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LISTENING IN: THE USE OF AUDIO RECORDINGS IN FAMILY PROCEEDINGS

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Divorcing couples and those sparring over child custody rights are often tempted to record their spouses (present or former) in conversation. After asking, "Is my husband calling a paramour the middle of the night?" or, "Is my ex-wife badmouthing me to my kids?", they may decide to record others' conversations.

These recorded discussions, they are sure, will help them to obtain a divorce, get a better marital settlement or get exclusive custody of a child.

ADMISSIBLE VS. INADMISSIBLE

When people like those described above come to you, the family law attorney, with the evidence, you may have to deliver some disappointing news. Recordings of these husband/paramour and mother/child conversations are inadmissible in court because they are the fruit of what, under New York law, is criminal eavesdropping -- none of the parties to the conversations have consented to the recording.

Civil Practice Law and Rules s 4506 provides that evidence obtained by the commission of criminal eavesdropping, as defined by Penal Law s 250.05, is inadmissible in both civil and criminal cases. Penal Law s 250.00 states that a person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation. "Wiretapping means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than the sender or receiver, by means of any instrument, device or equipment. ... Mechanical overhearing of a conversation means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a

person not present thereat, by means of any instrument, device or equipment." In *Berk v. Berk*, 70 AD 2d 943 (2 Dept 1979), for example, the court granted a mother's motion to suppress, pursuant to Civil Practice Law and Rules s 4506, certain taped telephone conversations between the mother and children, obtained without the mother's consent. The Appellate Division held that "Without proof of consent of at least one party to the conversations, the taped conversations may not be put into evidence."

Some tape recordings of discussions are not the result of illegal eavesdropping; as long as the recording is made with the consent of one party to the conversation, it is a lawful recording. Thus, your client is allowed to record his or her own conversation with any other person, including a threatening spouse or one who admits adultery.

When an admissible recording helps your client's case, you need to know the rules for getting it into evidence.

LAYING A FOUNDATION FOR THE ADMISSION OF SOUND RECORDINGS

Sound recordings of relevant events are admissible in evidence as long as a proper foundation is laid. In *People v. Ely*, 68 NY2d 520 (1986), the Court of Appeals held that there are four different ways to authenticate sound recordings of conversations. The court noted that the admissibility of a tape-recorded conversation requires proof of the accuracy or authenticity of the tape by clear and convincing evidence establishing that the offered evidence is genuine and that there has been no tampering with it.

The necessary foundation for the admissibility of sound recordings may be provided by: 1) the testimony of a participant in the conversation who can state that it is a complete and accurate reproduction of the conversation and has not been altered; 2) the testimony of a witness to the conversation or to its recording, such as the machine's operator, that it is a complete and accurate reproduction of the conversation and has not been altered; 3) testimony of a participant in the conversation, together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either, or; 4) a chain of custody method which requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court can identify it and testify to its custody and unchanged

condition. The fourth method may be used when no auditor of the conversation is available. *People v. Ely*, 68 NY2d 520 (1986).

The foundation for sound recording requires a showing that the entire tape is complete, accurate and free from alteration. These requirements cannot be avoided by introducing only isolated portions of tape to prove a particular prior inconsistent statement of a witness who testifies at trial. *People v. Joyner*, 240 AD2d 282 (1st Dept. 1997). A sound recording is not admissible if it is so inaudible and indistinct that a jury must speculate as to its contents. *People v.*

Carrasco, 125 AD2d 695 (2d Dept. 1986); *People v. Harris*, 199 AD2d 636 (3d Dept, 1993). A recording is sufficient if an independent third party can listen to the recording and produce a reasonable transcript. *People v. Carrasco*, supra. If the recording media is sufficiently audible, fair and accurate as to material events recorded thereon, the presence of some inaudible portions will not preclude its admissibility. See, e.g., *People v. Morgan*, 175 A.D.2d 930, 932 (2d Dept. 1991); *People v. Harris*, supra. These infirmities "go to the weight of the evidence, not its admissibility." *People v. McGee*, 49 NY2d 48, (1979); *People v. Wilson*, 207 A.D.2d 463 (2d Dept. 1994).

PROVING IDENTITY

The identification of the voices on the tape is another condition to the admissibility of a sound recording. A witness may testify that he recognized a person's voice as being that of the defendant's husband, whether he heard it in person, over the telephone, or by some other mechanical or electronic means. The Court of Appeals has also held that a voice heard may be compared with the voice of a speaker whom one meets for the first time as well as with the voice of a speaker whom one has known before. *People v.*

Dunbar Contracting Co., 215 NY 416,

422 (1915). In ascertaining the identity of the voice on a tape recording, the

remoteness of the personal conversations between the identifying witness and

defendant from the time of the voice identification affect the weight, rather than the

competency, of the evidence. *People v. Dinan*, 15 AD2d 786 (2d Dept.), aff'd,

11 NY2d 350 (1962).

A telephone caller's identity may be established by the substance of the conversation.

For example, where the caller refers to matters that only a particular person could have known about, this fact may be used to establish the identity of the caller. *People v. Lynes*, 49 NY2d 286 (1980).

When a witness testifies to the identity of a person to whom he has placed a call, he may be able to make the identification on the basis of familiarity with the recipient's voice. *People v. Dunbar*, supra. See also *People v. McDermott*, 160 Misc.2d 769 (Dist. Ct. Nassau Co.1994) ("If the witness was not acquainted with the speaker, and, therefore, did not recognize his voice at the time of the telephone conversation, the telephone conversation is admissible if the witness testifies that she met the speaker thereafter and then recognized his voice as the voice she had heard over the telephone"). In *People v. Lynes*, the court stated:

Thus, in part on the theory that the customary mode of operation of telephone users provides some assurance of reliability, in some instances the placing of a call to a number listed in a directory or other similarly responsible index of subscribers, coupled with an unforced acknowledgment by the one answering that he or she is the one so listed, has been held to constitute an adequate showing.

Thus, even if the witness has no familiarity with the recipient's voice, the identification of the speaker may be made on the basis of circumstantial evidence.

TRANSCRIPTS AS TOOLS

Finally, if a recorded conversation is admitted into evidence, it may also be helpful for the jurors to be able to view a transcript of it. A recorded conversation is considered a form of demonstrative evidence that "illustrates" the recording (*People v. Feld*, 305 NY 322 (1953)), so the court can allow the jury to view a transcript of the recording while listening to it (*People v. Tapia*, 114 AD2d 983 (2d Dept. 1985)).

CONCLUSION

They say a picture is worth a thousand words. So, too, a recording of an unguarded conversation may be worth a lot more than an opposing party's carefully worded

testimony.

As we have seen, weeding out the admissible from the inadmissible recorded conversations is a pretty straightforward affair. As long as at least one party to the discussion consents to the making of the recording, it may be admissible. All it takes is relevance and the laying of a proper evidentiary foundation. With these, the opposing side's own words may prove to be some of your client's most valuable evidence.

FNa1. Bari Brandes Corbin, a member of this newsletter's Board of Editors, maintains her offices for the practice of law in Laurel Hollow, NY. She is co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-West). Evan B. Brandes, also a member of this newsletter's Board of Editors, maintains his office for the practice of law in New York, NY. Both are Vice-Presidents of Joel R. Brandes Consulting Services Inc., Jersey City, NJ, and Ft. Lauderdale, FL (www.brandeslaw.com or www.nysdivorce.com), and editors of its Web sites. They both co-author the annual supplements to Law and the Family New York, Second Edition, Revised. (c) Copyright, 2009. Joel R. Brandes Consulting Services, Inc., Bari Brandes Corbin and Evan B. Brandes. All rights reserved.

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