

Ethics and Admissibility of Recorded Telephone Conversations

I recently had a personal injury case in which a delivery truck had rear-ended my client's automobile, thereby causing serious personal injuries. When I spoke with my client shortly after the accident, she stated that the truck driver had declared at the accident scene that "I've been telling those morons¹ for months that the brakes on this truck were not working right." Unfortunately, there was no mention of this statement or of any problem with the truck's brakes in the official police report.

As is my usual procedure after accepting employment on a case, I hired a private investigator to take recorded statements of all witnesses to the accident, including that of the truck driver since a lawsuit had not yet been filed. I was then pleasantly surprised to learn from the investigator several weeks later that the truck driver had given him a recorded statement over the telephone and had provided very detailed information regarding a long history of brake problems with the truck that was involved in this accident.

However, as I was listening to this recorded statement and imagining how angry a jury would be that this truck was still on the road at the time of this accident, I became concerned when I learned that the investigator did not inform the truck driver that his statement was being recorded. This was because I was under the impression that if one was going to record a telephone conversation, the law required that the person being recorded must first be informed of this fact and give their consent.

However, after researching the law in this area, I have found that while it is unethical for an attorney to record a telephone conversation with another attorney regarding a pending legal matter without the other attorney's knowledge, Legal Ethics Committee of the Indiana State Bar Association, *Opinion No. 1 of 2000*, RES GESTAE, March 2000, at 39-40, generally there is no requirement that a person be informed that their telephone conversation is being recorded, provided that at least one person to the conversation knows that it is being recorded. Ind. Code 35-33.5-1-5; Apter v. Ross, 781 N.E.2d 744, 756 (Ind. Ct. App. 2003).

I. The Indiana Wiretap Act

In considering federal and state statutes which are applicable to the recording of telephone conversations, Indiana does have a Wiretap Act which is found at Indiana Code 33-33.5-1-1 et seq., under the article title of "Interception of Telephonic or Telegraphic Communications." The Act defines an "interception" as the "intentional recording or acquisition of the contents of an electronic communication **by a person other than a sender or receiver of that communication, without the consent of the sender or receiver**, by means of any instrument, device or equipment under this article. This term includes the intentional recording of communication through

the use of a computer or a FAX (facsimile transmission) machine." Ind. Code 35-33.5.1.5 (Emphasis added).

Ind. Code 35-33.5-5-5(b) states that "a person who knowingly or intentionally intercepts a communication in violation of this article commits unlawful interception, a Class C felony." Ind. Code 35-33.5-5-4 also provides a civil cause of action to a person whose communications are intercepted in violation of this article and states that such a person is entitled to recover the following:

- (A) The greater of:
 - (1) actual damages;
 - (2) liquidated damages computed at a rate of \$100 per day for each day of violation; or
 - (3) one thousand dollars (\$1,000).
- (B) Court costs.
- (C) Punitive damages when determined to be appropriate by the trial court; and
- (D) Reasonable attorney fees.

However, the Statute clearly provides that if one person who is involved in the conversation is aware that it is being recorded, there is no violation of this Statute even though other participants in the conversation are unaware that they are being recorded. In interpreting this Statute, the Indiana Court of Appeals has also specifically held that "[u]nder the Indiana Wiretap Act, the recording of a telephonic or telegraphic communication is not an 'interception' if it is done with the consent of the sender or receiver of the communication." Apter v. Ross, 781 N.E. 2d 744, 756 (Ind. Ct. App. 2003).

Therefore, in a situation where an investigator takes a recorded statement of a witness or a participant in an accident but does not inform the person with whom he is speaking that the conversation is being recorded, there is no violation of Indiana's Wiretap Act because the investigator is aware that the conversation is being recorded.

II. The Federal Wiretap Act

Similarly, the Federal Wiretap Act, which is found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, beginning at United States Code Title 18 Part I Chapter 119 Section 2510, addresses the interception of wire, oral, or electronic communications. This Statute states that it is not unlawful for a person to intercept such communications "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." 18 U.S.C. 2511(2)(d). Accordingly, if one participant to the conversation is aware that it is being recorded, there is no violation of this federal statute.

¹ Apparently referring to the truck driver's employer.

actions had "not only frustrated the proper administration of justice, they infringed upon the privacy of unsuspecting people." 468 N.E.2d 849, 850. The Court also stated that "[a]n attorney must be aware of the importance of vigilantly guarding against such intrusions. The Respondent's disregard of the privacy rights of the others and his disregard of the authority vested in the Courts is inconsistent with his duty as an attorney and reflects adversely on his fitness to practice law." *Id.* As a result, Mr. Vickery was suspended from the practice of law for six (6) months, with an automatic reinstatement at the end of that time. *Id.*, 468 N.E. 2d at 850.

It should be noted that if this case were brought today, Mr. Vickery's conduct would also constitute a Class C Felony ("unlawful interception") as provided by Ind. Code 35-33.5-5-5 because none of the individuals whose conversations this gentleman recorded knew that they were being recorded.

Conclusion

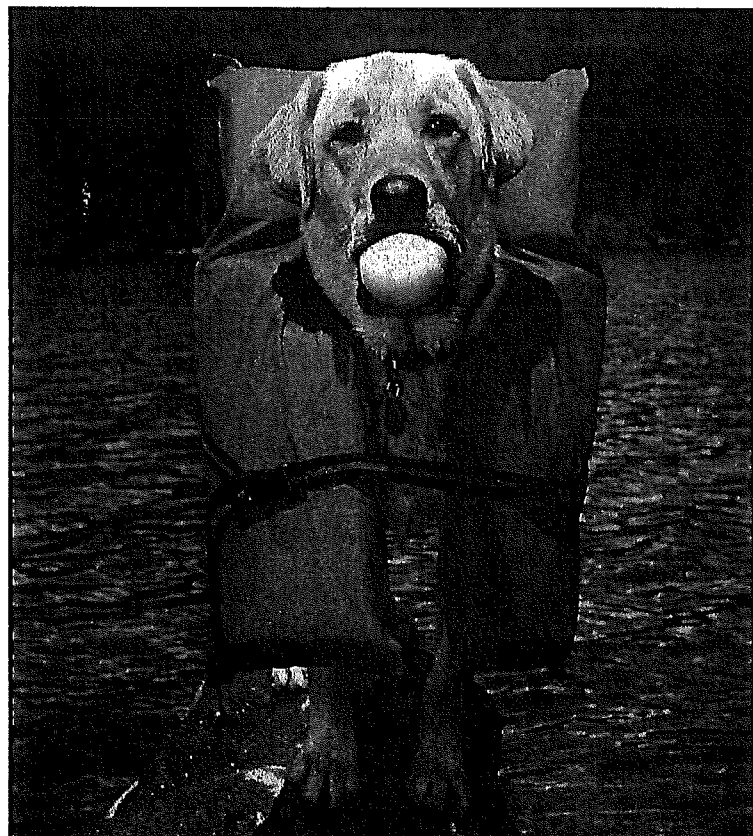
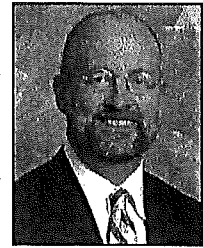
It is not illegal for a person to record a telephone conversation in which they are a participant without advising the other individual(s) to the conversation that it is being recorded. Such recordings are admissible into evidence in a legal proceeding provided that the usual evidentiary foundations are met. It is not unethical for an attorney to record a telephone conversation with someone who is not an attorney without advising the other person that the conversation is being recorded, provided that the attorney does not falsely represent that the conversation is not being recorded when in fact it is. While there is no definite rule regarding recording a client without their knowledge, this practice should be avoided unless the client first gives their consent.

The Legal Ethics Committee of the Indiana State Bar Association has issued an Opinion which indicates that an attorney would commit a violation of Indiana Rule of Professional Conduct 8.4(c) by recording a telephone conversation with another attorney in connection with a pending legal matter without obtaining permission from the other attorney to do so. However, the Committee's opinions are advisory and do not have the force of law.

In considering the foregoing, it is also important to recognize that the recording of a telephone conversation would seem to be the most accurate and objective method of preserving what in fact was said during the conversation. Simple memory or even the making of notes concerning what was said during a conversation is subject to the usual fragilities of human nature.

On the other hand, as noted by the aforementioned Legal Ethics Opinion from the Indiana State Bar Association, conversations between attorneys in an on-going legal matter do usually have an expectation of privacy and confidentiality that should be respected. Where to draw the line, so to speak, in such instances is one of the many judgments which attorneys must determine which makes our profession interesting.

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