*LABOR LAW*

# Mandatory tape-recording of investigative interviews not a crime

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*In both public and private sectors in California, full and fair investigations into alleged wrongdoing are imperative – particularly in cases of alleged harassment and discrimination. In such investigations, there is a crucial need for a clear and indisputable record of what was said in the investigatory interviews. Many employers and investigators believe tape-recording is the best means for achieving that record, but they often face a hurdle: claims that tape-recording without an employee's affirmative consent is a criminal act under California Penal Code Section 632.*

*Such allegations typically arise in the unionized public sector, where some unions – maintaining taping is inherently intrusive or intimidating – use threats of prosecution as a cudgel to prevent compulsory recording. Advocates for tape-recording will find comfort in the reasoning underlying a recent public-sector arbitration award that was decided squarely in favor of an employer's right to openly record investigatory interviews, even over an employee's objections.*

## Historical concerns and 'mutual consent'

In the 1940s and 1950s, the federal courts issued a series of decisions holding that using electronic listening and/or recording devices to obtain evidence wasn't an illegal or unconstitutional search unless a physical trespass occurred (e.g., intruding on property to install a recorder or physically splicing into telephone lines). As listening devices and recorders became smaller, cheaper, and more readily available, however, concerns grew over the invasive and offensive nature of using surreptitious recording to capture incriminating or embarrassing conversations between unknowing participants.

Legislatures in many states responded by adopting measures to curb the potential abuse of this then-novel technology. Generally speaking, they took one of two approaches:

- Some states opted for a "one-party consent" approach that barred *nonparticipants* from secretly listening to or recording conversations but allowed even a single participant to legally record without notifying the others.
- Other states took a stricter "mutual consent" approach, requiring that *all*

parties know about and/or affirmatively consent to any recording. The California Legislature initially took the first approach. Penal Code Section 653j, added in 1963, made it illegal for anyone to electronically eavesdrop on or record a confidential conversation "without the consent of *any* party." Five years later, however, the legislature changed course and replaced Section 653j with Penal Code Section 632.

Most of Penal Code Section 632's provisions mirrored the earlier statute, but with one crucial change: Instead of requiring only consent by "any party," subsection (a) of Section 632 nominally "all parties." Violations of that requirement can be punished by a fine not exceeding $2,500 or imprisonment for a year, or both â€• and for repeat offenders, the potential fine goes up to $10,000 per violation.

## Oft-cited Section 632(a) tells only half the story

Unions and employees who want to prevent compulsory taping focus exclusively on Penal Code Section 632(a), which they claim states a strict "mutual consent" requirement ("all parties"). The usually implicit threat of prosecution has caused some employers and investigators to relent, often to the disadvantage of an accurate factual record. True, investigators can often

capably witness interviews without taping by taking their own notes, having a notetaker, or even using a court reporter despite the additional expense and formality. But in serious misconduct cases that involve material factual or credibility disputes between witnesses, precision and thoroughness are critical.

Given the rather menacing language in Subsection (a), many employers can initially be daunted by Penal Code Section 632-based objections to compulsory taping. To understand Section 632(a)'s true meaning, however, a legal maxim becomes highly relevant: A statute must be read in its entirety to ascertain its true meaning. As will be seen below, that maxim came to the forefront in the recent arbitration case.

## Arbitration decision denies grievance

The case began with a grievance brought by a local of the Service Employees International Union against Stanislaus County, whose HR department had a long-established practice of tape-recording investigatory interviews. In the opening scene, the county scheduled an interview with an employee who might have violated its standards of conduct. As was usual, the employee was informed the interview would be tape-recorded. She wasn't asked whether she consented.

The employee objected, claiming recording made her feel "uncomfortable," but in the end, she was ordered to and did participate in a taped interview. The grievance alleged that when the county required her to be recorded over her objections, it violated both Penal Code Section 632(a) and the county's "past practice." Both claims were heard by an arbitrator with "final and binding" authority to resolve the dispute.

The arbitration decision rejected the argument that the county's conduct violated Penal Code Section 632. First, the decision held that Section 632(a)'s penalties apply only to recording "confidential communications," and under Section 632(c), a communication isn't "confidential" if the participants "may reasonably expect that the communication may be overheard or recorded."

No employee or union can legitimately claim an interview ("communication") is "confidential" when the employee is told it is being recorded. Obviously, an employee may "reasonably expect" to be recorded when she is explicitly informed taping will occur.

Second, the decision held that under Section 632(b), Penal Code Section 632(a)'s prohibitions do *not* apply to individuals "known by all parties to a confidential communication to be . . . recording the communication." When all participants in the interview are aware of taping, the investigator â€• for purposes of Section 632 â€• is not within the definition of "person" and doesn't break the law by recording.

Third, review of the extensive legislative history surrounding the pertinent statutes shows the legislature's intent in replacing Penal Code Section 653j with Penal Code Section 632 was *not* to make nonsecret recordings illegal. Rather, its action was directly aimed at nonpublic conduct â€• specifically, the perceived inequity of the fact that Penal Code Section 653j allowed one participant in a confidential communication to lawfully record the other participants without providing any notice whatsoever.

As the underlying bill's author, Assembly Member Jesse Unruh stressed to then-Governor Ronald Reagan at the time it was "carefully directed only at clandestine wiretapping and eavesdropping."
Finally â€• lest any doubt persist â€• the decision observed California Supreme Court precedent has also held in other contexts that Penal Code Section 632's prohibitions apply only to *Kearney v. Solomon Smith Barney, Inc*.)

For all those reasons, the arbitrator held that openly taping interviews doesn't violate Penal Code Section 632 and that employees can be

directed and required to participate in taped interviews.

Based on the strength of those arguments, the union dropped its claim. The parties agreed the issue still would be submitted to the arbitrator for a binding decision to create a precedent against future grievances.

## *Arbitration decision denies grievance*

For the vast majority of public employees who have "for cause" job protection, the employer has the burden to prove allegations of misconduct. Because employee statements are often key to meeting that burden, it's imperative to have a reliable record. This makes taping a highly useful tool in investigations involving discrimination and harassment allegations to protect employees and the workplace and defend against claims.

Of course, labor arbitration decisions aren't "precedential" except for the parties involved in the case. This decision and the underlying legislative history, however, may prove to be illuminating for employers confronted with arguments that Penal Code Section 632 bars taping interviews without consent. The arbitration decision and pertinent legislative history may be found at https://bit.ly/2ZAOZhc.

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*This article does not constitute legal advice. Employers confronted with a Penal Code Section 632 argument should consult competent counsel.*

*Full disclosure: Sloan Sakai represented Stanislaus County in the arbitration.*