Recorded evidence in employment matters

Is it a plaintiff's friend or foe? The answer may be found in Penal Code section 632

By Jason Erlich and Denise K. Top

You have just agreed to represent your new client in a wrongful termination, discrimination or harassment lawsuit. The case sounds promising – a believable client, a series of bad actors, and a solvent employer/defendant. The client assures you that he can prove the bad conduct because he has a recording of the supervisor, harasser or co-worker engaging in the subject conduct.

The client plays the recording – indeed, it confirms the harassing behavior, and/or the supervisor admitting some damming fact that would help your case. You have the "smoking gun" evidence that is so often missing. But then, the client confirms he made the recording without the other person's knowledge.

This scenario is becoming increasingly common in today's world of smartphones, which make recording both easy and inconspicuous. The predicament: on the one hand you have good evidence; maybe even so good, it blows the case wide open. On the other hand, you know California is a "two party" consent state and the recording may not have been legally obtained. You are also aware that employers have aggressively started filing counter complaints against plaintiffs asserting violations of California's Penal Code sections 632 and 632.7, the Invasion of Privacy Act, to gain leverage in civil actions. At the very least, the illegally obtained recording risks making your client look less than forthright. What do you do?

This article discusses some common tactics by defendants and several defenses that may be employed to possibly turn the tables on them.

Illegally obtained recordings a misdemeanor

An illegally obtained recording carries criminal and civil penalties. Penal Code section 632(a) prohibits the recording of private conversations without the approval of all parties to the conversation and subjects such conduct to criminal punishment by a fine not exceeding $2,500 or imprisonment in county jail not exceeding one year.

To prove a violation one must show: (1) an intentional eavesdropping or recording a conversation by using an electronic device; (2) that the plaintiff had a reasonable expectation that the conversation was not being overheard or recorded; (3) that the defendant did not have the consent of all parties to the conversation to eavesdrop or record it;(4) harm; and (5) the defendant's conduct was a substantial factor in causing plaintiff's harm. (CACI 1809.) Moreover, Penal Code section 637.2(a) allows an aggrieved party to recover $5,000 civil penalty or three times actual damages. (Pen. Code, § 637.2(a).)

Business entities have standing

Business entities have standing to bring a claim under Penal code section 632. The cross-complaint (or in federal court, counter-complaint) will usually take several forms: filed by the corporation (or other business entity) suing your client, and possibly the individual – whether a co-worker, supervisor or other person – who claims to have been improperly recorded.

Although it may seem counterintuitive that a business entity could be harmed from a recording, the statute specifically defines a "person" to include an "individual, business association, partnership, corporation, limited liability company, or other legal entity. . ." (Pen. Code § 632(b).) Courts have affirmed business entities have standing to pursue a claim. (*See e.g.*, *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 879 [acknowledging that corporations have no standing to pursue common law invasion of privacy claim, but have standing to pursue statutory claim].)

To disclose or not to disclose in civil discovery?

Breaking down the analysis, you should first ask whether the recording is relevant to your claims; next, did the defendant seek the recording through specific discovery demands; and finally, does the recording help or hurt your case?

If the recording is immaterial and not relevant to your claims, there is probably no duty to disclose it to the other side. (Code of Civ. Proc., § 2017.010; (Fed. R. Civ. Proc. 26(b)(1).) In fact, as discussed in more detail below, the U.S. Constitution's Fifth Amendment prohibition against self-incrimination may require that you not disclose criminal conduct.

Even if the discovery demands require disclosure, can you prevent disclosure? Under the Fifth Amendment privilege, a civil litigant need not disclose through discovery process information that may lead to criminal prosecution. (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712.) Four requirements trigger privilege against self-incrimination: (1) information sought must be incriminating; (2) personal to

defendant; (3) obtained by compulsion; and (4) testimonial or communicative in nature. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 366.) The privilege may apply where production of the recordings would itself be "testimonial" and incriminatory. For example, where by producing the documents sought, a party would effectively admit their existence and authenticate them as his or hers, thus supplying a link in the chain of evidence needed for prosecution. (*United States v. Doe*, 465 U.S. 605, 612, 104 S.Ct. 1237, 1242 (1984); (*In re Syncor ERISA Litigation* (C.D. Cal. 2005) 229 F.R.D. 636, 649.)

But when the recording helps your case, it may be advantageous to disclose the recording. This is because the risk of a counter claim and the damages resulting may be small compared to the benefits of having the damning evidence out there for the jury to hear. Strategically, decide whether you disclose the recording early or withhold it under the 5th Amendment and reserve it for impeachment.

It could be admissible

Illegally obtained recordings are admissible in limited circumstances. Penal Code section 632(d) specifically prohibits illegal recordings from being admissible, except as proof in an action or prosecution of a violation of Penal Code section 632. However, section 632 can be used for impeachment purposes. The rationale is the recording party should not be able to use section 632(d) as a shield for perjury and lie with impunity about the contents of the recording because he or she knows the recording cannot be admitted into evidence. (*See Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1497-8; *People v. Crow* (1994) 28 Cal.App.4th 440,452 [affirming the *Frio* holding to support its finding that unlawful tainted evidence and communication could be used for impeachment purposes].)

In addition, it is well-established that evidence that is otherwise inadmissible can be used to refresh present recollection. (Cal. Evid. Code § 771.) A party may therefore use an illegal recording, transcription or notes to refresh his or her memory of the contents of the conversation.

Affirmative defenses

There are several affirmative defenses available to undermine or defeat a Penal Code section 632 claim.

• ***No reasonable expectation of privacy***

One of the easiest defenses is showing the recording occurred in a place where no reasonable person would expect the conversation to be confidential. Penal Code section 632(c) defines a "confidential communication" to include "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 communications in "a public gathering," "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." (*Ibid*.) The California Supreme Court has found a conversation to be a "confidential communication" if a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774-775; *Shulman v. Group W Productions* (1998) 18 Cal.4th 200, 234 [finding the question turns on whether the person recorded reasonably expected the communication would not be overheard or recorded].)

But, the California Supreme Court has also rejected the concept there was no reasonable expectation of privacy when a conversation could be seen and/or overheard by others in the workplace. In *Sanders v. American Broadcasting Cos*. (1999) 20 Cal.4th 907, an employee of a tele-psychic call center brought suit for invasion of privacy and violation of Penal Code section 632 when a television reporter masking as an employee secretly recorded workplace conversations and later broadcast some of the conversation as part of a news program exposing fraudulent activities.

The Supreme Court recognized "[t]here are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." (*Id*. at 916.) Ultimately, the Court allowed the tele-psychic employee to proceed with his claim of invasion of privacy finding, "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation." (*Id*. at 923.) Notably the *Sanders* decision turned on the fact that the recording was conducted by a "stranger" to the workplace (even though the reporter had obtained employment at the tele-psychic business). But, the more important take away for defending clients in a Penal Code section 632 claim is the court's finding that the employees' conversations within cubicles or earshot of co-workers meant that the communications were not "confidential" under Section 632's definition. (*Id*. at 924-925.)

• ***Unclean hands: Employer's policies lower the expectation of privacy***

Employers routinely promulgate written policies putting employees on notice that there is no reasonable expectation of privacy in the workplace. Employers monitor employees' computer usage, voicemail, internet browsing history, install key stroke software, and video security cameras. An employer should not be able to use its policies as a sword and a shield by lowering the privacy bar for its own benefit, and then raising it

by claiming an employee's workplace recording was "confidential." Keep in mind that if the recording occurs in a conference room, break room or other location, the expectation of privacy might be lower. Some helpful cases include: *Marrs v. Marriott* (D.Md. 1992) 830 F.Supp. 274, 283, cited in *Sanders*, where the court held there was no reasonable expectation of privacy where employer's security camera recorded an employee picking a desktop lock in an open office; and, *Kemp v. Block* (D.Nev 1985) 607 F.Supp. 1262, finding no expectation of privacy in a small workshop with no interior walls where two employees shouted at each other.

When you are dealing with an employer with thorough policies, confirm there are no policies notifying employees that recording confidential conversations is illegal. In the absence of any such warning, turn the tables on the employer – why didn't the employer set forth a clear policy that recording of co-workers/supervisors is (1) illegal, (2) against company policy, (3) will not be tolerated, and (4) subject to discipline? Does the employer have policies notifying the employee that his/her conduct is being monitored? Evidence of this nature could help prove an "unclean hands" defense.

• ***Justification as an affirmative defense***

The defendant of an invasion of privacy claim "must prove that the circumstances justified the invasion of privacy because the invasion of privacy substantially furthered a relevant legitimate or compelling competing interest." (CACI-VF 1807). "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.'" (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440.)

Hypothetically, the plaintiff in a sexual harassment case alleges her supervisor repeatedly called after hours making sexual advances. One may argue the employee's recording of her supervisor's sexual propositions are justified as substantially furthering a relevant legitimate or compelling competing interest or one that is important – i.e., California's well established policy of rooting out discriminatory and harassing workplace conduct under the Fair Employment & Housing Act ("FEHA").

Indemnity claim against individually-named defendant

If a third party, not the employer, asserts a cross-claim against your plaintiff, you should consider asserting a "cross-cross-claim" (In federal court, it is also known as a "counterclaim in reply" and is recognized as an appropriate pleading. *See* 5 Wright & Miller, Federal Practice & Procedure, s 1188; *Electroglas, Inc. v. Dynatex Corp*. (N.D. Cal. 1979) 473 F. Supp. 1167, 1171; *Southeastern Industrial Tire Co. v. Duraprene Corp*. (E.D.Pa.1976) 70 F.R.D. 585) against the employer for indemnity, contribution, and declaratory relief. California has a strong public policy that favors the indemnification (and defense) of employees by their employers for claims and liabilities resulting from the employees' acts within the course and scope of their employment." (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 952) "Labor Code section 2802 codifies this policy and gives an employee a right to indemnification from his or her employer." (*Ibid*.) Labor Code § 2802 obligates California employers to indemnify an employee for all expenditures and losses, including attorney fees.

An employer may argue some points to get around the uncomfortable position of having to pay the costs of defense for a claim it approved. An employer may argue that no indemnity can lie for a "first party" claim by the employer against the employee. (*See e.g*., *Nicholas Labs., LLC v. Chen* (2011) 199 Cal.App.4th 1240; *Thornton v. California Unemployment Ins. Appeals Bd.*, (2012) 204 Cal.App.4th 1403.) There is case law authority, however, supporting a claim for indemnity when a third party, such as a co-worker, counter claims against your client. (*See Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 236-37 [finding Labor Code section 2802 "requires an employer to indemnify an employee who is sued by third persons for conduct in the course and scope of his or her employment"]; *Grissom v. Vons Companies, Inc.*, (1991) 1 Cal.App.4th 52, 57 [holding Labor Code "requires the employer to indemnify the employee for all that the employee necessarily expends in direct consequence of the discharge of the employee's duties"].)

An employer may argue that "illegal" recordings are not within the "course and scope" of employment. Yet, FEHA requires all employers, with more than 50 employees, to have written anti-discrimination and anti-harassment policies, and to train managers on the prevention of workplace harassment. (Cal. Code of Regs., tit. 2, § 11023.) An employee recording what he/she reasonably believes to be conduct in violation of the employer's policies would be acting in the course and scope of employment by placing the employer on notice and assisting in the enforcement of said polices. This is especially the case when the allegations are against a supervisor whose conduct creates strict liability for an employer, or even an employee whose behavior may implicate the employer under the theory of respondeat superior.

Conclusion

In sum, important decisions need to be made prior to filing a case regarding the use of illegally obtained recorded evidence. When the relevance and strength of the evidence weigh in favor of the risks associated with a counterclaim, it becomes a strategic question of how to best use it – disclose up front or withhold under the Fifth Amendment privilege and use for impeachment, if necessary. Should the defense file a cross claim, there are several affirmative defenses,

and possibly the option to file a claim for indemnity under Labor Code section 2802, that may be employed to offset and/or defeat any such claim.


Erlich

Jason Erlich is a partner at McCormack and Erlich, in San Francisco. He devotes the majority of his practice to representing individual employees in workplace disputes including wrongful termination, discrimination, harassment, unpaid wages, wage and hour violations, disability discrimination and accommodation, and family medical leave violations.

Jason graduated magna cum laude from the UCLA and was admitted to the Bar in 1999 after graduating from Hastings College of the Law. Jason volunteers his time to the Worker's Rights Clinic and, through the Bar Association of San Francisco he works with unrepresented tenants facing eviction. Jason has worked as a union organizer and in his spare time enjoys biking, hiking, skiing, camping and world travel.

Denise Top is a founding partner of Top | DePaul LLP focusing on employment issues and litigation in support of the rights of employees. As a former defense attorney, Denise defended public and private entities in employment matters and, as a result, she understands how employers work and can often achieve results before a lawsuit is filed.

The law is not Denise's first career. She worked almost a decade in social services and in the buying offices of several major Bay Area retailers before starting law school. She was on the editorial board of Law Review and received Witkin Awards for Academic Excellence in Remedies and Community Property and a CALI Excellence for the Future Award in Appellate Advocacy. Denise has been selected to the Super Lawyers Rising Stars list in 2013, 2014, and 2015. Endurance training for Ironman triathlons has taught Denise that any goal is attainable with hard work, dedication, and a good sense of humor.


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