



ALASKA BAR ASSOCIATION

Employment Law Section

Wednesday, October 3, 2012*
12 noon – 1 p.m.
Anchorage, Alaska

Surreptitious Taping in the Workplace: Is it Lawful, Ethical and Admissible?

Presenter: Gregory Fisher, Davis Wright Tremaine, LLC and
Section Co-chair

*this topic was originally scheduled for 9/5/12 which was cancelled due to windstorm

1 General CLE credit

Surreptitious Taping in the Workplace: Is it Lawful, Ethical, and Admissible?

By

Gregory S. Fisher, Esq.¹

Presentation to the Alaska Bar Association Employment Law Section
September 5, 2012

I. Is Alaska a one party consent state?

AS 42.20.310(a)(1): “A person may not use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation.”

Traditional view: *Palmer v. Alaska*, 604 P.2d 1106, 1108 n.5 (Alaska 1979) interpreted Alaska’s eavesdropping statute as only prohibiting third parties who are not part of a conversation from taping.

Minority (but perhaps better reasoned) view: No court in Alaska has ever actually studied this proposition. The brief discussion in *Palmer* was dropped in a footnote and could be construed as dicta since it was not material to the court’s disposition of the case. The current statute distinguishes between a “person” and a “party” to the conversation. If *Palmer* is correct, the statute is actually superfluous. Why would you need a statute to permit a person to tape with consent? If the taping person consents to taping, then the statute would only apply to wire-tapping or similar devices, and that is not how the statute is drafted. Similar analytical problems are part of the reason why so many customer service advisements notify callers that the conversation may be taped to ensure quality customer service or related purposes.

Federal (Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522: 18 U.S.C. § 2511(2)(d): “It shall not be unlawful under this chapter 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

¹ Partner, Davis Wright Tremaine LLP, 701 West 8th Avenue Anchorage, Alaska 99501 (907) 257-5300 gregoryfisher@dwt.com The views stated here are the author’s alone and do not necessarily reflect those of his partners or firm.

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.”

Related Federal laws (not discussed in this presentation): Stored Communications Act, 18 U.S.C. §§ 2701-2712; Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (exceeding authorized use). *See United States v. Nosal*, ___ F.3d ___, 2012 WL 1176119 (9th Cir. 2012) (en banc) (overruling panel, holding that CFAA does not extend to violations of website and company use restrictions, and the “exceeds authorized use” provision is limited to violations concerning access to information and not restrictions on use).

II. Assuming Alaska is a one party consent state, is surreptitious taping lawful?

It depends.

The lawfulness can only be analyzed in context.

For example, if an employee surreptitiously taped conversations in the workplace in which confidential and proprietary business information was discussed, the act of taping and the tape could be construed as misappropriation of a protected trade secret.

Hypothetical: Sales representative has not been meeting specified productivity goals. He is called in for a disciplinary meeting. He sees the writing on the wall and decides to tape the meeting. During the meeting, a range of information is discussed, including marketing plans, budgets, customer preferences, and other forms of confidential or proprietary business information.

Hypothetical: a public employee tapes co-workers and his supervisor in a variety of different communications. Is a public record thereby created? Under Alaska law, "public records" are defined as “books, papers, files, accounts, writings, including drafts and memorialization of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; "public records" does not include proprietary software programs.” *See AS 40.25.220(3)*. The concept of “public records” is broadly construed in Alaska. *See Margot Knuth, “Inspection and Discovery of State Records in Alaska,” 4 Alaska L. Rev. 277, 283 (1987)*.

III. Assuming it is lawful, is surreptitious taping ethical?

It depends.

Ethics Opinion No. 2003-1. “[T]he better practice may be for attorneys to disclose or obtain consent prior to recording a conversation, [however] attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation.”

Surreptitious taping by a lawyer is not per se violative of the ethical rules.

However, the manner by which the taping is completed or used may violate the ethical rules. For example, “recording or preserving only portions of the conversation to distort its content, using a recording to embarrass the other party to the conversation or a third party, or improper disclosure of a client confidence contained in a recording” may all run afoul of ethical rules.

An attorney may not use another person to do that which the attorney could not ethically do.

IV. Assuming it is lawful and ethical, is it admissible?

Yes, provided it can be authenticated and there is no bad faith.

Alaska Rule of Evidence 1004 provides, in relevant part: “The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . (a) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent in bad faith lost or destroyed them.” See Alaska R. Evid. 1004(a).

The Commentary instructs:

Original Is Lost or Destroyed. This subdivision permits secondary evidence if a proponent can show that the originals are lost or have been destroyed without bad faith on his part. Evidence of a search made in good faith of the places where an original would be found if it existed should be sufficient foundation to prove loss when no direct evidence is available. *The important factor here is that a proponent should not benefit by admitting secondary evidence where the original was lost or suppressed at his own instance.* This extends to situations where third parties have destroyed the original acting at the direction of the proponent. See McCormick (2d ed.) § 237.

See Commentary, Alaska Rule of Evidence 1004 (emphasis added).

With respect to tape recordings, the proponent seeking admission must come forward with evidence showing the absence of material deletions, additions, or alterations. *See United States v. Wardlaw*, 977 F. Supp. 1481, 1483 (N.D. Ga. 1997). Moreover, “because ‘recorded evidence is likely to have a strong impression on a jury and is susceptible to alteration,’ the evidence of its authenticity and accuracy must be ‘clear and convincing.’” *Id.* (citation omitted).

In the context of civil cases, courts are suspicious of self-edited tapes or transcripts where the proponent cannot produce the original underlying tape. For example, in *McAlinney v. Marion Merrell Dow, Inc.*, 992 F.2d 839, 842 (8th Cir. 1993), the court held that an audiotape was inadmissible where it had been surreptitiously recorded and then re-recorded by the plaintiff-employee who was alleging employment discrimination. Similarly, in *Cassetta Frank, Inc. v. P.G.C. Associates*, 264 A.D.2d 375, 376, 694 N.Y.S.2d 102 (App. 1999), the court held that the trial court committed error by admitting evidence of surreptitiously taped recording that was intentionally partially erased. A final example is seen in *Lee v. Metropolitan Airport Commission*, 428 N.W.2d 815, 821 (Minn. App. 1988). There, the court held that partial transcripts made by the plaintiff-employee were inadmissible because the transcripts were self-edited transcripts that did not include a full transcription of the underlying tapes. These are only three examples of cases applying generally recognized principles consistent with the rule and precedent.

V. **Assuming it is lawful, ethical, and admissible are there other concerns?**

Spoliation: If the tape is lost or not properly preserved you may face sanctions or adverse instructions.

Jury/juror impact: An employer’s secret taping may strike some as a heavy-handed or sneaky tactic.

VI. **Common contexts for surreptitious taping**

Boyko v. Anchorage School District, 268 P.3d 1097 (Alaska 2012)

- Employee discipline, disciplinary interviews, or disciplinary consequences
- Terms of an employment agreement or bargain
- Gathering evidence by “testers” in employment discrimination hiring cases
- Union “Salts”
- Job references

VII. Employer Policies

May an employer prohibit surreptitious taping?

In *Stephens Media LLC d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011), the Board held that an employer committed an unfair labor practice charge when it fired a worker who secretly taped a meeting with management. However, the Board's decision seemed to be affected by the fact that the employer had no policy prohibiting such taping. However, even with a policy, the policy may be subject to challenge if it chills protected concerted activity.

Sample Policy for a Public Employer

Respecting Privacy

Unauthorized recording, videotaping, or photographing in the workplace is prohibited. In order to effectively function, the workplace should promote candid communications. From time to time communications in the workplace may implicate confidential or privileged information. Some communications once taped may constitute a public record or could be construed as evidence subject to a litigation hold which the participants to the conversation may not even know about. A frank and candid expression of views may be chilled if employees are concerned that conversations with other employees are being recorded. In light of these considerations, the City prohibits employees from recording conversations of other employees with any type of recording device without permission. Videotaping and photographing is also prohibited without consent and permission. Prior approval must be received from your supervisor or a member of upper-level management, or all parties to the conversation give their consent, before recording, videotaping, or photographing is allowed. Violation of this rule may lead to disciplinary action, up to and including termination.

Sample Policy for a Private Employer

Respecting Privacy

In order to effectively function, the workplace should promote candid communications. From time to time communications in the workplace may implicate confidential or privileged information. Some communications once taped could be construed as evidence subject to a litigation hold which the participants to the conversation may not even know about. A frank and candid expression of views may be chilled if employees are concerned that conversations with other employees are being recorded. In light of these considerations, the Company prohibits employees from recording conversations of other employees

with any type of recording device without permission. Videotaping and photographing is also prohibited without consent and permission. Prior approval must be received from your supervisor or a member of upper-level management, or all parties to the conversation give their consent, before recording, videotaping, or photographing is allowed. Violation of this rule may lead to disciplinary action, up to and including termination. This policy is not intended to prevent employees from engaging in lawful concerted activities that are protected by the National Labor Relations Act or the Labor Management Relations Act or any similar statute. Employees with any questions regarding this policy should see their supervisor or another manager.

DISCLAIMER: These sample policies are not intended as, and should not be construed as, legal advice. General disclaimers (“This policy is not intended to prevent employees from engaging in lawful concerted activities that are protected by the National Labor Relations Act or the Labor Management Relations Act or any similar statute”) may not be sufficient to insulate a policy from review. Any public or private employer considering a no-taping policy should confer with counsel.