

# Tape Recording Of Conversations: Ethics, Legality, and Admissibility



*Photograph by Al Adcock*

**NO MATTER HOW PRUDENT OR** careful you are, at some time or another you have probably said something to an opposing counsel, client, or witness you wish you had not. Nowadays, you could find yourself hearing such remarks played back on a tape recorder.<sup>1</sup> The tape recording of conversations in legal proceedings may be more common than many lawyers realize.<sup>2</sup> And more than one lawyer has learned the hard way that what you say may not only end up on tape but also be used against you. In a recent case, a Texas lawyer was disbarred after a jury heard tape-recorded remarks the lawyer made to a former client.<sup>3</sup>

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In another case, a Texas lawyer boasted to a client's father about being a college chum of the judge who would preside over the case, stated that he knew the "ins and outs" of the judge's court, and promised a favorable outcome in the case. Dissatisfied with the sentence his lawyer secured in a plea bargain, the client sought relief from the court and another judge was assigned to consider his request. The father revealed that he had secretly taped the conversation with the lawyer and played it for the reviewing judge. The judge set aside the defendant's guilty plea and the plea bargain and banned the lawyer from practicing in the original judge's court.<sup>4</sup>

## Legality of Taping

Under both Texas and federal law, a person may ordinarily tape record a conversation if at least one party to the conversation consents — the other participants in the conversation need not be advised of the taping.<sup>5</sup> For example, it is legal to tape one's own telephone conversation with another without telling the other person.<sup>6</sup> On the other hand, it is illegal, for example, for a husband to tape record his wife's conversation on the couple's home phone with her alleged paramour if neither the wife nor the paramour consent to the taping.<sup>7</sup> And it might be illegal, for example, for an investigator making a secret videotape of a personal injury claimant to record any audible conversations between the claimant and another.<sup>8</sup> Videotapes are a simultaneous audio and video recording of events.<sup>9</sup>

## Civil Penalties For Illegal Taping

Texas and federal law prescribe civil penalties for illegal taping of conversations.<sup>10</sup> Under Chapter 123 of the Texas Civil Practice & Remedies Code and Article 18.20, Section 16 of the Texas Code of Criminal Procedure, victims of illegal taping may recover: an injunction against further taping and against divulgence of the illegally taped information; statutory damages of \$1,000; all actual damages above \$1,000; punitive damages; and lawyer's fees and costs.<sup>11</sup> Chapter 123 is anything but

toothless. In a case where a party to a divorce proceeding bugged the office of his wife's lawyer, the Fort Worth Court of Appeals affirmed an award of \$1 million in punitive damages.<sup>12</sup>

Under federal law,<sup>13</sup> a victim may recover: injunctive and/or declaratory relief; and damages as follows: the sum of the actual damages suffered and any profits made by the violator; or the greater of \$100 for each day of violation or \$10,000; punitive damages; and lawyer's fees and litigation costs.<sup>14</sup> The federal statute is not exclusive and does not preempt similar state statutes.<sup>15</sup> Under both statutes, the limitations period for bringing an action is two years.<sup>16</sup>

## Criminal Penalties For Illegal Taping

The illegal taping of a conversation is a second degree felony punishable by jail time under Texas law.<sup>17</sup> Violation of the federal wiretap statute is punishable by fine and/or imprisonment of up to five years.<sup>18</sup>

## Ethics of Taping By Lawyers

Lawyers should think carefully before taping any conversation. 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.<sup>19</sup> In the past, it was not unethical for a Texas lawyer to record conversations if the recording was otherwise legal.<sup>20</sup> In 1967, however, the ABA Committee on Ethics held it would be an ethical violation for a lawyer to surreptitiously record a conversation even if one party consents.<sup>21</sup> The ABA formally adopted this position in 1974, in part as a result of the Watergate scandal.<sup>22</sup>

Accordingly, in 1978, the Texas Professional Ethics Committee withdrew its 1953 opinion permitting lawyers to record conversations. The committee concluded lawyers owe a higher duty than the general public and held lawyers must inform all participants in a conversation if the conversation is to be recorded.<sup>23</sup> In 1991, the Dallas Bar Association issued a

similar opinion and held neither a lawyer nor an investigator the lawyer hires may surreptitiously record a conversation.<sup>24</sup>

This year, the Texas Professional Ethics Committee revisited the issue. In Ethics Opinion 514, the committee reiterated that a lawyer may not tape any conversation without first advising the parties to the conversation that it is being taped.<sup>25</sup> The committee premised its position on Disciplinary Rule 8.04(a)(3), which states a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>26</sup> The committee's stance against secret tape recording by lawyers is arguably reasonable because the practice "provides opportunities for the unscrupulous attorney to take advantage of opposing counsel, clients, friendly witnesses, and potential litigants."<sup>27</sup> On the other hand, there may be extreme situations where a limited exception to the prohibition would be justified.

Presently, the only exception to the ethical rule that a lawyer may not secretly record a conversation is for special situations where the state attorney general or local government or law enforcement attorneys or officers are acting within strict statutory limitations conforming to constitutional requirements.<sup>28</sup>

In Ethics Opinion 514, the committee also addressed the question of whether a lawyer may have a client do what the lawyer cannot; that is, secretly tape a conversation. Because a lawyer is required to give the client an accurate statement of the law, lawyers may explain that a client may secretly tape conversations to which the client is a party or where at least one participant in the conversation consents to the taping.<sup>29</sup> "An attorney may not, however, circumvent his or her ethical obligations by requesting that clients secretly record conversations to which the lawyer is a party."<sup>30</sup>

Not all jurisdictions follow the ABA's lead.<sup>31</sup> For example, in the District of Columbia, a lawyer may tape record an interview the lawyer attends with a client and a representative of a federal agency investigating the client and need not reveal the taping unless asked.<sup>32</sup> In Oregon, a lawyer may secretly record his or her tele-

phone conversation but may not tape an in-person conversation.<sup>33</sup> Under an ethics opinion issued by the New York County Committee on Professional Ethics, a lawyer may surreptitiously tape conversations with another person, including a client or another lawyer, but if asked, the lawyer must reveal that the conversation is being taped.<sup>34</sup> In Mississippi, a lawyer who receives threatening and harassing phone calls from a former opposing counsel may record the conversations without the other lawyer's consent or knowledge.<sup>35</sup> Other states that do not strictly adhere to the ABA position include Arizona, Tennessee, Idaho, and Utah.<sup>36</sup>

## Admissibility Of Tape Recordings

Tape recordings made in violation of the federal wiretap statute are, by statute, inadmissible in any judicial proceeding.<sup>37</sup> In one case, a Texas court of appeals held it was reversible error for a trial court to admit into evidence tape recordings a husband secretly made of his wife's conversations with her

alleged paramour because, according to the court, the taping violated the federal wiretap statute.<sup>38</sup> In reaching this holding that a spouse's secret taping of the other spouse's telephone conversations in the couple's home violated the federal wiretap statute, the court expressly declined to follow a U.S. Fifth Circuit Court of Appeals decision to the contrary.<sup>39</sup> Denying the application for writ of error in the case, the Texas Supreme Court noted the conflicting Fifth Circuit authority and stated that it neither approved nor disapproved of the holding of the court of appeals concerning the admissibility of the recording.<sup>40</sup>

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.<sup>41</sup> Chapter 123 of the Civil Practice and Remedies Code does not specifically address the admissibility of tape recordings.<sup>42</sup> It does, however, provide that a victim of an illegal taping can obtain an injunction against "divulgence or use of information obtained by an interception."<sup>43</sup>

The Texas Supreme Court has held that legally-made tape recordings are

admissible evidence in civil trials.<sup>44</sup> In order to gain admission of a tape recording, the offering party must lay the proper predicate by showing: that the recording device was capable of taking "testimony"; the operator of the device was competent; the authenticity and correctness of the recording; no changes were made to the tape; the manner of preservation was reliable; the identity of the speakers; and the testimony was voluntary.<sup>45</sup> Some elements of the predicate may be inferred.<sup>46</sup> The same predicate also applies to videotapes.<sup>47</sup>

It remains to be seen whether Texas courts will adopt, for civil cases, a rule that a party is entitled to exclusion of any evidence derived from an illegal recording under a "fruit of the poisonous tree" argument.<sup>48</sup> In one Texas case, a wife argued that her husband should not have been permitted to introduce independent evidence of her extramarital affairs because he first learned about the affairs by illegally monitoring her phone calls and then gathered additional confirming evidence.<sup>49</sup> The appellate court held there was sufficient evidence that the information about the affairs was not derived solely as a result

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of the wiretap. The court also declined to consider the issue because the wife failed to preserve error with a timely objection.<sup>50</sup> In another case, the U.S. Fifth Circuit Court of Appeals held the district court did not abuse its discretion in rejecting an argument that lawful tape recordings "deceptively obtained" should be excluded.<sup>51</sup>

## Discoverability Of Tape Recordings

Tape recordings are frequently the subject of interrogatories and requests for production.<sup>52</sup> Under Texas Rule of Civil Procedure 166b, relevant, unprivileged tape recordings are discoverable.<sup>53</sup> Lawyers should take this into account whenever contemplating the making of a tape recording. Also, clients should be warned that any tape recordings they make may be discoverable if no privilege applies. Moreover, there is a danger that a privilege will be lost even if a recording was made legally by a party.<sup>54</sup> A federal district court in Virginia held the work product privilege was waived for tapes made by

a party after they were turned over to the party's lawyer.<sup>55</sup> According to the court, the lawyer involvement in the taping rose to the level of active encouragement and support, thus resulting in waiver of the privilege.<sup>56</sup>

Likewise, a secret tape recording made by a lawyer may be discoverable even if there is an applicable privilege. At least that is what the U.S. 11th Circuit Court of Appeals held when a lawyer tried to assert the work product privilege for tape recordings he had secretly made of conversations with witnesses.<sup>57</sup> Although the work product privilege was clearly applicable, the court held it was waived by the lawyer's unethical conduct in making the secret recordings.<sup>58</sup> In another case, a New York court held an otherwise privileged tape recording became discoverable after it was given to a witness who used it to refresh his recollection while preparing for a deposition.<sup>59</sup> And the Fifth Circuit approved discovery sanctions in a case where a lawyer failed to disclose in interrogatories the existence of taped telephone conversations.<sup>60</sup> In the same case, the Fifth Circuit also held the work product privilege was waived by the lawyer's unethical conduct.<sup>61</sup>

## Conclusion

Over the years, tape recordings have led to the downfall of countless public figures, and lawyers are by no means immune from this trend. Sadly, the prudent lawyer should probably act as if just about everything said over the phone while practicing law may well end up on tape.<sup>62</sup> Likewise, any lawyer who undertakes to record a conversation should take extreme care to ensure demonstrable compliance with the ethical requirements governing this practice. The examples discussed at the beginning of this article suggest that to do otherwise invites disaster.<sup>63</sup>

1. This article provides a general overview of the topic. For a comprehensive treatment of wiretapping issues in civil litigation, see Susan L. Kopecky, *Dealing with Intercepted Communications: Title III of the Omnibus Crime Control and Safe Streets Act in Civil Litigation*, 12 Rev. Litig. 441 (1993) [hereinafter Kopecky]. See also Charles W. Adams, *Tape Recording Telephone Conversations — Is it Ethical for Attorneys?* 15 J. Legal Prof. 171 (1990). To research this issue in Texas, consult 59 Tex. Jur. 2d

Privacy §§ 9, 10 (1988) and 46 Tex. Digest 2d *Telecommunications* §§ 493-530.

2. See Tex. Comm. on Professional Ethics, Op. 482, 57 Tex. B.J. 200 (1994) (involving a question posed by a law firm that regularly records conversations with those involved in litigation); see also Marjorie A. Caner, *Propriety of Attorney's Surreptitious Sound Recording of Statements of Others Who Are or May Become Involved in Litigation*, 32 A.L.R. 5th 715 (1995); Corneli H. Tuite, *Secret Tape Recordings Pose Danger for Integrity*, *Law License*, Chi. Daily L. Bull. Aug. 7, 1992, p. 5; Jay W. Waks, *Taping Raises Legal, Practical Questions*, Nat'l L.J. Sept. 16, 1992, p. 16. Tape recording is especially common in family law matters. See, e.g., *Chance v. Chance*, 911 S.W.2d 40, 51 (Tex. App. — Beaumont 1995, writ denied).
3. Bruce Vincent, *Taped Threat Leads to P.I. Lawyer's Disbarment*, *Texas Lawyer*, Feb. 12, 1996, p. 4.
4. Gary Taylor, *Client Taped Boastful Remarks — Conversation Haunts Lawyer*, Nat'l L.J., Oct. 16, 1989, p. 14.
5. 18 U.S.C. § 2511(2)(d); Tex. Code Crim. Proc. Ann. art. 18.20 § 17(a)(4) (Vernon 1986).
6. In California, for example, it is illegal for a person to secretly record any conversation, even one in which he or she participates. Cal. Penal Code §§ 629.38 *et seq.* (West 1996). In one case, a Texas resident taped conversations with California residents. *Becker v. Computer Sciences Corp.*, 541 F.Supp. 694 (S.D. Tex. 1982). The court held that Texas law applied and refused to permit recovery of damages under the California statute. *Id.*
7. *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. — Houston [14th Dist.] 1995), writ denied *per curiam*, 923 S.W.2d 569 (Tex. 1996); but see *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974) (holding that it is not a violation of the federal wiretap statute for a spouse to secretly record conversations by the other spouse that take place over the telephone in the marital home). See generally Allan H. Zerman, Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating to Electronic Eavesdropping and Their Application in Matrimonial Cases*, 12 J. Am. Acad. Matrim. Law 227 (1994); Note, *Interspousal Wiretapping: Should State Law or Federal Statute Govern?* 10 Hamline L. Rev. 255 (1987); Scott J. Glick, *Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance*, 41 Cath. U. L. Rev. 845 (1992).
8. See *United States v. Torres*, 751 F.2d 875, 885 (7th Cir. 1984) (the soundtrack of a videotape, no less than a free-standing tape-recording, is within the scope of the federal wiretap statute); see also *Boddie v. American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984); *Wasserman v. Low*, 691 P.2d 716 (Ariz. Ct. App. 1984). Such a recording likely would not be considered a violation of Chapter 123 of the Texas Civil Practice and Remedies Code because the intercepted conversation is not a communication transmitted with the aid of a wire or cable. See Tex. Civ. Prac. & Rem. Code Ann. § 123.001.
9. *Ali v. State*, 742 S.W.2d 749, 754 (Tex. App. — Dallas 1987, pet. ref'd).
10. Before enactment of statutory remedies for illegal wiretapping, Texans could bring a civil action for illegal wiretapping under a right of privacy theory. See *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). See

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also A.M. Swarthout, Annotation, *Eavesdropping as Violating Right of Privacy*, 11 A.L.R. 3d 1296 (1967).

11. Tex. Civ. Prac. & Rem. Code Ann. § 123.004 (Vernon 1986). See Russell G. Donaldson, Annotation, *Construction of State Statutes Authorizing Civil Cause of Action By Person Whose Wire or Oral Communication is Intercepted, Disclosed, or Used in Violation of Statutes*, 33 A.L.R. 4th 506 (1984).
12. *Parker v. Parker*, 897 S.W.2d 918, 930-31 (Tex. App. — Fort Worth 1995, writ denied).
13. The federal statute is sometimes referred to as "Title III of the Omnibus Crime Control and Safe Streets Act."
14. 18 U.S.C. § 2520.
15. *U.S. v. Donovan*, 429 U.S. 413, 444 (1977)(Burger, J., concurring).
16. *Collins v. Collins*, 904 S.W.2d 792 (Tex. App. — Houston [14th Dist.] 1995), writ denied per curiam, 923 S.W.2d 569 (Tex. 1996); 28 U.S.C. § 2520(e)(limitations begin to run on date victim could have reasonably discovered the violation).
17. Tex. Penal Code Ann. § 16.02(f); *Collins*, 904 S.W.2d at 792.
18. 18 U.S.C. § 2511(4)(a).
19. Tex. Comm. on Professional Ethics, Op. No. 514, 59 Tex. B.J. 181 (1996).
20. Tex. Comm. on Professional Ethics, Op. No. 84 (1953).
21. See ABA Committee on Ethics and Grievances, Informal Op. No. 1008; ABA Committee on Ethics and Grievances, Informal Op. No. 1009 (1967).
22. ABA Committee on Ethics and Professional Responsibility, Formal Op. 337 (1974); Stanley S. Arkin, *Attorneys, Tape Recorders and Perfidy*, N.Y.L.J., April 14, 1994, p. 3.

23. Tex. Comm. on Professional Ethics, Op. No. 392, 41 Tex. B.J. 580 (1978).
24. Dallas Bar Ass'n, Op. No. 1991-02 (1991).
25. Tex. Comm. on Professional Ethics Op. No. 514, 59 Tex. B.J. 181 (1996).
26. *Id.*; see also *People v. Selby*, 606 P.2d 45 (Col. 1979).
27. Stanley S. Arkin, *Attorneys, Tape Recorders and Perfidy*, N.Y.L.J., April 14, 1994, p. 3.
28. Tex. Comm. on Professional Ethics, Op. 514, 59 Tex. B.J. 181 (1996).
29. *Id.* See also Daniel Wise, *Attorney's Role in Secret Tapes Under Review*, N.Y.L.J. March 1, 1993, p. 1 (discussing application of rule that lawyers are permitted to advise their clients about the legality of tape-recording and are not required to forbid their clients from engaging in such conduct).
30. *Id.*
31. See Mark Koehn, *Attorneys, Participant Monitoring, and Ethics: Should Attorneys Be Able to Surreptitiously Record Their Conversations?*, 4 Geo. J. Legal Ethics 403 (1990)(discussing ethics opinions concerning taping by attorneys).
32. District of Columbia Bar, Op. No. 229 (1992).
33. Oregon State Bar, Op. No. 1991-74 (1991).
34. N.Y. County Lawyers' Committee on Professional Ethics, Op. No. 696 (undated); but see N.Y. City Comm. on Prof. & Jud. Ethics, Formal Op. No. 1995-10 (lawyer may not surreptitiously tape record conversations with opposing counsel). See generally Matthew Goldstein, *Lawyers' Fault Ethics Opinion on Taping Telephone Calls*, N.Y.L.J., Sept. 22, 1993, p. 1.
35. Mississippi State Bar, Op. No. 203 (1992); See also Marjorie A. Caner, *Propriety of Attorney's Surreptitious Sound Recording of Statements of Others Who Are or May Become Involved in Litigation*, 32 A.L.R. 5th 715 (1995).
36. David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception By Undercover Investigators and Discrimination Testers*, 8 Geo. J. Legal Ethics 791, 829 nn. 137, 138 (1995).
37. 18 U.S.C. § 2515.
38. *Turner v. PV Int'l Corp.*, 765 S.W.2d 455, 471 (Tex. App. — Dallas 1988), writ denied per curiam, 778 S.W.2d 865 (Tex. 1989).
39. *Turner*, 765 S.W.2d at 470 (declining to follow *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974)). The *Simpson* case is considered controversial by many. See Kopecky, 12 Rev. Litig. at 452. See generally Alan M. Grosman, *Tapping Into Trouble: Wiretapping and Divorce*, 157 N.J. Lawyer 16 (Nov./Dec. 1993); Jonathan D. Niemeyer, *All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act*, 81 Ky. L.J. 237 (1992/1993). See also *Platt v. Platt*, 685 F.Supp. 208, 209 (E.D. Mo. 1988)(federal wiretap act not violated where woman attached recording device to her own phone and recorded conversations between her daughter and her estranged husband).
40. *PV Int'l Corp. v. Turner*, 778 S.W.2d 865, 866 (Tex. 1989).
41. *Ward v. State*, 787 S.W.2d 116, 119 (Tex. App. — Tyler 1990), rev'd on other grounds, 829 S.W.2d 787 (Tex. Crim. App. 1992).
42. *Kotrla v. Kotrla*, 718 S.W.2d 853 (Tex. App. — Texarkana 1986, writ ref'd n.r.e.).
43. Tex. Civ. Prac. & Rem. Code § 123.004(1) (Vernon Supp. 1996).
44. *Matter of Bates*, 555 S.W.2d 420 (Tex. 1977); *Seymour v. Gillespie*, 608 S.W.2d 897 (Tex. 1980).

45. *Matter of Bates*, 555 S.W.2d at 432.
46. *Seymour*, 608 S.W.2d at 898; *Boarder to Boarder Trucking, Inc. v. Mondy, Inc.*, 831 S.W.2d 495, 497 (Tex. App. — Corpus Christi 1992, no writ).
47. *Ali v. State*, 742 S.W.2d 749, 754 (Tex. App. — Dallas 1987, pet. ref'd).
48. Justice Felix Frankfurter coined the term "fruit of the poisonous tree" in an early wiretap case. *Nardone v. United States*, 308 U.S. 338, 340-41 (1939). In New Jersey, evidence obtained through an illegal wiretap is statutorily excluded as "fruit of the poisonous tree." N.J. Stat. Ann. 2A:156A-21. See also *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1065-66 (5th Cir. 1985)(discussing applicability of exclusionary rule in the context of a taping issue).
49. *Fabian v. Fabian*, 765 S.W.2d 516, 519 (Tex. App. — Austin 1989, no writ).
50. *Id.*
51. *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1065-66 (5th Cir. 1985).
52. See, e.g., *Davis v. Pate*, 915 S.W.2d 76 (Tex. App. — Corpus Christi 1996, orig. proc.). See generally Kopecky, 12 Rev. Litig. at 462-63.
53. Tex. R. Civ. P. 166b(2)(b).
54. See Michael C. Silberberg, *Attorney Ethics in Discovery and Other Pretrial Preparation*, N.Y.L.J., April 1, 1993, p. 3.
55. *Haigh v. Matsushita Electronic Corp. of America*, 676 F.Supp. 1332 (E.D. Va. 1987).
56. *Id.*
57. *Parrott v. Wilson*, 707 F.2d 1262, 1272 (11th Cir. 1983); see also *Wilson v. Lamb*, 125 F.R.D. 142 (E.D. Ky. 1989).
58. *Id.*
59. *Herrmann v. General Tire & Rubber Co.*, 435 N.Y.S.2d 14, 16 (N.Y. App. Div. 1981).
60. *Chapman & Cole and CCP, Ltd v. Ite Container Int'l B.V.*, 865 F.2d 676 (5th Cir. 1989).
61. *Id.*
62. See Brian Graifman, *Taping on Telephone Not Such a Bad Idea*, N.Y.L.J. Oct. 6, 1993, p. 2 (lawyers should assume every conversation is being taped).
63. See Corneli H. Tuite, *Secret Tape Recordings Pose Danger for Integrity, Law License*, Chi. Daily L. Bull. Aug. 7, 1992, p. 5.

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