Thursday, December 1, 2011

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

Surreptitious recording and its implications

Secretly recorded conversations have been the fodder of salacious news stories for decades. Just this week, a recording involving the wife of former Syracuse coach Bernie Fine made headlines.

It should not be surprising that surreptitious recordings often surface in litigation. Of course, technology has changed by leaps and bounds since President Nixon infamously recorded conversations on reel-to-reel tape. Now there is "an app for that," and devices that can record conversations are ubiquitous.

Although New York law generally permits the recording of a conversation where one party consents, an attorney's ethical obligations when advising a client to engage in this conduct or when electing to record a conversation herself are less than clear.

Even where a litigant possesses a recording that supports her case, she may still face hurdles of authentication and admissibility. From a practical perspective, attorneys should exercise caution when advising their clients, and potential defendants must be aware that their employee's utterances may be subject to immortalization by prospective plaintiffs.

By SARAH MERKEL
Daily Record Columnist

Surreptitious recording under New York law

New York law prohibits "eavesdropping," including "wiretapping" and "mechanical overhearing of a conversation." N.Y. Penal Law § 250.05. These terms are defined in Section 250.00, which excludes recordings made by a participant in the conversation, *Id.* at § 250.00 (1)&(2). In other words, New York law does not proscribe the recording of a conversation as long as one participant consents.

Not all jurisdictions permit surreptitious taping. Pennsylvania, for example, requires the consent of all parties to the conversation. 18 Pa. Cons. Stat. § 5703(1). Although federal law contains one-party consent language similar to New York law, different standards may apply where interstate communications are recorded, see 18 U.S.C. § 2511(2)(d); *Lane v. CBS Broad., Inc.*, 612 F. Supp. 2d 623, 636-637 (E.D. Pa. 2009) (federal Electronic Communications Privacy Act does not automatically preempt state law).

An attorney's ethical obligations

The ethics of an attorney surreptitiously recording conversations or advising a client to do the same are unclear. While no New York Rule of Professional Conduct specifically prohibits or permits such activity, the progression of ethical opinions on the topic suggests that, at the very least, attorneys must exercise some degree of caution.

In 1974, the New York State Bar Association Committee on Professional Ethics issued an opinion noting that although it is not illegal for an attorney to surreptitiously record a conversation to which she is a party, absent "extraordinary circumstance," such conduct "offends the traditional high standards of fairness and candor that should characterize the practice of law," Opinion 328 (1974).

Five years later, the Committee "clarified" its earlier opinion, and addressed the question of whether a lawyer may "counsel a client concerning the recording of a conversation between the client and a third party to whom no notice is given," Opinion 515 (1979).

The opinion obliquely answered the question in the affirmative, observing that an attorney who simply advises her client on the legality of such an act does not violate the rule. Yet the committee intimated that an attorney should also advise her client on the factors that would lead the client to engage in a course of action that is both legally and "morally just," *Id.*

"Each situation should be considered on its own merits, weighing the contribution to social good (such as obtaining authoritative evidence of wrongdoing) against the danger to privacy of communications," *Id.*

In 2001, the American Bar Association Standing Committee on Ethics and Professional Responsibility weighed in, reversed its prior position on attorney recording without consent and noted that the Model Rules did not prohibit an attorney from secretly recording a conversation as long as her jurisdiction permits such conduct, ABA Formal Opinion 01-422.

However, recording attorney-client communications without the client's knowledge and consent was "inadvisable," and an attorney may not "falsely represent that a conversation is not being recorded," *Id.*

The Association of the Bar of the City of New York opined that the ABA's 2001 decision was an "overcorrection," Formal Opinion 2003-02. Although undisclosed taping may be acceptable where it advances a "generally accepted societal good," routine

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undisclosed taping by attorneys "entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice," *Id.*

So, while an attorney may advise a client of the bounds of permissible recording under New York law, New York ethical opinions express reservations about surreptitious recording, requiring some moral or societal justification. In short, there is no clear cut license to generally advise clients to undertake a campaign of surreptitious recording in order to establish a potential claim.

Use of recorded conversations in civil litigation — admissibility and authentication

Where a conversation has been recorded in violation of New York or federal law, the conversation and any resulting evidence is inadmissible, see 18 U.S.C. § 2515; CPLR 4506(1). Even legally recorded conversations may still be inadmissible.

Regardless of venue, evidence must be authenticated. For example, Rule 901 of the Federal Rules of Evidence requires that authentication is "a condition precedent to admissibility," and "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims," F.R.E. 901(1); see also *Oi Tai Chan v. Society of Shaolin Temple, Inc.*, 2010 NY Slip Op 20440 (N.Y. Sup. Ct. 2010) (discussing authentication of audio tape recording).

A plaintiff's conduct during discovery and failure to preserve the original recording may lead to a finding that the recording cannot be authenticated, *Jung v. Neschis*, 2009 U.S. Dist. LEXIS 126950 (SDNY March 6, 2009) (where evidence showed that tapes were not original records, as claimed by plaintiff, tapes could not be authenticated). Even where a recording can be authenticated, questions about its accuracy or completeness may still impact the weight afforded to the proffered evidence.

Moreover, a recording is the quintessential out-of-court statement. If the statement is offered to prove the truth of the matter asserted, it is generally inadmissible unless an exception to the hearsay rule applies. In civil litigation, it is likely that the proponent of the evidence will argue that any recorded utterance constitutes the admission of a party-opponent, now referred to in the Federal Rules of Evidence as simply an "opposing party's statement," F.R.E. 801(d)(2) (effective Dec. 1).

Where a recording captures the utterances of a party-opponent employee, such statements are admissible if the employee "was authorized to make a statement on the subject," or if the statement was made "on a matter within the scope of that relationship and while it existed," see F.R.E. 801(d)(2)(C)&(D); see also *Tyrrell v. Wal-Mart Stores, Inc.*, 97 N.Y.2d 650 (2001) (proponent must show that the speaker was authorized to make the statement in order to establish exception to hearsay rule).

Practical Considerations for Potential Litigants and their Counsel

Depending on the recording method employed, any recording may be difficult to authenticate and resulting recordings are often partially inaudible. Personal devices use a variety of software to create voice records, and the resulting file may be difficult to preserve. In short, simply making the recording may not be enough to bring that evidence before a jury.

From the attorney's perspective, in order to fully advise a client on even the legal permissibility of taping, the attorney may also need to consider whether secret recording violates a work rule and could subject an employee to discipline. Simply knowing the bounds of the Penal Law may not give an attorney enough information to adequately advise her client. The nebulous nature of the existing ethical opinions suggests that an attorney must always tread carefully.

Moreover, most recordings are not smoking guns. In my experience, many recordings simply capture a potential litigant attempting to bait another into making some type of admission. Yet such tapes are subject to disclosure under federal and state rules. In other words, such evidence may hinder rather than aid a client's case.

There is no doubt that recording will become more and more prevalent and, not surprisingly, the law will struggle to keep pace with technology. It remains to be seen whether the potentially public nature of private conversations will lead to a call for a change in the law or whether society will tacitly accept privacy intrusions as a byproduct of modern technology.

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