Unfortunately, most people, including many lawyers, are not aware of this law. In fact, I am often asked by clients and lawyers if they can use their secret recordings in court. The answer, unfortunately, is not a simple yes or no. This article explains the general rule about recording conversations, when they are admissible in court, the potential criminal and civil repercussions of making an illegal recording, and the real world ways to deal with such recordings.

Penal Code Section 632 prohibits the recording of a confidential communication without the consent of all parties. A communication is deemed confidential if it is "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." Penal Code Section 632(c). The test of confidentiality requires the existence of an objectively reasonable expectation by one of the parties that the communication is not being overheard or recorded. *Flanagan v. Flanagan*, 27 Cal.4th 766, 773 (2002). The recording itself is the violation of the statute, and thus a violation does not require any intent to disclose or actual disclosure or dissemination.

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A violation of the statute is a misdemeanor and can result in a criminal fine of \$2,500 and imprisonment in county jail not exceeding one year. A repeat offender who violates the act may be fined up to \$10,000 and can be sent to state prison. Further, the act states that evidence obtained as a result of recording a confidential communication in violation of Penal Code Section 632 is inadmissible in any judicial, administrative, legislative or other proceedings (except criminal prosecution under the statute). Additionally, Penal Code Section 637.2 provides that any person who has been injured by such a violation may sue the offending party for \$5,000 or three times the amount of actual damages, if any, as a result of the recording. These damages can include emotional distress and other damages. The injured party may also seek injunction to prevent a violation of the statute.

California courts have made clear that even if a recording is illegal and inadmissible under the act, it can still be used to impeach a witness. In *Frio v. Superior Court*, 203 Cal. App. 3d 1480 (1988), the court held that a witness cannot use the exclusionary provisions of Penal Code Section 632 as a shield for perjury. It stated that "[t]he repugnance of an opportunity for a witness who was recorded to lie in this situation is akin to the circumstance of a criminal defendant who testifies at variance with an earlier statement ruled inadmissible because of a violation of Miranda." The court stated that the "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." Further, the court held that notes from an illegal recording can be used to refresh testifying witness' independent recollection, even though the notes and recording themselves are inadmissible.

Similarly, in *People v. Crow*, 28 Cal. App. 4th 440 (1994), the court was weighing public policy considerations when considering evidence that was inadmissible (statements made during plea negotiations) and allowing a

witness to lie about those past statements. In looking at the law and ruling the evidence was admissible for impeachment, the court reiterated that "Evidence of confidential conversations obtained by eavesdropping or recording in violation of [Penal Code] section 632 is generally inadmissible in any proceeding (Section 632, subd. (d)), but can be used to impeach inconsistent testimony by those seeking to exclude the evidence." As such, lying under oath outweighed the exclusionary rule.

These decisions, along with others, make it clear that the public policy against perjury, and in favor of truth-finding, will outweigh exclusionary rules, including illegal recordings.

Employers often record employees at work to ensure safety, security, and work productivity, and sometimes do so without permission. Sometimes employees record their bosses so they can try to protect themselves from what they believe to be harassing or illegal conduct. For example, an employee who is having a discipline meeting sometimes thinks a recording will help them protect their rights later. Unfortunately, they make the recording without the other person's knowledge or consent and have no idea they may have committed a crime. After doing so, they then ask an attorney if they can use it to help a lawsuit, and then learn that it may have been illegal.

With regard to potential criminal ramifications, many of the criminal and civil lawyers that I have spoken with have indicated that they know of nobody who has been prosecuted for a simple violation of this statute. The criminal lawyers have all indicated it may be an add-on to a list of other crimes being prosecuted, but that they have not heard of, and cannot imagine, it being the sole crime prosecuted. This makes sense in that prosecutors do not have the time to try cases involving one minor violation, and often never hear about them as it is not something commonly reported to the police. Still, it is a risk any person should consider in recording someone else. It should also be a risk that any lawyer considers in advising their clients in a civil lawsuit to disclose the existence of such a recording. Although again, the recording itself was the illegal act and whether you attempt to use it in a civil case or not, the crime may have already been committed.

For lawyers attempting to admit such evidence in a civil case, they should focus on proving the recording was not confidential (e.g. the location was out in a public restaurant or the circumstances were such that others might overhear the conversation). If you believe that it was a confidential conversation and therefore inadmissible, the best strategy is to try to lock the recorded witness into sworn testimony before disclosing the recording. If they admit the facts that you wanted, there is no need to use the recording, and therefore it does not matter if it is ruled inadmissible. If they lie under oath, then you can now use the recording to impeach, which will not only help you prove the facts by letting the jury hear the recording, but will reveal that the other side lied under oath. The risk of a criminal prosecution or a possible \$5,000 private cause of action may be worth the risk of trying to use it in court, but the facts of each case will determine that. Again, this appears to be the best way to handle a tricky situation within the confines of the law.

Simply put, if your client asks you in advance whether they should secretly record a conversation (which rarely happens), the answer should be a resounding no, as it is likely illegal. If, however, they have already recorded the conversation (which is usually the case), you should be aware of the criminal fines, jail-time penalties, civil penalties, and of course, how to use it to your advantage within the boundaries of the law.



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