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**Research on whether, and under what circumstances, a private individual may
record conversations with third parties under Texas law**

Questions Presented

1. Under Texas law, may a private individual ever lawfully record a conversation with other individuals?
2. Under what circumstances are privately recorded conversations admissible as evidence in Texas?

Short Answers

1. Yes. Under both Texas and federal law, a person may ordinarily tape record a conversation if at least one party to the conversation consents to the recording.
2. Texas decisions show that the recording of private conversations by a private individual are generally admissible as evidence because they do not fall under the restrictions provided under the wiretap statutes.

Introduction

Our client requires us to research whether and under what circumstances a private individual may lawfully record a conversation with a third party under Texas law. The client needs a discussion of the law with respect to both telephone conversations and in-

person conversations. The client also requires information as to whether the consent of the person(s) being recorded is necessary in order for the recording to be legal.

This memo also discusses the related issue of admissibility: whether privately recorded conversations are admissible as evidence in Texas courts.

Discussion

1: LEGALITY OF RECORDING CONVERSATIONS BY PRIVATE

INDIVIDUALS

Under both Texas and federal law, a private individual may tape record a conversation if at least one party to the conversation consents. The other participants in the conversation need not be informed of the taping. *18 U.S.C. § 2511* is the relevant federal law. The Section reads in relevant part:

18 U.S.C. § 2511(2)(d)

It shall not be unlawful under this chapter [*18 USCS § § 2510 et seq.*] for a person not acting under color of law to intercept 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 to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

As for Texas law, the relevant legislation is Texas Penal Code § 16.02, which deals with Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications. The Code reads:

§ 16.02(c) (4) makes it an affirmative defense if:

a person not acting under color of law intercepts a wire, oral, or electronic communication, if:

(A) the person is a party to the communication; or

(B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

Texas law thus mirrors the federal provisions, though with a difference: in Texas, the consent of one party to the conversation is an affirmative defense. Regardless, Texas and federal statutory law reach the same result: recording is legal so long as one participant to the conversation consents.

Texas law does not distinguish between the recording of telephone and in-person conversations. § 16.02(c)(4) applies to “wire, oral, or electronic communication” equally.

Texas law demonstrates that it is legal to tape one’s own telephone conversation with another person without telling the other person. *Becker v. Computer Sciences Corp.*, 541 F. Supp. 694 (D. Tex. 1982). In *Becker*, plaintiff was discharged from his employment by defendant. Plaintiff filed suit alleging that defendant breached a contract of employment with plaintiff. The plaintiff surreptitiously recorded telephone conversations between plaintiff and defendant’s employees. At the time these conversations were recorded, plaintiff was located in Texas while defendant’s employees were in California. *Cal. Penal Code § § 629.38 et seq (West 1996)* makes it illegal for a person to secretly record any conversation, even one in which he or she participates. The court held that Texas law applied and refused to permit recovery of damages under the California statute. The court held that though Texas recognizes an invasion of privacy claim, it exempts from its coverage communications that are intercepted with the consent of one of the parties to the communication. In the case before the court, the plaintiff was a consenting party. The *Becker* court held:

While Texas does not provide a remedy for the surreptitious recording of telephone conversations where only one party to the conversation consents, Texas does recognize a cause of action for invasion of the right to privacy. Indeed, the Texas legislature, with one significant exception pertinent to the instant cause, has even enacted a statute similar to the California statute which is the basis of defendant's proposed counterclaim. See *Tex.Rev.Civ.Stat.Ann. art. 9019* (Vernon Supp.1982). The Texas statute, like the California statute, prohibits audial prying into conversations and prescribes criminal penalties and civil remedies for the violation of the statute. The Texas statute exempts for its coverage, however, communications which are intercepted with the consent of one of the parties to the communication. *Id.* Thus, while defendant has a right of recovery under the California statute, defendant has no claim under the Texas statute as plaintiff was a consenting party to the conversations which were recorded.

Id. at 702-703.

Cases pertaining to spousal wire taping underscore the need for consent. In *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. 1995), the court held that it is illegal for a husband to tape record his wife's conversation on the couple's home phone with the wife's alleged paramour if neither the wife nor the paramour consent to the taping.

Although it is legal for a person to secretly tape his own conversation under Texas and federal law, a Texas lawyer who tape records a conversation without informing the other person commits an ethical violation.¹ According to the ABA Committee on Ethics, it would be an ethical violation for a lawyer to surreptitiously record a conversation even if one party consents.

2: ADMISSIBILITY OF TAPE RECORDINGS IN LEGAL PROCEEDINGS

Texas statutes dealing with interception and use of wire, oral, or electronic communications mainly apply to cases involving eavesdropping by law enforcement

¹ Tex. Comm. on Professional Ethics, Op. No. 514, 59 *Tex. B.J.* 181 (1996).

officers. *Tex. Code Crim. Proc. art. 18.20* (2005); *Tex. Civ. Prac. & Rem. Code § 123.001* (2005). *Section 123.001* defines “interception” as:

(2) "Interception" means the aural acquisition of the contents of a communication through the use of an electronic, mechanical, or other device that is made *without the consent of a party to the communication*, but does not include the ordinary use of:

(A) a telephone or telegraph instrument or facility or telephone and telegraph equipment;

(B) a hearing aid designed to correct subnormal hearing to not better than normal;

(C) a radio, television, or other wireless receiver; or

(D) a cable system that relays a public wireless broadcast from a common antenna to a receiver. (Emphasis added)

Texas courts are generally reluctant to apply the same restrictive standards of admissibility of tapes and records obtained by illegal eavesdropping, to cases involving recording of communications by private individuals. In *Kotrla v. Kotrla*, 718 S.W.2d 853 (Tex. App. 1986), the Texas Appellate Court held that recording of a conversation with the wife by the husband without the wife's consent was not made inadmissible in a divorce and custody proceeding by former Tex. Rev. Civ. Stat. Ann. art. 9019, (now Tex. Civ. Prac. & Rem. Code Ann. § 123.001(2), *quoted above*). According to the court, § 123.001(2) did not address the admissibility of a tape recording and was not applicable where one party to the conversation consented to the recording. In *Kotrla*, the Appellant ex-wife sought review, claiming that the trial court committed error when it admitted a

tape recording of Appellant that was made without her consent. On the tape Appellant admitted to using drugs. The Appellate Court affirmed the order admitting the tape recording, holding that *Tex. Rev. Civ. Stat. Ann. art. 9019* did not bar admission of the recording. The court reasoned that *Tex. Rev. Civ. Stat. Ann. art. 9019* only applied to cases of eavesdropping, and in the case before it, Appellee only taped his own conversations with Appellant. The court held that the statute does not address the *admissibility* of a tape recording.

Relying on *Seymour v. Gillespie*, 608 S.W.2d 897 (Tex. 1980) the *Kotrla* court further observed that tape recordings, even if obtained without the consent of a party to it, are admissible if the proper predicate is laid. *Id.* at 855.

Article 18.20, Section 14 of the Code of Criminal Procedure addresses the admissibility of tape recordings, but it does not apply to recordings made by a private individual. In *Ward v. State*, 787 S.W.2d 116, 119 (Tex. App. 1990), the court held that the restrictions in *Tex. Code Crim. Proc. Ann. art. 18.20* (1990) regarding the use and admissibility of wiretaps did not apply to tape recording made by the victim's mother of a telephone conversation with Defendant. The Defendant argued that the victim's mother taped his conversation without his knowledge and consent. The court held that when the Appellant talked to the victim's mother, he took the risk that she would repeat or record their conversation. The court further held that since the mother of the victim personally taped the conversation at issue and because she willingly recorded the incident as a private individual, the restrictions in *Tex. Code Crim. Proc. Ann. art. 18.20* (Vernon Supp. 1990) regarding the use and admissibility of wiretaps does not apply. *Id.* at 119.

In *Seymour v. Gillespie*, 608 S.W.2d 897 (Tex. 1980), the Petitioners challenged the judgment of the Court of Appeals, which affirmed the trial court's decision that petitioners take nothing in their suit against respondent individual for personal injuries arising from assault and battery. Petitioners claimed that the trial court committed reversible error in excluding a tape recording of the conversation and sounds that occurred during the alleged assault and battery. The Texas Supreme Court agreed with Petitioners. Holding that the recordings were admissible, the Texas Supreme Court quoted the decision in *In the Matter of Bates*, 555 S.W.2d 420 (Tex.1977) and observed that recording of conversations by one party to the conversation is not an invasion of privacy, is not illegally obtained and, under circumstances such as these, the testimony of the unknowing party is freely given. *Id.* at 898.

In *Allen v. Mancini*, 170 S.W.3d 167 (Tex. App. 2005), the Court of Appeals held that Tex. Civ. Prac. & Rem. Code Ann. ch. 123 does not address the admissibility of a tape-recorded conversation at trial, and when a party to the communication consents to the interception of the communication, there is no violation of Chapter 123, assuming that Chapter 123 does apply. In *Allen v. Mancini*, there was a question regarding the admissibility of a tape recording into evidence. The Appellate Court affirmed the decision of the trial court. Applying a best interest of the child standard, the court held that Chapter 123 does not address the admissibility of a tape-recorded conversation at trial so long as a party to the communication consents to the interception of the communication. In such a situation, there is no violation of Chapter 123. *Id.* at 172.

The *Mancini* court reasoned that *Section 123.004(1)* of Chapter 123 provides a cause of action for a person whose communications have been wrongfully obtained; it

does not address the admissibility of that evidence absent an injunction prohibiting the divulgence or use of information obtained by an "interception." *Id.* The court added that federal wiretap laws also do not prohibit admissibility of the tapes. The court held:

Federal wiretap laws are covered by *18 U.S.C. §§ 2510-2521. Section 2511(2)(d)* provides that, if a person is not acting under color of law, it is not unlawful to intercept a communication if one of the parties to the communication has given prior consent to the recording of the communication and the interception is not for the purpose of committing a criminal or tortious act in violation of federal or state constitutions or laws. Although not all federal courts agree that the federal wiretap laws apply to family law cases and although there are not many cases touching upon the subject, it has been held that a parent may vicariously consent to the tape-recording of a minor child as long as the parent "has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the" tape recording.

Id. at 173.

Tex. Civ. Prac. & Rem. Code § 123.004(1) does, however, provide that a victim of an illegal taping can obtain an injunction against "divulgence or use of information obtained by an interception."

Conclusion

In Texas, a person may tape record a conversation if at least one party to the conversation consents. It is not necessary that the other participants in the conversation be informed of the taping. Texas decisions show that the recording of private conversations by a private individual does not generally fall under the restrictions provided under the wiretap statutes. Furthermore, courts have held that the recording of conversations by one party to the conversation is not an invasion of privacy.

Recorded conversations are usually admissible evidence in Texas courts. Statutory restrictions on recorded evidence tend only to apply to law enforcement. Even if the relevant statutes do apply to private individuals, the consent of one party to a

conversation is all that is needed for the evidence to be admissible. In some cases, the courts have held the recordings admissible in the larger interest of justice even if they are obtained without the consent of a party to the conversation.

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