To: Prof. Cortright

From: LARAW Section D, No. 3 (Sriranga Veeraraghavan)

Re: Applicability of California Penal Code § 632

Date: 7 Nov 2004

## Question Presented

Can the transcript of Mr. Gunn's employment termination meeting be used at trial given that Mr. Gunn may have violated Cal. Penal Code § 632 (West 1999) by making the recording without the knowledge of the other parties present but that the door to the office where the meeting was held was partially open?

## Short Answer

The transcript will probably be useable at trial either directly as evidence or indirectly to refresh Mr. Gunn's memory prior to testifying or to impeach the testimony of the other parties present because (1) § 632 (a) only covers confidential conversations and the conversation Mr. Gunn recorded was probably not confidential due to its confrontational nature and the partially open office door and (2) transcripts of recordings made in violation of § 632 (a) can be used by a witness to refresh his memory prior to testifying or to impeach the testimony of other parties present at the meeting.

## Facts

Mr. Gunn was a manager at Pacific Software, Inc. On the sixth of January 2003, a meeting was held between Mr. Gunn, Ms. Smith and Mr. Wesson in Ms. Smith's office. Ms. Smith was Mr. Gunn's supervisor. Mr. Wesson was the VP of Human Resources for Pacific Software, Inc., and, according to his deposition, was present because of company policy. The purpose of the meeting was to discuss details of Pacific Software's decision to terminate Mr. Gunn's employment. According to Ms. Smith and Mr. Wesson's

depositions, the door to Ms. Smith's office was left partially open during the meeting. According to Ms. Smith's deposition, this was to allow her to summon her administrative assistant as needed.

Mr. Gunn recorded the meeting without obtaining consent from or informing Ms. Smith or Mr. Wesson. According to Mr. Gunn's deposition he believed this was legal. During the meeting Mr. Gunn stated that he would discuss the meeting with his attorney. Ms. Smith and Mr. Wesson did not responded to that statement. Mr. Gunn also suggested that (1) Ms. Smith was withholding information about the circumstances surrounding his termination and (2) the reason for Mr. Wesson presence was to ensure that the meeting was "on the record."

## Discussion

In order to introduce the transcript of termination meeting as evidence it will be necessary to show that § 632 (a) does not apply because it was produced from a recording of a non-confidential communication. The nature of the meeting, the presence of Mr. Wesson and the partially open office door will have to be interpreted to show that the parties could not (1) reasonably desire that the communication be limited to themselves and (2) reasonably expect that the communication would not be overheard. Even if the transcript is excluded because it was derived from a recording made in violation of § 632 (a), a decision by the Court of Appeals for the Second District may allow Mr. Gunn to use the transcript to refresh his memory prior to testifying or to impeach the testimony of a party at the meeting. Frio v. Super. Ct., 203 Cal. App. 3d 1480, 1498-1499 (1988). It seems likely that the transcript will be usable at the trial, at least indirectly.

Section 632 is generally applicable since subsection (a) prohibits anyone from intentionally recording confidential communications without the consent of all the parties and subsection (d) excludes such recordings from use in judicial proceedings. In order to introduce the transcript in evidence, it will be necessary to show that while Mr. Gunn may have made the recording without the consent of the other parties, the communication was non-confidential and thus not covered under § 632 (a).

The Supreme Court of California has held that the Court of Appeals for the Second District correctly determined the standard for confidentiality as "a reasonable expectation … that no one is … overhearing the conversation". Flanagan v. Flanagan, 27 Cal. 4th 766, 772-773 (2002); Frio, 203 Cal. App. 3d at 1480, 1490. In Flanagan, the court held that the defendant's intentional nonconsensual recording of phone conversations between the plaintiff and his father violated § 632 (a). Flanagan, 27 Cal. 4th at 776. In Frio, the court held that meeting notes prepared by the plaintiff based on recordings made in violation of § 632 (a) could not be admitted into evidence, but that § 632 (d) did not prohibit the plaintiff from using the notes to refresh his memory about what was said at the meetings prior to testifying. Frio, 203 Cal. App. 3d at 1492-1493. The court also held that even if the plaintiff's testimony was excluded under § 632 (d) the recorded parties could not "use the evidentiary sanction as a license to lie." Frio, 203 Cal. App. 3d at 1498-1499.

Intentional Recording Without Consent

The first element of § 632 (a) is intentional recording, by any person, of a communication without the consent of all the parties. Person is defined in § 632 (b) as

any individual who overhears or records the communication without the knowledge of all the parties.

From Mr. Gunn's deposition, it appears that he (1) recorded a conversation between himself, Ms. Smith and Mr. Wesson without their knowledge and (2) believed his actions were legal. The depositions of Ms. Smith and Mr. Wesson show that they did not know Mr. Gunn was recording the conversation and they probably would not have consented to the recording.

There are similarities between Mr. Gunn's actions and those of the defendant in Flanagan. In Flanagan the defendant (1) made recordings of the plaintiff's phone conversations with his father without the plaintiff's knowledge or consent and (2) believed that her conduct was legal. Flanagan, 27 Cal. 4th at 771. The court held that the recordings violated the protection "against intentional, nonconsensual recording" provided by § 632 (a). Id. at 776. It seems likely that Mr. Gunn probably violated this element of § 632 (a).

Confidential Communication

The second element of § 632 (a) is requirement that the recorded communication must be confidential. Section 632 (c) defines confidential communications by (1) including communications where any party reasonably desires the communication to be limited to the parties themselves and (2) excluding communications where the parties reasonably expect the conversation to be overheard or recorded. In Frio, the court determined that confidentially was satisfied by "a reasonable expectation by one of the parties that no one is … overhearing the conversation". Frio, 203 Cal. App. 3d at 1490. In Flanagan, the Supreme Court of California emphasized that the Frio test included

"simultaneous dissemination to … a mechanical device". Flanagan, 27 Cal. 4th at 775 citing Ribas v. Clark, 38 Cal. 3d 355 (1985).

During the meeting the door to Ms. Smith's office was partially open. In her deposition, Ms. Smith stated that the door was open to allow her to summon her assistant. In order for the assistant to hear a summons she was probably within earshot of the conversation, thus precluding a reasonable expectation, by the parties, that the conversation would not be overheard.

A case cited in Frio, provides another basis for finding that the conversation was non-confidential. Frio, 203 Cal. App. 3d at 1489 citing People v. Pedersen, 86 Cal. App. 3d 987, 994 (1978). In Pedersen, a surreptitiously obtained recording of a meeting was allowed into evidence because the conversation non-confidential. Frio, 203 Cal. App. 3d at 1489. In Frio, the court states that this determination was made because (1) it was a confrontational face to face meeting, involving an accusation of embezzlement, (2) many "interested parties", including supervisors, were present and (3) conduct by the parties that "belied an expectation of confidentiality." Id.

Mr. Gunn's meeting shares these elements. It was a face-to-face meeting between Mr. Gunn, Ms. Smith, his supervisor, and Mr. Wesson, an interested party. The meeting was confrontational as Ms. Smith tried to enumerate Mr. Gunn's failure to perform his duties and Mr. Gunn responded by accusing Ms. Smith of leaving out essential details. Mr. Gunn's statement during the meeting that "every time she [Ms. Smith] wants something on the record, there is somebody there, but when she doesn't, there's nobody there" could be used inferred that by inviting Mr. Wesson, Ms. Smith did not reasonably expect the conversation to be confidential. Also Mr. Gunn's statement that he would be

"discussing this with my attorney" can be compared to the challenge by the defendant in Pedersen to "take the necessary steps" in regard to the embezzlement charge. Frio, 203 Cal. App. 3d at 1489.

While there is a basis for suggesting that the conversation was non-confidential, some problems are present. It is not certain that the assistant was close enough to overhear the conversation; she may have been far enough away that she could hear a call from Ms. Smith but could not hear the conversation. Thus one of the parties could have had a reasonable expectation that the conversation was confidential. Similarly, although Ms. Smith did not refute Mr. Gunn's statement about why Mr. Wesson was present, it seems that company policy required his presence. For these reasons a court may rule that the conversation was confidential.

Exclusion of Evidence

The final element, § 632 (d), excludes evidence obtained as a result of violating § 632 (a). In Frio, the plaintiff sought to introduce into evidence notes that were based in part on nonconsensual recordings of phone conversations with his business associates. Frio, 27 Cal. App. 3d at 1487. The court held that the notes could not be introduced into evidence because "exclusion rules … prohibit the introduction evidence which is the derivative product of the primary evidence." Id. at 1490. If the conversation Mr. Gunn recorded is deemed confidential, the transcript cannot be introduced into evidence. However, this does not preclude the use of the transcript at trial.

In Frio, the appeal was based in part on the exclusion of the plaintiff's testimony on the grounds that by reviewing his notes prior to testifying, his testimony was "'obtained as a result' of the recording." Id. at 1491. The Court of Appeals held that

under the theory of present recollection refreshed, the testimony was admissible if the plaintiff had merely used the notes to refresh his memory because the plaintiff's memory was "independent of the illegality" and was not tainted "by mere refreshing … so as to render it inadmissible." Frio, 27 Cal. App. 3d at 1495. However, the court also held that if the plaintiff's testimony was merely a recitation of the notes, then it could be barred under the past recollection recorded theory because such testimony amounts to "merely read[ing] in evidence a writing which itself contains the facts." Id. at 1492.

If Mr. Gunn's memory of the conversation is reasonably accurate, then having him refresh his memory prior to testifying about the meeting would be allowed under the present recollection refreshed theory. However, if Mr. Gunn's memory of the meeting is not very clear, Pacific Software may try to have his testimony about the meeting barred because he his merely reciting the contents of the transcript.

If Mr. Gunn's testimony about the meeting is barred the transcript may still be of some use. In Frio, Court of Appeals held that if the trial court barred the plaintiff's testimony, the other parties could not treat the sanction as a "right to commit perjury." Id. at 1487. If the testimony of Ms. Smith or Mr. Wesson is inconsistent with the transcript and Mr. Gunn's testimony has been barred, it would be possible use the transcript to impeach their testimony.

## Conclusion

There is a basis for having the transcript entered into evidence. Failing that, it seems safe to conclude that the transcript can be used at the trial either to refresh Mr. Gunn's memory prior to testifying or to impeach the testimony of Ms. Smith or Mr. Wesson.